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INDIAN FISHING RIGHTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE

EIGHTY-EIGHTH CONGRESS

SECOND SESSION

ON

S.J. Res. 170 and S.J. Res. 171

JOINT RESOLUTIONS REGARDING INDIAN FISHING RIGHTS

AUGUST 5 AND 6, 1964

Printed for the use of the
Committee on Interior and Insular Affairs

U.S. GOVERNMENT PRINTING OFFICE
37-688 WASHINGTON : 1964

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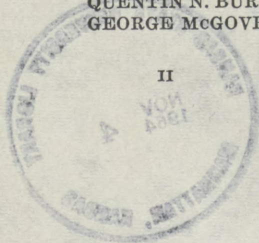

CONTENTS

Page

S.J. Res. 170 1
S.J. Res. 171 2
Departmental reports:
Interior 3
Justice 8

STATEMENTS

Bell, Lewis A., representing the Tulalip Tribes of Washington 151
Bellarts, Henry J., Richland, Wash 228
Bugas, Theodore T., executive secretary, Columbia River Salmon & Tuna Packers Association, Astoria, Oreg 122
Carver, John A., Jr., Assistant Secretary of the Department of the Interior; accompanied by Clarence F. Pautzke, Commissioner of Fish and Wildlife; George Dysart, assistant Regional Solicitor, Portland, Oreg.; and Graham E. Holmes, Assistant Commissioners of Indian Affairs 11
Coniff, Joseph L., assistant attorney general, State of Washington; accompanied by Mike Johnston, assistant attorney general, State of Washington, appearing for department of game; and Walter Neubrech, chief of Enforcement Division, Washington Department of Game 25
Cross, Silas V., vice chairman, Puyallup Tribal Council 98
Hawkins, Hank, Snohomish Tribe 134
Hobbs, Charles, general counsel to the Quinault Tribes; accompanied by Jerry C. Straus 138
Jackson, Hon. Henry M., a U.S. Senator from the State of Washington 9
Johnston, Mike, assistant attorney general, State of Washington 33
Magnuson, Hon. Warren G., a U.S. Senator from the State of Washington 10
Makah Indian Tribe 76
McLeod, Malcolm S., attorney, Puyallup Tribe 93, 107
Morse, Hon. Wayne, a U.S. Senator from the State of Oregon 211
Neubrech, Walter, chief, enforcement division, Washington State Department of Game 28
Panner, Owen, attorney for Confederated Tribes of Warm Springs; accompanied by Ed Scott, chairman, Warm Springs Council; and Vernon Jackson, secretary-treasurer 184
Parker, David, representing Makah Tribal Council 89
Peterson, Charles, representing Makah Tribal Council 91
Schoning, Robert W., director, Fish Commission of the State of Oregon 43, 130
Additional statement 213
Seelatsee, Eagle, chairman, Yakima Tribal Council; accompanied by Watson Totus and Robert Jim, members of the tribal council, and James Hovis, tribal attorney 49
Swinomish Indian Tribal Community 186
Washington State Sportsmen's Council 212
Williams, Wayne W., Tulalip Tribe of Washington: accompanied by Lewis A. Bell, tribal attorney 146
Wright, Frank, chairman, Puyallup Tribe 103, 115
Ziontz, Alvin J., attorney for Makah Tribe 76

COMMUNICATIONS

Page

Amoth, Clarence N., secretary, Bonneville Rod & Gun Club: Letter to Hon. Wayne Morse, U.S. Senate, containing exchange of letters regarding Columbia River fishing ---- 216

Barry, Frank J., Solicitor, Department of the Interior: Memorandum to the Secretary of the Interior on Indian fishing rights dated May 16, 1962 ---- 46

Bellarts, Henry J., Richland, Wash.: Letter to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, dated July 27, 1964 ---- 228

Brown, Walter E., Bellingham, Wash.: Letter to Hon. Frank Church, chairman, Subcommittee on Indian Affairs, dated July 15, 1964 ---- 228

Campbell, Miss Colleen K., Shelton, Wash.: Letter to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, dated July 25, 1964 ---- 227

Clark, Frances M., and Hansen, Ruth, Washougal, Wash.: Letter to Hon. Warren G. Magnuson, U.S. Senate, containing a petition signed by 956 citizens of Washington and Oregon ---- 222

Cullen, Frank, chairman, Fish and Game Department, State of Idaho: Letter to Hon. Frank Church, U.S. Senate, dated July 30, 1964 ---- 19

Davidson, S. C., commissioner, Ellensburg, Wash.: Letter to the Indian agent, Washington Territory, dated June 27, 1889 ---- 12

Guren, David H., executive director, American Civil Liberties Union of Washington: Letter to Hon. Frank Church, chairman, Subcommittee on Indian Affairs, dated August 4, 1964 ---- 224

Hallauer, Wilbur G., State senator, Washington: Letter to Hon. Warren G. Magnuson, U.S. Senate, dated August 27, 1964 ---- 224

Hansen, Ruth, Columbia River Fishermen's Wives Auxiliary: Letter to Hon. Frank Church, chairman, Subcommittee on Indian Affairs, dated July 22, 1964 ---- 226

Kimball, Thomas L., executive director, National Wildlife Federation: Letter to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, dated August 3, 1964 ---- 214

Kooy, Harold, president, Lynden (Wash.) Chamber of Commerce: Telegram to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, dated June 26, 1964 ---- 229

McClanahan, Mark C., attorney, Confederated Tribes of the Umatilla Indian Reservation: Letter to Hon. Wayne Morse, U.S. Senate, dated August 4, 1964 ---- 211

Myrvold, Astrid, Seattle, Wash.: Letter to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee ---- 227

Nelson, Atley O., Olympia, Wash.: Letter to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, dated June 30, 1964 ---- 225

Sefrit, Ben H., president, Bellingham Chamber of Commerce: Telegram to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, dated July 13, 1964 ---- 229

Stinson, W.P., president, Richland Rod & Gun Club, Inc.: Letter to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, dated July 28, 1964 ---- 227

Van Andel, Jim, mayor, city of Lynden, Wash.: Telegram to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, dated June 26, 1964 ---- 229

Westerholm, Wm., executive secretary, Columbia River Fishermen's Protective Union: Telegram to Hon. Frank Church, chairman, Subcommittee on Indian Affairs, dated August 3, 1964 ---- 227

Williams, Wayne W., secretary, Inter-Tribal Council of Western Washington Indians: Letter to Hon. Henry M. Jackson, chairman, Interior and Insular Affairs Committee, containing intertribal resolution ---- 214

MISCELLANEOUS INFORMATION

Page

Affidavits of noted biologists and fisheries experts 230
Citations:
- *Makah* v. *Schoettler* 34
- *New York ex rel. Kennedy* v. *Becker* 34
- *Tulee* v. *Washington* 34
- *U.S.* v. *Winans* 34
- *Village of Kake* v. *Egan* 34
- *Ward* v. *Race Horse* 34

Commercial landings of spring, summer, and fall chinook and sockeye salmon and steelhead trout, 1951–63 131
"Fish Depletion," letter to the editor, Seattle Post-Intelligencer 97
"Here and There," from the Yakima (Wash.) Herald, Nov. 28, 1961 229
"Oregon Enlists Indian Tribes in Columbia Fish Conservation," from the Oregon Journal, May 22, 1964 61
"Palefaces Raid Indian Fish Nets on Nisqually," from the Seattle Post-Intelligencer, January 6, 1962 96
Puyallup Tribe, Tacoma, Wash.:
- Fishing ordinances 102
- Judiciary ordinances 101
- Resolution on fishing 101
- Rules and regulations 102

Resolutions:
- Inter-Tribal Council of Western Washington Indians 214
- National Congress of American Indians 24
- Puyallup Tribe 101
- Regulations for Yakima Indian fisheries on Columbia River and Yakima River, 1964 59
- Tulalip Tribe 157

Steelhead catch in 1962, summary 225
Tulalip Tribe:
- Excerpts of treaties made with Indian tribes 161
- Executive order—Tulalip or Snohomish Reserve 161
- Ordinance for regulation of fishing 154
- Resolution 157
- Treaty with Dwamish, Suquamish, etc., 1855 158
- Washington State Supreme Court decisions 163

"Two Recent Fish Kills Laid to Chemical," from the Seattle Times, July 19, 1964 98
Washington v. *Joe McCoy:*
- State Supreme court opinion 163
- Superior court opinion 192

INDIAN FISHING RIGHTS

WEDNESDAY, AUGUST 5, 1964

U.S. SENATE,
SUBCOMMITTEE ON INDIAN AFFAIRS OF THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:15 a.m., in room 3110, New Senate Office Building, Senator Frank Church presiding.

Present: Senators Church, Jackson, Simpson, and Mechem.

Also present: James H. Gamble, professional staff member.

Senator CHURCH. The hearing will be in order.

The resolutions before us provide the Interior and Insular Affairs Committee with a most useful vehicle for initiating congressional study of the complex, and unfortunately sometimes inflamed, problem involving the nature of Indian treaty rights to fish at usual and accustomed places outside of their reservations. The resolutions and the report thereon from the Department of the Interior and the Department of Justice will be printed at this point.

(The resolutions and report follow:)

[S.J. Res. 170, 88th Cong., 2d sess.]

JOINT RESOLUTION Regarding Indian fishing rights

Whereas article III of the treaty of June 9, 1855, with the Yakima Nation of Indians (12 Stat. 951) provides that "The right of taking fish at all usual and accustomed places, in common with citizens of the Territory [is secured to said Confederated Tribes and Bands of Indians]", and

Whereas article III of the Medicine Creek Treaty of 1855 (10 Stat. 1132) provides that "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory," and

Whereas article V of the Treaty of Point Elliott of 1855 (12 Stat. 927) provides that "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory", and

Whereas similar language is contained in other Indian treaties, and

Whereas the United States Supreme Court has said that while such treaty language "leaves the State with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the State from charging the Indians a fee of the kind in question here" (Tulee against Washington, 315 U.S. 681 (1942)), and

Whereas the United States Supreme Court has recently cited with approval its Tulee decision as a holding that off-reservation fishing rights reserved by treaty are subject to State regulation (Village of Kake and others against Egan, docket numbered 3, October term (1961)) and further litigation on the subject should not be necessary: Therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in accordance with and in furtherance of the purposes of any treaty with American Indians that secures to them a

right to take fish at all usual and accustomed places, in common with other citizens, the States involved are authorized to enact and to enforce laws of a purely regulatory nature concerning the time and manner of fishing outside an Indian reservation that are for the purpose of conservation of fish, and that are equally applicable to Indians and all other citizens without distinction. State legislation enacted pursuant to this law is hereby declared to be in furtherance of and not in derogation of the treaties involved.

[S.J. Res. 171, 88th Cong., 2d sess.]

JOINT RESOLUTION Regarding Indian fishing rights

Whereas article III of the treaty of June 9, 1855, with the Yakima Nation of Indians (12 Stat. 951) provides that "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory" is secured to said Indians; and

Whereas article III of the Medicine Creek Treaty of 1854 (10 Stat. 1132) provides that "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory"; and

Whereas article V of the Treaty of Point Elliott of 1855 (12 Stat. 927) provides that "That right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory"; and

Whereas similar language is contained in other Indian treaties; and

Whereas the United States Supreme Court has said that while such treaty language "leaves the State with power to impose on Indians, equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the State from charging the Indians a fee of the kind in question here" (Tulee against Washington, 315 U.S. 681 (1942); and

Whereas there has been extended litigation regarding the scope of, and the limitations on, the States' authority to regulate the treaty right in the absence of congressional guidelines, the most recent cases being Maison against Confederated Tribes of the Umatilla Indian Reservation, 314 F. (2) 170 (1963), certiorari denied 375 U.S. 829 (1963), and Washing against McCoy, 387 Pac. 2d. 942 (1963), petition for writ of certiorari pending, and such litigation has not resolved the issues; and

Whereas Congress could by legislation resolve the issues either (1) by prescribing the kind of regulation that may be imposed on the exercise of these treaty rights in order to conserve, protect, and develop the fishery resource, or (2) by providing for the relinquishment and extinguishment of these treaty rights by purchase and the payment of just compensation therefor; and

Whereas it is the desire of Congress to provide for the relinquishment and extinguishment of these treaty rights by acquisition and the payment of just compensation therefor: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is authorized to purchase from any Indian tribe, band, or group that is entitled to exercise a right secured under any treaty to take fish at all usual and accustomed places, in common with other citizens, a relinquishment and extinguishment of such right, or to acquire such right by condemnation.

SEC. 2. In purchasing or acquiring a treaty right under the first section of this joint resolution, the value of such right, for the purpose of determining just compensation to the Indian tribe, band, or group, shall be the current average annual market value of the fishery resources taken under such right by such Indian tribe, band, or group multiplied by twenty-five. Such current average annual market value shall be determined from the three most recent consecutive calendar years for which satisfactory data is available to the Secretary of the Interior.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., August 4, 1964.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR JACKSON: This is in response to your request for a report on Senate Joint Resolution 170 and Senate Joint Resolution 171, regarding Indian fishing rights.

The purpose of both resolutions is to resolve a longstanding controversy over Indian treaty rights to fish at usual and accustomed places outside of their reservations. Several treaties with Indians in the Pacific Northwest give to the Indian tribes and bands the right to take fish at their usual and accustomed fishing places in common with all other citizens. For several years a controversy has existed between the States and the Indians regarding the power of the States to regulate Indian fishing pursuant to these treaties in the interest of conservation of the fishery resources.

Senate Joint Resolution 170 grants statutory authority from the Federal Government for State regulation of the time and manner of fishing pursuant to the treaties, outside of reservations, for purposes of conservation. Senate Joint Resolution 171 provides for purchase and extinguishment of the treaty fishing rights, both inside and outside of the reservations. The two resolutions represent alternative approaches to the problem.

We are enclosing three statements. The first relates to the background of the treaty provisions. The second relates to the judicial interpretations of the authority of the States to regulate Indian fishing pursuant to treaty. The third relates to the conservation aspects of Indian fishing, particularly in terms of effective management of the fishery resource.

Whether legislation along the lines of either Senate Joint Resolution 170 or Senate Joint Resolution 171 should be enacted, or whether the issues should be left for further litigation in the courts, is a matter particularly appropriate for Congress to decide. We make no recommendation. If either resolution is favorably considered by the committee, however, we should like to suggest some technical and perfecting amendments.

The enactment of Senate Joint Resolution 170 would involve no cost to the United States. We are not able to estimate the cost involved in the enactment of Senate Joint Resolution 171, but it undoubtedly would be high. The one Indian fishery purchased in connection with the construction of The Dalles Dam cost of $26 million.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

JOHN A. CARVER, Jr.,
Assistant Secretary of the Interior.

[Attachment 1]

BACKGROUND OF THE INDIAN TREATY FISHING PROVISION

During the years 1854, 1855, and 1856, approximately 11 treaties were negotiated with the various Indian tribes and bands occupying the area that is now Washington, Oregon, and Idaho. These treaties provided for the ceding of all of the lands in this area to the United States and created in this area certain designated small tracts as reservations. The treaties contemplated that all of the Indians in this area were to be located on the small reserved areas. As a consideration for the ceding of the large area of land involved, the Indians received a cash payment and there was a provision for education, training, and assistance in blacksmithing and carpentry.

In addition to the cash and assistance considerations, there was also reserved to the Indians the "right of taking fish at usual and accustomed grounds and stations" off of the reservations.

The Indians involved in these treaties were known as fish eaters and historically their principal means of support were the fish that came up the various rivers involved to spawn. The Indians not only used the fish for their immediate subsistence but they smoked and preserved fish for the nonfishing season and traded some fish with Indians occupying other areas. This fishing right was important to the Indians, the reservation of the right constituted a valuable

asset, and in the minds of the Indians it was one of the important considerations.

It appears from a close examination of the 11 treaties involved that all of the tribes, bands, and groups of Indians occupying this area were involved in one or more of the treaties.

Some of the bands and groups in this area settled on the reservations, and others apparently never relocated or occupied a reservation area. In the years since the treaty period, the U.S. Government has dealt with and furnished certain services to those Indians occupying the reservation areas. For this purpose enrollment records have been maintained for the reservation Indians. The groups and bands and their descendants who did not occupy the reservation areas have not generally received special services or attention of the Government and there is therefore no roll or record and little is known concerning them.

One of the unresolved issues is whether any person who can trace his ancestry to one of these groups is entitled to exercise the treaty right to fish, and, if so, the number of persons involved.

In the language of the treaties the right to take fish is reserved at "usual and accustomed grounds and stations." However no effort is made in the treaties and none has been made since to define the exact location of these usual and accustomed grounds and stations. It appears that although it was easier to take fish at certain points along the rivers, that is, narrows and rapids and areas of shallow waters, it is possible that at one time or another a great many places were used for fishing purposes. There are many old campsites along all of the streams along the west coast. Another of the unresolved issues is therefore the locations of these usual fishing stations.

The Indian treaty fishing right is economically valuable to the Indians involved; it was one of the considerations for the cession of large areas of land, and either purchase or restriction by regulation of the fishing right could possibly affect seriously the economy of several thousand Indian people.

[Attachment 2]

Judicial Interpretation of the Authority of the States To Regulate Indian Fishing Pursuant to Treaty

Several treaties with Indan tribes and bands in the Pacific Northwest give to the Indians the right to take fish at their usual and accustomed fishing places in common with all other citizens. This treaty right was construed by the U.S. Supreme Court in 1942 in *Tulee* v. *Washington*. The Court said that the State could not charge the Indians a fee before allowing them to exercise their treaty right to fish, but that the State could impose upon Indians, equally with others, restrictions of a purely regulatory nature concerning the time and manner of fishing that are necessary for the conservation of fish.

The Supreme Court of Washington acted in 1957 in a manner that left the State's position unclear. In *State* v. *Satiacum*, by a divided decision of 4 to 4, the court affirmed the decision of a lower State court dismissing charges against Indian defendants on the ground that the State law could not be enforced against them. One group of four judges took the position that the State law could be enforced if it were shown to be necessary for conservation purposes, but that the showing had not been made. The other group of four judges took the position that the State conservation laws could not be enforced against the Indians at all, notwithstanding the *Tulee* decision, and that they would adhere to that position until the Federal Government acted through a new ruling by the U.S. Supreme Court or through legislation by Congress.

In 1961, the Supreme Court cited with approval its *Tulee* decision as a holding that off-reservation fishing rights reserved by treaty are subject to State regulation. The citation was in connection with a fish-trap controversy in Alaska (*Village of Kake* v. *Egan*, 369 U.S. 60 (1961)).

In 1963, the U.S. Court of Appeals for the Ninth Circuit decided the case of *Madison* v. *Confederated Tribes of the Umatilla Indian Reservation* (314 F. (2) 170 (1963) certiorari denied.) The court took the following position:

1. The State can regulate Indian fishing only to the extent the regulation is necessary to conservation.
2. "Necessary" means that the particular regulation is "indispensable" to the limitation of fishing in the interest of conservation.

3. The limitation of Indian fishing is not indispensable if a restriction on non-Indian fishing alone would accomplish the conservation purpose. In the words of the court, "restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others."

4. Fishing by non-Indians can be restricted if the restriction is reasonable, which is the requirement of the 14th amendment, but fishing by Indians can be restricted only if the restriction is indispensable, which is the requirement of the treaty.

5. The State failed to show in this instance that its conservation objective could not be obtained by restricting the fishing rights of non-Indians only, and the State law could therefore not be enforced against Indians.

The Supreme Court declined to grant a writ of certiorari to review the decision of the court of appeals. Its action indicates neither approval nor disapproval of the decision of the court of appeals.

Later in 1963, the case of *Washington* v. *McCoy* was decided by the Supreme Court of the State of Washington (387 Pac. 2d 942 (1963)). In that case the Washington Supreme Court took the following position:

1. The issue is whether the State can enforce reasonably necessary regulations for the conservation of Chinook salmon fisheries against an Indian whose tribe was a party to the Point Elliott Treaty. The answer is "Yes."

2. The treaty gave the Indians an easement to go upon the land at their usual and accustomed fishing places, even though the land is now owned by others. The treaty did not, however, impair the police power of the State.

3. The treaty was in the nature of a real estate transaction for the purchase of land. It was not a limitation on the governmental power of the United States or the State.

4. The power to protect fish and game is an inherent attribute of the sovereign power of a State. That power will not be limited by implication and deduction. There must be a clear and unequivocal expression by Congress if State powers are to be preempted. There was no such expression in the treaty, and the State law must prevail.

5. The State offered evidence which, if it had been considered by the trial court, would have proved that the State regulations were reasonably necessary. The exclusion of the evidence was error and the State is entitled to a new trial.

Although the *McCoy* decision does not say that it is not following the *Umatilla case*, it appears to conflict with the *Umatilla* decision in one important respect. *Umatilla* said that State regulation of Indian fishing must be "indispensable" for sound conservation. *McCoy* however, said that the State regulation need be only "reasonably necessary" for conservation.

The *McCoy* decision did not take a position on a second major issue, which relates to the burden of proof. The *Umatilla* decision had said that the burden of proof is on the State to prove that the law is reasonably necessary (or indispensable), rather than on the Indian defendant to prove that the law is not reasonably necessary (or indispensable). The *McCoy* decision did not discuss the issue because the State had assumed the burden of proof by offering evidence sufficient to prove the point. The position of the State supreme court on this issue is therefore not clear.

Senate Joint Resolution 170 expresses the rule of law in a manner that is consistent with the *McCoy* decision, and contrary to the rule as stated in the *Umatilla* decision. By referring to State legislation that is "for the purpose of conservation" rather than "reasonably necessary for conservation," the joint resolution seems to reject the rule relating to burden of proof as stated in the *Umatilla* decision, and leaves the burden on the person who challenges the validity of the State legislation, which is the rule that normally applies.

There is no question about the power of Congress to prescribe by legislation the manner in which the treaty right may be regulated. Senate Joint Resolution 171 adopts a different approach. Instead of regulating the exercise of treaty fishing rights in the interest of conservation, it provides for Federal purchase and extinguishment of the treaty fishing rights. After purchase and extinguishment, the State could of course regulate Indian fishing in the same manner it regulates fishing by other persons.

[Attachment 3]

Fishing by Treaty Indians in Streams Outside of Reservations in the Pacific Northwest

Unrestricted fishing for salmon and steelhead trout in streams in the Pacific Northwest by Indians claiming a treaty right to fish at usual and accustomed places outside of Indian reservations is becoming an increasingly difficult problem for the fishery management agencies of the States of Idaho, Oregon, and Washington. The streams fished by the Indians provide spawning areas of varying degrees of importance for these anadromous species which are hatched in fresh water and migrate to the open sea where they are harvested under conservation regulations by commercial and sport fishermen from Alaska to mid-California.

Since these fish are harvested primarily within State waters, the authority to prescribe conservation regulations is vested in the States. The only Federal management regulation currently in effect is one designed to implement the International Convention for the High Seas Fisheries of the North Pacific Ocean. The regulation in question prohibits the use of nets in taking salmon on the high seas off the coasts of British Columbia and Alaska. (See title 50, Code of Federal Regulations, pt. 210.)

Although the Federal Government does not have authority to regulate the taking of salmon or steelhead within State waters, the Fish and Wildlife Service has a real concern for the effective conservation of the fishery resources which is derived from the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a–742j). Under section 7 of the act, the Secretary of the Interior, with the assistance of the Fish and Wildlife Service, is directed to—

"(1) develop and recommend measures which are appropriate to assure the maximum sustainable production of fish and fishery products and to prevent unnecessary and excessive fluctuations in such production;

"(2) study the economic condition of the industry, and whenever he determines that any segment of the domestic fisheries has been seriously disturbed either by wide fluctuation in the abundance of the resource supporting it, or by unstable market or fishing conditions or due to any other factors he shall make such recommendations to the President and the Congress as he deems appropriate to aid in stabilizing the domestic fisheries;

* * * * * * *

"(4) take such steps as may be required for the development, advancement, management, conservation, and protection of the fisheries resources; * * *"

Fishery management seeks to achieve an optimum harvest and an optimum escapement through effective regulations in order to perpetuate the species. If management is to be fully effective, all segments of the fishery must be subjected to appropriate regulations. At present, State regulations are being applied effectively only to the sport and commercial fisheries in Idaho, Oregon, and Washington. With the exception of a few isolated instances, the Indian fishery is not being controlled by the regulations prescribed by the management agencies of the States. The Indian tribes are vested with authority to regulate fishing by their members, both on Indian reservations and at usual and accustomed places outside the reservation boundaries, but the authority of the State to regulate such fishing has been the subject of extended controversy, and the issue has not been resolved.

The existing situation results in partial regulation of the fishery, or, when particular Indian tribes exercise their regulatory authority, dual regulation of the same resource. This has made effective management difficult, if not impossible, and constitutes a serious threat to the continued maintenance of the salmon and steelhead resources. Past experience has demonstrated that tribal regulations passed in good faith have not, for a variety of reasons, always been effectively enforced by tribal officials.

Existing data show that uncontrolled fishing by Indians outside of reservations has caused serious depletion of salmon stocks in several streams in Washington. To a lesser extent, unregulated Indian fishing also takes place in Idaho and Oregon. The State of Washington has reported that unregulated fishing by Indians occurs in 36 streams encompassing 116 miles of fishing area off reserva-

tions, and that intermittent fishing takes place in 20 other streams aggregating 880 miles of fishing area. In Oregon, Indian fishing takes place in three streams, and in Idaho in eight streams of importance.

It is reported that the Puyallup River in Washington is fished so heavily by Indians that the State salmon hatchery upstream is unable to take enough spawning stock to replenish the stock. Here gill nets have been stretched across the river which for all practical purposes block the passage of fish. The Washington Department of Fisheries now operates the station with salmon stock hauled from outside sources.

On the Hoko River in Washington steady pressure from Indian gill netting has reduced the salmon production to a negligible point, far below any normal condition that will permit effective management of this resource.

The Yakima River is partly within the Yakima Reservation. Much of the fishery by the Indians, however, is downstream from the reservation. During the 1964 spring run the catch by Indians at Prosser and Horn Rapids, off the reservation, was so heavy that the Indians upstream on the reservation were unable to obtain the catch they normally expect. The total Indian catch of chinook salmon was about 3,200. The escapement of salmon beyond this fishery as counted at Roza Dam was only 31 fish this year, a number far below that needed to perpetuate the run. The entire spawning population is estimated at 60 chinook, which would be expected to produce a return run 4 years hence of about 180 fish. A few years ago this spawning run was counted in the thousands. The spawning escapement of chinook counted at Roza Dam (which is about half of the total spawning population) has been as follows:

Year	Count	Year	Count	Year	Count
1958	2, 200	1961	1, 129	1964	31
1959	1, 022	1962	150		
1960	608	1963	196		

In carrying out a coordinated program under the so-called Mitchell Act of May 11, 1938, as amended (16 U.S.C. 755–757), the Federal Government has been concerned specifically with the management of the Columbia River fisheries through the Columbia River fishery development program. This act provides for the conservation of the fishery resources of the Columbia River through the establishment, operation, and maintenance of salmon cultural stations in the Columbia River Basin in each of the States of Oregon, Washington, and Idaho. In addition, the act provides for the conduct of necessary investigations, surveys, stream improvements, and stocking operations for these purposes. The provisions of this act are carried out with the full cooperation of the State conservation agencies in Oregon, Washington, and Idaho.

Under the Columbia River Basin program, the Federal Government has invested in excess of $24 million in capital expenditures directly related to the perpetuation of the anadromous fish resources. Without effective regulations on all segments of the fisheries, commercial, sport, and Indian, the runs of the Columbia River Basin probably cannot be maintained, and the benefits of this investment cannot be realized.

A serious threat to the salmon and steelhead conservation in the Columbia River is the magnitude of the Indian gillnet fishery. Virtually unregulated fishing has been conducted by Indians in the Bonneville pool area with nets being placed in the main migration routes to established salmon cultural stations. A precise measurement of the effects of this fishery has not been obtained, but, if continued, the results could be disastrous. Commercial fishing by non-Indians is prohibited in this area.

The management of salmon and steelhead resources is not simple. Only by the application of the most modern methods and the best knowledge of experienced administration and research are we able to show any progress in salmon conservation, and even with this background, success is being achieved only with difficulty. Unless effective means can be devised for controlling fishing effort from all sources, the inevitable result will be a further loss of the salmon and steelhead resources of the Northwest.

Although unregulated Indian fishing is a serious and growing threat to the resource, it is not the only threat. Other factors need to be considered. Some of them are the effect on the fishery of existing and proposed high dams, and pollution caused by increasing development and industrial growth.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., July 10, 1964.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on Senate Joint Resolution 170 regarding Indian fishing rights.

A number of the treaties entered into with Indian tribes of the Pacific Northwest provide that the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory. As indicated by the recitals in the resolution there is some conflict in the views of the Supreme Court of the United States and those of the Supreme Court of the State of Washington as to whether such treaty language empowers a State to regulate, solely for purposes of conservation, fishing by Indians outside an Indian reservation. The Supreme Court has said that while such treaty language "leaves the State with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the State from charging the Indians a fee of the kind in question here" (*Tulee* v. *Washington*, 315 U.S. 681 (1942)). The Supreme Court has recently cited *Tulee* in support of the proposition that "Even where reserved by Federal treaties, off-reservation hunting and fishing rights have been held subject to State regulation * * *" (*Kake* v. *Egan*, 369 U.S. 60 (1961)).

The Supreme Court of Washington in an opinion signed by four of the eight justices participating, has said that, notwithstanding the statement of the U.S. Supreme Court, such treaty language precludes the State from regulating the Indian fishing rights and that this interpretation of the law will be followed until such time as the U.S. Supreme Court specifically overrules the State court or Congress legislates on the subject (*State* v. *Satiacum*, 314 P (2d) 400 (1957)).

In seeking to resolve the conflicting views of the Supreme Courts of the United States and of the State of Washington, the resolution would provide that State statutes of a purely regulatory nature concerning the time and manner of fishing outside of an Indian reservation which are reasonably necessary for conservation and which are equally applicable to Indians as well as others shall be considered to be in furtherance of and not in derogation of treaties securing to Indians the right to fish at usual and accustomed places outside Indian reservations. This is in accord with the views of the Supreme Court of the United States and in our view would merely be declaratory of existing law.

Accordingly, the Department of Justice has no objection to the resolution.

In order to avoid any possible contention that the resolution authorizes any tax or license fee on any Indian, it is suggested either, that the legislative history should indicate the resolution is in accord with the decision of the Supreme Court in *Tulee* and thus a legislative declaration of existing law, or that a sentence to the following effect should be added after the sentence ending with the word "distinction" on line 2, page 3: "Nothing in this resolution shall be construed as authorizing any tax or license fee on any Indian."

As a technical matter, in the last recital of the resolution on page 2, a more convenient reference to the decision in *Kake* would be to substitute for the language "docket numbered 3, October term," the citation "369 U.S. 60."

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

NICHOLAS DEB. KATZENBACH,
Deputy Attorney General.

Senator CHURCH. As you know, Senate Joint Resolution 170 contemplates granting statutory authority from the Federal Government for State regulation of the time and manner of fishing pursuant to the treaties, outside of reservations, for the purposes of conservation. Senate Joint Resolution 171 provides for purchase and extinguishment of the treaty fishing rights, both inside and outside of the reservations.

We hope today to elicit from our witnesses a summary of the historic and legal background of the treaties in question. Equally important, we shall try to secure, with as much precision as possible, the relation of off-reservation Indian fishing practices, under claimed treaty rights, to the proper conservation and management of the anadromous fishery involved.

The chairman of the full committee, my distinguished colleague Senator Jackson, is here this morning. I might say that he has established an enviable record over the years through his concern with the conservation of U.S. fisheries, as I am sure the representatives of the U.S. Fish and Wildlife Service here will heartily attest. And I know Senator Jackson has a number of questions this morning to help us illuminate this knotty issue. It is my earnest hope that our work today will make a useful start toward putting this vital conservation matter in its correct perspective.

I am pleased now to ask our chairman, Senator Jackson, if he will commence our proceedings with whatever statements and whatever questions he may wish to put.

STATEMENT OF HON. HENRY M. JACKSON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator Jackson. Thank you, Senator Church. May I first of all express my appreciation to you for undertaking to chair this inquiry. I think we all realize that we are dealing with a very serious problem. We are confronted at the same time with some difficult challenges that the committee will have to go into very carefully in order to do justice to all of the parties concerned.

I am very pleased to welcome the witnesses from the State of Washington who are here—the State government, the Indian tribes, and the interested private groups who have taken the time and interest to prepare for this inquiry. I am certainly looking forward to having their first-hand and, I trust, forthright evaluation of this problem in light of all the considerations that are involved in connection with this inquiry.

In order to make real progress, we want to avoid oversimplification of what in many instances, are obviously very complex problems. If we fail in that endeavor, I believe we will defeat our purpose. I am fully confident the chairman of the subcommittee, who has piloted through the Senate so much legislation relating to Indian matters, is keenly aware of the difficulties we face when we go on the floor of the Senate or when the matter comes up in the House, in not having all of the pertinent facts. Therefore, our purpose here today in connection with the two pending resolutions is to get as comprehensive a presentation as possible from the witneses, regardless of the viewpoints they may express. It is only with such full ventilation of all of the relevant data that we can hope to establish the basis for a proper resolution of the problems that we face.

Senator Magnuson, Mr. Chairman, who is the sponsor of Senate Joint Resolutions 170 and 171, is regrettably detained in the Appropriations Committee meeting this morning. He has a statement which I should like to have placed in the record at this point. Senator Magnuson's statement is a discussion of the two resolutions. In addition

he has some correspondence and other material which could be placed at an appropriate place in the record if there is no objection.

Senator CHURCH. Without objection the Senator's statement and other material will be placed in the record.

(The statement referred to follows:)

STATEMENT BY HON. WARREN G. MAGNUSON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

At the request of many citizens and of the fish conservation officials of the State of Washington, I introduced the two Senate joint resolutions which are designed to bring order to a fishery that is being damaged by the unregulated fishing of a very small number of our citizens.

Senate Joint Resolution 170 would authorize State regulation of the time and manner of fishing outside an Indian reservation when such regulations are for the purpose of conservation and are equally applicable to all persons.

Senate Joint Resolution 171 would provide for the asquisition of Indian treaty rights to take fish at all usual and accustomed places, in common with other citizens, a relinquishment and extinguishment of such right, or to acquire such right by condemnation.

I am of the opinion that it will be advantageous to the Committee on Interior and Insular Affairs to have both resolutions before it during consideration of this fisheries problem. It is also possible, that from the discussion at these hearings on the two proposals, there might come a better solution to properly conserve the very important salmon and steelhead resources of the Pacific Northwest.

Many treaties between the Federal Government and the Indian tribes, and this is especially true in the State of Washington, contain the following language: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the State or territory."

This right of the Indians—"the right of taking fish at all usual and accustomed grounds"—was purchased by them very dearly, through giving up two-thirds of the State of Washington. They ceded to the United States a vast territory which has contributed much to the economy of our country.

These treaties, which were entered into with the Indian tribes over 100 years ago from 1850 to 1858, are still the supreme law of the land and as such they must be respected and honored.

Indian treaties have the same weight and effect as does any other treaty that we have ever entered into.

The only concession reserved to the Indians was the right of taking fish at all usual and accustomed grounds and if they are to be deprived of any part of this right they should be properly compensated.

This is known as an aboriginal right that they have possessed since time immemorial and this right is just as compensable as any real right that any of us have ever owned.

I believe these treaties are a part of our heritage—but solely, in support of fish conservation, I believe that these treaties should fit present-day conditions in the overall consideration for maintaining our fishery resources.

American historians agree that so bountiful were fisheries resources in our early history that settlers could not conceive that the supply would ever be seriously impaired. Unfortunately, however, the presumption was not well founded. Nature could not compensate for the exploitive commercial and personal uses made by man of the fish. Natural breeding and spawning areas have been destroyed as our country has been settled more densely. Industrialization has resulted in waterway pollution. Particularly damaging to migratory fish life has been the construction of dams and water diversions for power and irrigation purposes.

As our fish runs began to decline, as the results of overfishing became evident, it became necessary to limit catches, to limit days of fishing—and all of these practices have been observed and respected by all citizens—with the exception of a small segment of our Indian fishermen.

With conservation and management of our great fish wealth becoming more and more important to guarantee its survival, I believe that it is absolutely necessary that the Indian fisheries be managed as a part of the total management

picture and that in contrast to the fears of some persons, this management will benefit the Indians as well as their neighbors.

An immediate action plan to modify the effects of the unregulated Indian fishery is imperative. That change is necessary is indisputable—and there are many, many Indians who have advised me of their agreement with our conservation agencies.

I believe that the two Senate joint resolutions that I have submitted for appropriate reference will provide a starting point for consideration of a workable and fair solution to this most vexatious question.

In my mind there is no question but that the Indian has historic special fishing rights and that their rights must be respected. However, I believe that Indian treaty rights must be reviewed in the light of conservation today, so that the few—fewer than 1½ percent of the Indians—who are under neither tribal nor State controls do not destroy these fisheries for themselves, their fellow tribesmen, and everyone else. If Indian fishing is to be modified, then there should be compensation to the Indians to the extent that the adjustment restricts treaty rights.

Senator JACKSON. Thank you very much, Senator.

Senator CHURCH. And thank you, Senator Jackson. Our first witness this morning is the Honorable John Carver, the Assistant Secretary of the Interior. If you would care to have members of your staff come up with you, Mr. Secretary, we will be pleased to have them sit at this table.

Mr. CARVER. Thank you, Mr. Chairman.

STATEMENT OF JOHN A. CARVER, JR., ASSISTANT SECRETARY OF THE DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY CLARENCE F. PAUTZKE, COMMISSIONER OF FISH AND WILDLIFE; GEORGE DYSART, ASSISTANT REGIONAL SOLICITOR, PORTLAND, OREG.; AND GRAHAM E. HOLMES, ASSISTANT COMMISSIONER OF INDIAN AFFAIRS

Mr. CARVER. Due to the nature and complexity of this matter, I have asked to join me, in the different programs and interests that are involved, the Commissioner of Fish and Wildlife, Clarence Pautzke, to my left; to my right, Mr. George Dysart, assistant solicitor in Portland, Oreg., who has had a great deal of background and experience with this problem; and the Assistant Commissioner of Indian Affairs, Mr. Graham Holmes, with your permission, Mr. Chairman.

Senator CHURCH. We want to welcome you all this morning, gentlemen.

Mr. CARVER. Mr. Chairman, just as the two proposals before you are inconsistent, so also are the program interests of the Department of the Interior. Senate Joint Resolution 170 would rely upon the conservation responsibilities of the Federal Government as a basis for authorizing State regulation of the time and manner of off-reservation fishing by Indians. Senate Joint Resolution 171 would attack the problem by authorizing the purchase and consequent extinguishment of the Indian treaty fishing rights, on and off the reservations.

In the Department, our trust responsibilities for the Indians are always gravely considered. Protection of the rights of Indians granted by treaties is one of the duties of that trust. But the responsibility for the conservation of our national resources, including the great fishery resources of the Northwest, is a congressionally mandated responsibility not to be taken lightly at any time.

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Experience has amply demonstrated that accommodation of these two program interests is difficult.

I might say parenthetically here that I have a letter from a lawyer in Ellenburg, Wash., dated June 27, 1889, in which he says that if he is sent a copy of the treaty that he, as a U.S. Commissioner, will be able to solve this matter promptly. I thought the chairman might be glad to see how longstanding this matter is.

Senator CHURCH. Well, I would like to state that that letter is a masterpiece of overstatement, and your testimony that "Experience has amply demonstrated that accommodation of these two program interests is difficult," is a masterpiece of understatement. Without objection, the text of the letter may appear here in the record.

(The letter referred to follows:)

ELLENBURG, W.T., *June 27, 1889.*

INDIAN AGENT
F. L. SIMCOE, W.T.

DEAR SIR: There is some trouble about Indians fishing in some of the streams in this country. The local authorities claim that the Indians have no right to use traps, etc. Will you please send me a copy of treaty with the Yakima Indians so the matter can be settled without further trouble. The Indians have appealed to me to know what to do knowing I am a Commissioner.

Respectfully yours,

S. C. DAVIDSON,
U.S. Commissioner.

Mr. CARVER. The elements of the problem can be stated, however, in fairly precise terms:

First, the treaty right to fish is important to the economic welfare of the Indians. The Deparement's report encloses a brief statement on this subject.

Second, the Indians believe that as a matter of law their treaty right to fish is not subject to regulation by the States. This legal issue has been litigated in the courts over an extended period of time, and a clear answer has not been given. The Department's report also encloses a statement on this subject.

Third, the State officials who are responsible for management and conservation of the fishery resource, and the Fish and Wildlife Service of this Department, believe that effective management of the resource is impossible unless all segments of the fishery are regulated. The Department's report also includes a statement on this subject.

Fourth, the segments of the anadromous fishery are sport fishing, commercial fishing, and Indian fishing. The States' regulations have been designed to accommodate the needs of the first two segments, sport fishing and commercial fishing, but we have not recognized any separate need for the Indian fishing, believing that the Indians should engage in sport and commercial fishing on the same terms that apply to other citizens.

This general statement is not designed in any way to indicate that the States have not done a very fine job. There has been a genuine effort on the part of State officials in all of the States involved to try to accommodate to the needs of the Indians and to try to work with them. But the regulatory structures, as the members of the committee will understand, have not separately dealt with the needs as far as this Indian fishing.

The unwillingness of the States to recognize any special Indian need is probably the reason for the Indians' unwillingness to be subjected to State regulation. This poses a most difficult policy issue, which is: To what extent should the Indian fishery be subjected to different rules? I suppose it would be possible to restrict sport and commercial fishing to a greater degree, and thereby allow greater freedom in Indian fishing, and still carry out an effective conservation management program.

Fifth, the issue therefore resolves itself into one of who should regulate the Indian segment of the fishery—the State, the Federal Government through the Secretary of the Interior, or the Indian tribes themselves. A subsidiary issue is whether the treaty right should first be purchased and extinguished before Indian fishing is regulated. This subsidiary issue is a policy one and not a legal one, because the authority of the Congress to regulate the Indian fishery in the interest of conservation seems clear.

As the Department's report indicates, the two alternatives available are either to legislate the answer to the problem, or to leave the issue for further litigation in the courts. The choice is not an easy one.

I recognize, Mr. Chairman, that this is quite an unsatisfactory report on our part, because we have a duty, in addition to identifying the problem, to make a recommendation, and——

Senator Church. Well, I am glad, Mr. Secretary, that you said that before I did. Now, do you have anything with respect to these two resolutions in terms of recommendations to this committee?

Mr. Carver. Well, speaking personally, it has always seemed to me that the trust responsibilities with reference to the Indians can be carried on consonant with good conservation practices. That is, neither in Northwestern United States nor in Alaska, nor anywhere else, should we, as a matter of policy, take the view that bad conservation practices can be indulged in. On the other hand, sometimes bad conservation practices are found and in that case, when such bad conservation practices get started, changes have to be made under our constitutional system.

Certainly I feel that we should all work toward a common conservation practice, everybody in the area. That is, how a fishery is regulated should be determined upon the best information available, scientific and otherwise, and other management principles to keep the fishery at its present level, or to increase it if possible.

I think that the Indians also subscribe to this view. I think that they have as much interest in conservation as do the fish and game commissions or the Federal Government. So in part some of our difficulties have arisen, not over a different objective, but rather over a difference in—well, the matter of their standing on their rights, so to speak, a question of the atmosphere in which these matters have been approached.

Senator Church. You make the statement in your testimony that "the authority of the Congress to regulate the Indian fishery in the interest of conservation seems clear." Is that the position of the Department?

Mr. Carver. Yes, sir.

Senator Church. It is?

Mr. CARVER. That the Congress has the authority to regulate, that would seem plain enough.

Senator CHURCH. Regardless of the treaty provisions setting over to the Indians unrestricted hunting and fishing rights?

Mr. CARVER. Absolutely. Insofar as those rights were interfered with by what the Congress would do, the Congress would provide payment. The Congress would provide that they be paid, but its power under the legislation is there.

Senator CHURCH. Then I think we ought to condition that statement with the qualifying testimony you have just given, that is to say, the authority is in the Congress to regulate, subject, to such property rights as the treaty may have conferred to the Indian people; is that so?

Mr. CARVER. Yes, sir; certainly.

Senator CHURCH. And where those property rights are clear, then they must be treated as any other property right, and cannot be impinged without payment of just compensation. Is that the position of the Department?

Mr. CARVER. Yes, sir.

Senator JACKSON. May I ask a question, Mr. Chairman?

Senator CHURCH. Yes.

Senator JACKSON. What is the effect on Indian treaty rights of an act of Congress purporting to modify or abrogate these treaty rights? I understand that Congress does have the power. I am not saying that they should do it, but I am only posing that as a legal problem.

Mr. CARVER. I am sorry Senator, but would you please repeat that statement?

Senator JACKSON. Well, the question is this: Do I understand correctly that Congress has the power to modify or to abrogate an Indian treaty?

Mr. CARVER. It certainly has the power to do so and has done so many times.

Senator JACKSON. This is the point I wanted to make. Unless arrangements are made for just compensation in the event of such abrogation by Congress, the Indians would not be entitled to it, would they?

Mr. CARVER. Without some legislation, the Court of Claims or other authorizing legislation where they could pursue their claim for compensation, they would have a right without a remedy.

Senator JACKSON. Yes.

Mr. CARVER. In other words, the Congress is the one that sets up the framework by which recovery would be had.

Senator JACKSON. But to the extent that the fishing right is held by the courts to be a property right, could the Indian people not have their constitutional guarantee against whatever action the Congress might take?

Mr. CARVER. Well, then like anybody else who has a constitutional right, they have to find a forum in which to carry it out.

Senator JACKSON. The Federal courts provide a very good forum as far as constitutional rights are involved.

Mr. CARVER. I certainly think that the Congress would provide for compensation.

Senator CHURCH. Mr. Secretary, we are just trying to get the specifics of the legal framework within which we have to consider this problem; is that not so?

Senator JACKSON. That is what I am getting at.

Mr. CARVER. Perhaps I better turn to Mr. Sigler, my constitutional lawyer, who is here, Mr. Chairman. It is my own view that the Congress could abrogate a right and say, "We won't pay," and probably get away with it.

Senator CHURCH. Mr. Sigler, would you care to comment on that?

Mr. SIGLER. Mr. Chairman, I might point out to the committee that whether the Indian fishing right is a property right or not is something that is not clearly established. But assuming for the moment that it is a property right, then the question becomes one of: May the Federal Government regulate the exercise of that property right? Now the Federal Government has for many years controlled and regulated grazing, and timber cutting, which are property rights of Indians. It was regulation in the interest of conserving the Indian assets, and there has never been any question about the authority of the Federal Government to take that kind of action.

Regulation of the fishing right, if it is a property right, I think would fall in the same category.

Senator CHURCH. You are distinguishing between regulation for the purpose of conserving the right from the extinguishment of the right?

Mr. SIGLER. Yes, sir.

Senator CHURCH. Which would raise an entirely different constitutional question.

Mr. SIGLER. Yes, sir.

Senator JACKSON. May I, Mr. Chairman?

Senator CHURCH. Yes.

Senator JACKSON. What about any possible regulation by the Federal Government of off-reservation fishing on the part of the Indians?

Mr. CARVER. Well, the answer——

Senator JACKSON. Would you have authority to do that? I am just posing the question. I am not asking or suggesting it necessarily as a course of action. I only want your judgment on the matter.

Mr. CARVER. I am sure the Congress would have the authority to direct the Secretary of the Interior to do it off reservation or on reservation.

Senator JACKSON. But do you presently have that authority or would you need legislation? Mr. Sigler?

Mr. SIGLER. As far as I am aware, we do not have any authority now to regulate off-reservation Indian fishing.

Senator JACKSON. But on-reservation fishing?

Mr. SIGLER. I think not even there. The tribes themselves have that authority.

Mr. CARVER. That is as I understand it, too.

Senator JACKSON. That has been delegated by Congress?

Mr. CARVER. By Congress?

Mr. SIGLER. That is one of the tribes' inherent powers, and it has not been taken away from them by the Federal Government.

Senator JACKSON. How do you distinguish that situation from the grazing and forest procedure.

Mr. SIGLER. There we have the legislation.

Senator JACKSON. Specific legislation?

Mr. SIGLER. Yes, sir.

Senator JACKSON. You are then saying that if there is to be regulation, either on or off reservation, by the Federal Government in lieu of what is proposed in the pending resolutions——

Mr. SIGLER. The pending resolutions are a form of Federal regulation.

Senator JACKSON. I understand that. In any event, Federal regulation could require, in your judgment, legislation by the Congress?

Mr. SIGLER. Yes, sir.

Senator JACKSON. That is all.

Senator CHURCH. One further question, Mr. Sigler. From the standpoint of the Constitution, do you find anything in either Senate Joint Resolution 170 or Senate Joint Resolution 171 which would, in your opinion, raise any serious constitutional question?

Mr. SIGLER. Mr. Chairman, I think—my own personal opinion and judgment is that the question will not be a serious one. I do not mean to say that the question might not be raised. It is always impossilbe to predict what is valid or not in another person's judgment.

Senator CHURCH. Yes.

Mr. SIGLER. I think that inasmuch as the regulation is phrased in terms of regulation for conservation purposes, it would be sustained if challenged on constitutional grounds. As far as the second resolution is concerned, which provides for the purchase and extinguishment of the Indian treaty rights, there could be a question of compensation. The resolution provides for the payment of compensation, but if the Indians felt that it was not an adequate amount of compensation, they could, of course, challenge it, and if they were successful they could recover a judgment in the Court of Claims. That situation arises all the time when the Federal Government takes property. For example, in the *Yellowtail* case of a few years ago, the Government took the property and specified the payment and then said if the Indians were not satisfied they could sue for more, which they are doing.

Mr. CARVER. It seems to me——

Senator CHURCH. Excuse me, I had one further question, either for you, Mr. Secretary, or for Mr. Sigler. Do any of the treaties that are here involved undertake to limit the fishing right to the reservation?

M. SIGLER. No. The treaties are explicit. They apply to the usual and accustomed fishing places.

Senator CHURCH. Regardless of reservation boundaries?

Mr. SIGLER. That is correct, and that issue has been litigated and is reasonably well established. The Indians do have the right of access to their usual fishing places, even though they must cross somebody else's property. They may fish in their usual and accustomed places. The issue here, I think, is entirely one of the extent to which regulation is needed.

Senator JACKSON. I have an additional question. How does the matter of hunting as distinguished from fishing enter into this general area of conflict?

Mr. SIGLER. I am afraid I cannot answer you on that, but my recollection is that these treaties refer solely to fishing. Some other

treaties do refer to hunting. That question has arisen in the past, but I don't know the answer to your question at the moment, Senator.

Senator CHURCH. Would the Department, just for the edification of the committee, supply us some information on the hunting aspects of this general question, so that we will have that for purposes of reference?

Mr. SIGLER. I will be glad to.

Senator CHURCH. As we consider this fishing problem.

Mr. SIGLER. Yes; I will do that.

Mr. CARVER. That situation exists in the State of Idaho.

Senator CHURCH. Yes.

Mr. CARVER. And I do not think we will have any more definitive answer there than we have with reference to fish, Mr. Chairman.

Senator CHURCH. Well, that is not too encouraging. Any other questions of Secretary Carver?

Senator SIMPSON. No.

Senator MECHEM. No.

Senator CHURCH. Senator Jackson?

Senator JACKSON. No.

Senator CHURCH. All right.

Senator JACKSON. I do have some questions for Mr. Pautzke, when we come to him.

Senator CHURCH. All right. Why don't you proceed, now, Senator Jackson?

Senator JACKSON. Thank you, Mr. Chairman. You may recall, Mr. Pautzke, that Senator Magnuson and I have been greatly concerned about the need for rehabilitation of the runs on the White River. We certainly hope that the Department can include funds in next year's budget to carry out the very worthwhile study you have initiated.

I wonder if you would comment on the progress that has been made in connection with this study and its significance to other similarly depleted streams in the Pacific Northwest?

Mr. Chairman, this relates to the matters we are discussing here, and that is the basis for raising the question.

Senator CHURCH. Yes.

Mr. PAUTZKE. Senator, early this spring at the request of you and Senator Magnuson, we put on a preliminary survey of the White River to ascertain in a general preliminary way a review of the problems concerned with the production of this stream.

As you know, this stream has been the scene of considerable litigation, and that at the present time there are two Indian tribes that are concerned with the fisheries there. Also there are a number of other problems of concern. One would be that the Army engineers have a flood control dam on the upper reaches; two, there is a power diversion taking water, also there is a sport and commercial fishery; and there is also flood control conducted by the two counties that border this stream.

Our preliminary data, which was gathered by a survey crew on the river, plus compilation of the information that was available from the States, show that there is more than one facet to this problem, and only one portion of it is the Indians.

There is also a State fish hatchery on the stream which at the present time has been experiencing a lack of returning Broadfish.

Senator JACKSON. You do not know to what extent the depletion problem is involved in connection with Indian activities?

Mr. PAUTZKE. Senator, I would state that the records will show that as a result of the Indian fisheries in here, and we have three sets of data to prove this, on the upper portion of the stream is a dam in which we picked up the fish and trucked them around to the upper tributaries. We have immediately below this the Muckleshoot Indians, which have used this area as their accustomed fishing grounds. And then down at the mouth of the river the Puyallup Indians have recently started fishing. As a result of the intensified fishing on the part of the Puyallups at the mouth of this stream, the Muckleshoot take has dropped off drastically, as has the number of fish that have now reached the dam where we have had records since 1950.

In reverse, the matter of the take of fish by the Puyallups has risen drastically—taking the two pieces of data from the Muckleshoots and our trucking records and comparing those with the Puyallup take there is definitely a correlation. As they take them at the mouth, the runs decrease farther up the stream.

Senator JACKSON. Would you describe off-reservation Indian fishing practices today? In that connection, would you explain whether or not they differ substantially from the period of the 1850's when most of the relevant treaties now under consideration were negotiated?

Mr. PAUTZKE. Senator and Mr. Chairman, there are still the remnants of rock deflectors, and the old documents say the Indians used branches and sticks to deflect the fish from the main current into the shallow waters, a means by which the Indians brought these fish into shallows where they could be captured.

Other fishing places were at obstructions where they either took them with baskets as they jumped at these obstructions or they speared them by using a buckhorn spear.

Today, through modern invention, we have the nylon gill nets. The net is a net with a certain size mesh in it, and no limitation to length, and the depth is commensurate with the depth of the water in which they are fishing.

These nets are anchored into place and oftentimes they stretch completely across the stream acting as a total block. They can be anchored into place and as the fish come upstream in off-color water or even with the new nets, in clear water, the fish attempt to swim through these net obstructions. The net is so constructed that they go into the net as far as the hump on the shoulder of the fish and then as they try to back out their gill coverings are caught in the mesh. These nets are a very efficient piece of fishing equipment.

Senator JACKSON. How many Indians encompassed by Senate Joint Resolution 170 depend substantially on subsistence fishing?

Mr. PAUTZKE. Sir, I really do not know. I know that we are talking about some 36 streams and possibly some intensified fishing spots on 116 miles of stream, and there are some 20 other streams with 880 miles that we have computed as being occasionally used.

Senator JACKSON. That information should clearly be supplied for the record.

Senator CHURCH. Fine, Senator. I have here a letter from Mr. Frank Cullen, the chairman of the Fish and Game Department of the State of Idaho, placing that department on record in favor of Senate Joint Resolution 171. The letter concludes:

> Inasmuch as this overall problem is a matter of great concern to the Idaho Fish and Game Commission, we ask that your subcommittee report favorably on Senate Joint Resolution 171, the principles of which we strongly support as the most fair and equitable solution, both in relation to reimbursement for valid Indian rights and to insure the future of the anadromous fishery resource in the Pacific Northwest.

Without objection, I would like to have this letter included at this point in the record.

(The letter referred to follows:)

STATE OF IDAHO,
FISH AND GAME DEPARTMENT,
Coeur d'Alene, Idaho, July 30, 1964.

Hon. FRANK CHURCH,
U.S. Senator,
Washington, D.C.

DEAR SIR: It has come to our attention that hearings are to be held by the Senate Subcommittee on Indian Affairs on Wednesday, August 5, at 10 a.m., relative to Senate Joint Resolutions 170 and 171.

Inasmuch as treaties with Indians in Idaho contain similar language and provisions to those cited in said resolutions and inasmuch as Idaho shares all of its runs of anadromous fish to some degree with the States of Oregon and Washington, the Idaho Fish and Game Commission feels that it should make a statement for the subcommittee hearing records concerning these resolutions.

Even though it is true that wildlife harvest in Idaho by Indians has had a serious effect on only a few species of basic brood stock to date and this in only a few limited sections of the State, as time goes on the picture could change considerably if the numbers of Indians involved in unrestrained hunting and fishing increase and/or they go still further in the use of modern methods and gear in taking, preserving, and transporting wildlife which has been harvested during its periods of greatest vulnerability. Such developments could easily lead to the decimation, if not annihilation, of a given species of game or race or run of fish in a limited and particular locality or body of water. The unpredictability of such unregulated Indian harvest has already made proper management and long-range planning extremely difficult, if not completely futile and useless in some such instances.

On the specific subject of anadromous fish we can cite the chinook salmon run on the Yankee Fork of the Salmon River, where unrestrained fishing by Indians alone has been largely instrumental in preventing the revival of that run of fish and may eventually threaten its very existence. To date the impact of the Indian harvest of anadromous fish in most Idaho waters has not generally been so serious in such a direct manner. However, heavy fishing at certain points along the Columbia River by Indians using such modern gear as monofilament gill nets will undoubtedly be having greater effect on the amount of anadromous fish reaching Idaho waters each year.

The combined effect of unregulated downstream, main stem Indian harvest coupled with heavy removal by similar ethnic groups from the shallow, spawning headwaters could eventually spell doom for the Idaho portion of this interstate resource. The inability demonstrated by the several Indian tribes, up to this date, to adopt or effectively apply and enforce suitable tribal regulations relative to wildlife makes the future picture even more discouraging for those areas and species being affected.

Inasmuch as this overall problem is a matter of great concern to the Idaho Fish and Game Commission, we ask that your subcommittee report favorably on Senate Joint Resolution 171, the principles of which we strongly support as the most fair and equitable solution, both in relation to reimbursement for valid Indian rights and to insure the future of the anadromous fishery resource in the Pacific Northwest.

Sincerely,

FRANK CULLEN, *Chairman.*

Senator CHURCH. Are there any further questions of these gentlemen?

Senator JACKSON. I should like to ask Mr. Pautzke whether he believes there is adequate information available to act in a fair and equitable way in connection with the pending legislation? Do you believe there is a need for additional investigation into the relevant conservation questions here?

Mr. PAUTZKE. Senator and Mr. Chairman——

Senator JACKSON. In other words, we should not make any recommendations here until we have the facts.

Mr. PAUTZKE. I feel—and this is my own interpretation from looking at the available information material—my feeling is that we have sufficient information so far as the Fish and Wildlife Service is concerned, to know that an unregulated fishery can create a condition that is adverse to the fishery resources; and we have data of intensified nature on a number of streams to definitely prove to us that this is true.

Senator JACKSON. In other words, you have information on certain streams that you believe to be reasonably accurate?

Mr. PAUTZKE. That is right.

Senator JACKSON. But do you have adequate information on all of the other streams that are involved in this resolution?

Mr. PAUTZKE. That is right. Let us say we have only sampling data on the other streams.

Senator JACKSON. Well, is that adequate?

Mr. PAUTZKE. Well, I believe so.

Mr. CARVER. Senator, could I interject?

Senator JACKSON. Surely.

Mr. CARVER. I think what Mr. Pautzke is saying, and I certainly agree with him, is that he does not need to make any more study to know that an unregulated impact on fishery is bad for conservation. He would not need to gather all of the data on all of the streams to show that.

I would like to suggest, however, that there is an area where we do not have very complete data, and it goes back to the last question you asked, and that is the economic impact of the fisheries on the various tribes of Indians. This data is not available in any great amount.

Senator CHURCH. Do you not think this kind of data is rather crucial in the matter of deciding upon what course of action to take in order to do equity to the Indian people?

Mr. CARVER. Certainly, unless the Congress should determine upon outright purchase under the plan set forth in Senate Joint Resolution 171, it would be quite important to know what differing forms of regulation would do and the economic impact upon the individuals and tribes involved throughout that area. And I do not think, although Mr. Dysart or Mr. Holmes may say differently, I do not think that we have this kind of information with any great precision. Is that right?

Mr. DYSART. That is right.

Mr. HOLMES. That is right.

Senator CHURCH. But even if the Congress should ultimately decide to adopt the course proposed in Senate Joint Resolution 171 and buy the fishing rights outright, this kind of data would be indispensable.

Mr. CARVER. That is right.

Senator CHURCH. In order to ascertain what the likely cost would be.

Mr. CARVER. That certainly is true; although the purpose of gathering the information and the way you did it might vary, depending upon whether you are trying to buy it or whether you are trying to achieve some kind of regulatory structure.

Senator CHURCH. How long would it take to make the kind of survey which would furnish this information?

Senator SIMPSON. Well, you do not have the situation here where you have a willing buyer who wants to buy and a willing seller who wants to sell, and you have to take into consideration all of the elements, including the estimates of the Indians themselves.

Senator CHURCH. Mr. Carver, would you get the answer to my last question and furnish it to the committee?

Mr. CARVER. Yes. Mr. Holmes has just said to me that we are in a difficult area because of the off-reservation practices and——

Senator SIMPSON. Is there any State agency, Mr. Chairman, that is going to testify?

Senator CHURCH. Yes.

Senator SIMPSON. And wouldn't that material come best from them?

Senator CHURCH. We do have State agencies here to testify on this, yes.

Mr. CARVER. As Mr. Holmes is pointing out, this is a very difficult area. They may have their records, but we don't. They do not have to say anything to us about it, you know, and we don't have the techniques to gather it for our own information. We have to go out and try to find it out from the beginning.

Senator CHURCH. Well, I should think that that kind of effort is going to be required if we are going to come to a resolution of the problem.

Mr. CARVER. We would hope to have the cooperation of the States in this matter, sir, and the tribes, too, because without the cooperation of the States and the tribes, why, we are trying to pick up a lot of loose ends here.

Senator SIMPSON. Well, the States would have the most authentic information because they have to compile it; do they not?

Mr. CARVER. That would be my understanding.

Senator CHURCH. But with respect to the economic importance of the fisheries to the Indian people, it is not——

Mr. CARVER. This we would have to get——

Senator CHURCH. It is not likely that the States would have that?

Senator SIMPSON. No; only as it relates to—that is what I am trying to point out, they would have the material and the data which would relate to economic impacts upon the Indian tribes, and that coupled with the Federal cooperation, plus the Indian tribes' cooperation, seems to me to be necessary to arrive at an implementation of Senate Joint Resolution 171.

Senator CHURCH. I think that is right, yes. Mr. Pautzke, can you tell us how many Indians are involved in off-reservation fishing practices that are significant hazards to effective conservation?

Mr. PAUTZKE. This I cannot do, Mr. Chairman.

Senator CHURCH. Do you have sufficient data to demonstrate, irrespective of whether or not Indian fishing practices are in fact regu-

lated by the States affected, that such practices are generally the chief factor in any decline of anadromous fisheries in the Pacific Northwest?

Mr. PAUTZKE. I did not quite understand that question. I am sorry.

Senator CHURCH. All right. Let me just rephrase it. Do you have sufficient data to show that Indian fishing on the streams of the Northwest is the chief factor in any decline of anadromous fishing in the Northwest?

Mr. PAUTZKE. I will answer it, Mr. Chairman, in this way: On a number of streams, and this is restricted in number, I would say that we have data on less than 10 streams, but we have data on these streams to show that unregulated Indian fisheries are a very definite factor in relation to the decline of the fish in those streams.

Senator JACKSON. A very definite factor, but the question was: Is this the chief factor, as far as you have conducted your careful survey on those streams?

Mr. PAUTZKE. In the streams of the Puyallup and the Hoko, I would say this is definite.

Senator JACKSON. This is the chief factor?

Senator SIMPSON. Are you talking about the off-reservation fishing now?

Mr. PAUTZKE. This is off-reservation fishing. This is the chief factor.

Senator SIMPSON. Do you have any indication of the impact of that on on-reservation streams?

Mr. PAUTZKE. This is off the reservation, sir.

Mr. CARVER. These are the ones we have compiled the data on.

Senator CHURCH. Can you tell us what percentage of the total Pacific Northwest anadromous fishing harvest is caught by Indians in off-reservation fishing?

Mr. PAUTZKE. That I cannot do.

Senator CHURCH. Or what percentage is harvested by sport fishermen?

Mr. PAUTZKE. The data is probably available, but I do not have it here.

Senator CHURCH. By commercial fishermen?

Mr. PAUTZKE. The data is available, but I do not have it here.

Senator CHURCH. Well, I think we ought to have that data and that it should be furnished for the record. Will you see that it is, please?

(The following letter was received from the department:)

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., September 15, 1964.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate,
Washington, D.C.

DEAR SENATOR JACKSON: During the course of the recent hearings on Senate Joint Resolution 170 and Senate Joint Resolution 171 before the Senate Interior Subcommittee on Indian Affairs, we were asked to supply, if possible, information relating to—

1. Indian treaty hunting rights.
2. How many Indians depend substantially on subsistence fishing, on the reservation and off the reservation.
3. How many Indians are engaged in commercial fishing.
4. What would be the economic impact on Indians of State regulation of Indian fishing.

5. What percentage of the anadromous fishery in the Pacific Northwest is caught by—
(*a*) Indians off reservations;
(*b*) Indians on reservations;
(*c*) Sport fishermen; and
(*d*) Commercial fishermen.

We are assembling this information to the extent it is available, or can be obtained, and will submit it to the committee as soon as possible.

Sincerely yours,

LEWIS A. SIGLER,
Acting Legislative Counsel.

Senator SIMPSON. Mr. Chairman, if I may interrupt.

Senator CHURCH. Yes.

Senator SIMPSON. I gather from the testimony of some of the Government witnesses that they have little or no knowledge of off-reservation fishing. Now, do I understand the witness as saying he can get this data from your Department?

Mr. PAUTZKE. The question, as I understood it, was were the Indians affecting the anadromous fish runs in the streams. As you will find in your report there, there are 36 streams affected where there is unregulated Indian fisheries going on. This totals 116 miles. There is another 880 miles of intermitent fishing which covers 20-some streams.

I said in earlier testimony that we had intensified data on a number of streams. I quoted for Senator Jackson the effects on the Puyallup River, whereby the data showed in this situation the effects of an unregulated fishery. This amount showed a decreasing run of fish to another tribe up the stream and to our hauling station that we have used since 1950. And as the fishing intensity went up at the mouth, the other two sources of data correspondingly showed a decreased number of fish in theirs. In addition a State hatchery which traps fish in the lower river for spawning purposes, found it necessary to bring in salmon spawn as a result of the depleted run of fish.

I said that fishing on this other stream the Hoko, also has shown adverse effects as a result of intensified Indian fishing. There are checks upon other streams fished by Indians that show adverse effects of this Indian fishing

This data is probably available from the States, and perhaps some of the State witnesses will be to answer that further.

Senator CHURCH. Mr. Pautzke, what is your personal assessment of the feasibility of any program of tribal regulation of off-reservation fishing, Indian fishing?

Mr. PAUTZKE. My assessment of this is that unregulated fisheries on anadromous fish cannot be allowed to proceed. There are three factors here: commercial fishing, sports fishing, and Indian fishing. With an unregulated segment in there, management is completely out of the question.

Senator CHURCH. In other words, your answer is that you think it is not feasible?

Mr. PAUTZKE. It is not feasible to have an unregulated condition.

Senator CHURCH. And do you think that an unregulated condition will exist if the matter of control is left in the tribe itself?

Mr. PAUTZKE. The ability of the tribal councils to control off-reservation fishing has been ineffective to date, although they have tried.

Senator SIMPSON. So then you come back to the question of who should control, the Federal Government or the States; and the decisions themselves are full of indecision about that—so you are about where you started.

Mr. PAUTZKE. I grant you, and the legal people could probably tell you, that the courts are at variance in their decisions here; yes, sir.

Senator CHURCH. And that I think sums up the reasons for these two resolutions.

Now, are there further questions of these gentlemen?

Senator SIMPSON. No.

Senator MECHEM. No.

Senator CHURCH. If not, thank you very much. At this point, Bob Burnette has called to my attention the fact that the National Congress of American Indians has passed a resolution on the subject of these hearings, and he asked that that resolution be included in the record. Without objection, it will be inserted at this point in the record.

(The resolution referred to follows:)

RESOLUTION NO. 9

Whereas Senator Warren G. Magnuson, State of Washington, has introduced Senate Joint Resolution 170 to authorize the States concerned to enact and enforce laws of a purely regulatory nature, "in accordance with and in furtherance of the purposes of any treaty with the American Indians that secures the right to them to fish at all usual and accustomed places in common with other citizens," concerning the time and manner of fishing outside Indian reservations for conservation purposes, which would be equally applicable to Indians and other citizens without distinction; and

Whereas Senator Magnuson has also introduced Senate Joint Resolution 171 which would authorize the Secretary of the Interior to provide for the relinquishment and extinguishment of such rights by purchase at the current annual market value of the fishery resources taken by the Indians by virtue of such rights; and

Whereas no definitive study has ever been completed on the salmon industry and the effect of Indian fishing in general on the salmon resources, and the incomplete statistics and data produced by State fish and game departments and by sportsmen are inadequate for use as a basis for abrogating or limiting treaty rights; and

Whereas it is in the interest of all concerned that the cause or causes of depletion of salmon runs and in other fish resources be accurately determined by a comprehensive survey and study; and

Whereas the restrictive regulation of Indian fishing in contravention of treaty rights, without proof that such restriction would increase the salmon runs on other fish resources or prevent their further depletion by other contributing factors, would work an undue hardship on the Indians; and

Whereas if the survey indicates steps that can be taken by the Indian fishermen, commercial fishermen, and sports fishermen on an equitable basis so that all will be cooperating toward the maintenance or increase of the fish resources, the Indians are ready, willing, and able to regulate themselves, provided that the authority therefor is clarified to the end that tribal governing bodies may regulate not only on-reservation but also off-reservation fishing: Now, therefore, be it

Resolved by the National Congress of American Indians in convention assembled July 28 to 31, 1964, That Congress be urged to enact legislation for a comprehensive study and survey of the fishing industry from the time of spawning to the catching, processing, and distribution, including a detailed study of the extent of Indian fisheries, the percentage of the Indian catch in relation to the catch of commercial and sportsmen fishing, and the effect of Indian fishing on the fish resources; and be it further

Resolved, That Congress be urged to withhold action on Senate Joint Resolutions 170 and 171 until the comprehensive survey and study are made to determine the manner and extent of regulation necessary, for conservation and other purposes, without violation of the rights guaranteed by the United States to Indians by treaty.

This is to certify that the above resolution was enacted by the 21st Annual Convention of the National Congress of American Indians, July 31, 1964.

ROBERT BURNETTE,
Executive Director, NCAI.

Senator CHURCH. Our next witness is Mr. Joseph L. Coniff, assistant attorney general of the State of Washington.

STATEMENT OF JOSEPH L. CONIFF, ASSISTANT ATTORNEY GENERAL, STATE OF WASHINGTON; ACCOMPANIED BY MIKE JOHNSTON, ASSISTANT ATTORNEY GENERAL, STATE OF WASHINGTON, APPEARING FOR THE DEPARTMENT OF GAME; AND WALTER NEUBRECH, CHIEF OF ENFORCEMENT DIVISION, WASHINGTON DEPARTMENT OF GAME

Mr. CONIFF. Mr. Chairman, first let me express my appreciation for this opportunity to appear before this committee.

Senator CHURCH. It is a pleasure to have you, Mr. Coniff. Just proceed in your own way.

Mr. CONIFF. I have been authorized to state the position of the Department of Fisheries of the State of Washington with regard to the two resolutions which are under discussion here this morning. The department of fisheries supports the principles contained in both resolutions, particularly Senate Joint Resolution 170 which, of course, would operate as a reaffirmation of the State's power to regulate off-reservation Indian fisheries.

The need is great for such legislation. The facts and figures which the department has developed indicate, as has been testified by Mr. Pautzke, that unregulated Indian net fishery of the nature which has been described is totally incompatible with any intelligent management program designed to conserve this great natural resource.

I would further like to comment on the suggestion that has been made regarding the need for an additional study of the facts on these off-reservation fisheries prior to any committee action on these bills. The department believes that we do have sufficient data and information at the present time to support legislative action of the type which the committee is contemplating.

It is the uniform opinion of various biologists, including Dr. Richard Van Cleve, the head of the College of Fisheries of the University of Washington, Dr. Lauren Donelson, Mr. J. B. Lassiter, Mr. William Reith, Mr. Edward Main, Mr. Clarence Pautzke, Dr. Rainer, and Mr. Pressey, all competent men, who all have the uniform opinion that such an unregulated fishery of the type that we have been experiencing, and which we have been attempting to control via court action, is incompatible with any intelligent management program.

I would further point out to the committee that the State spends annually approximately $145,000 for various stream surveys in which actual counts of fish are taken in the various spawning areas. Now, these stream surveys are performed on an index basis—in other words,

a quarter mile area, a mile, or a half mile area of a particular river or a stream will be sample and an estimate will be made on the total escapement, and these data then form the basis for the projections for the oncoming run of fish and the management regulations thereafter are put into effect by the State.

Senator SIMPSON. Mr. Chairman, may I interrupt?

Senator CHURCH. Yes.

Senator SIMPSON. Are there any definitive studies collaborated in by the three States affected: Oregon, Washington, and Idaho?

Mr. CONIFF. The major study of which I am aware, Senator, is one which is conducted in cooperation with British Columbia on the gill-net fisheries of the Frazer River, and this study demonstrated that a gill-net fishery is capable of taking 98 percent of a run of anadromous fish in a river the size of the Frazer River. And, of course, the rivers and streams that we are concerned with are much smaller than the Frazer River and therefore I think we can safely assume that the gear presently utilized by Indians is capable of virtually eliminating any particular run of anadromous fish.

Senator SIMPSON. The resolution adopted by the national council says that no definitive studies have been made and that before any action is taken on these resolutions, such a study should be made. Are you in accord with that statement?

Mr. CONIFF. No, I am not, Mr. Senator. I believe we know what the pernicious effects of an unregulated net fishery are. We have data, raw data primarily—I don't have it all with me concerning the——

Senator SIMPSON. Can you supply that?

Mr. CONIFF. I can supply the data to the committee. And I would also be happy to supply to the committee if it desires, copies of affidavits which I have obtained in connection with these various lawsuits that are presently pending in the courts, of these various fishery biologists, and their uniform opinion regarding the effects of such unregulated fisheries.

Senator SIMPSON. I think that is important.

Senator CHURCH. Yes, I think that ought to be included in the record.

Mr. CONIFF. I would be happy to send them to you. All I have with me at the moment are file copies.

Senator CHURCH. We would appreciate your sending this information to the committee, and it will be included in the record when received.

(The material referred to appears in the appendix on p. 230.)

Mr. CONIFF. Should the committee decide, however, that such a study is desirable we would like to make clear the position of the State. We already have a research staff available. However, we don't have sufficient funds to conduct such a program of the magnitude that apparently is being contemplated by the committee, although we would like to make it clear that we would like to cooperate and work with this committee insofar as the accumulation or acquisition of this data is concerned.

Senator SIMPSON. You would go along with the Federal Government and the tribes on a cooperative investigation?

Mr. CONIFF. Yes, we would make ourselves available, if the committee so desires. However, we do not believe that such a study is necessary at the present time.

Senator SIMPSON. You would admit that the regulation of the fisheries would be in contravention of the treaty rights?

Mr. CONIFF. No, I do not admit that. I think that we are talking about two different things, when you talk about property rights and sovereign rights. The State has to operate on a system of equality of all its citizens, and in order to have an effective management program under our State police power it is essential that we have a system of regulation.

No court, to my knowledge, has gone so far as to hold that the State is entirely without power to regulate off-reservation fishing. What has happened is—and this matter will be covered in more detail by my colleague, Mr. Mike Johnston—what has happened is that the State has been operating under an impossible burden of proof that has been put upon us by the Ninth Circuit Court of Appeals.

Now, we have in essence a clash between our State cases and the ninth circuit cases which purport to place the burden of proof upon the State in connection with the enforcement of its conservation laws, and the State has been experiencing great difficulty in meeting the standards set forth by the Ninth Circuit Court of Appeals.

Senator CHURCH. Mr. Johnston is going to testify to that in more detail?

Mr. CONIFF. Yes. Mr. Johnston will give a brief legal summary of the State's position to the committee.

Senator CHURCH. Mr. Coniff, would you like to complete your testimony, then?

Mr. CONIFF. Yes, sir. I would like also like to state to the committee that we want to make it quite clear that the State of Washington is unalterably opposed to Federal regulation of off-reservation fisheries, and the reason for our opposition is simply this:

Historically the State has been the proper party, the proper managing party, and has been attempting to the extent that we have been able to fulfill our obligations insofar as conservation of its resources are concerned.

Secondly, I feel that it is essentially an unworkable program, that is, to divide the management power for each run of fish. In other words, in order to have an intelligent management program, it should be unified, and we would like to make it clear that it is our position we are doing the best we can and we would like to have any assistance that this committee might give us; but we are opposed to Federal control.

Senator CHURCH. I take it then that you have gone on record in favor of the enactment of Senate Joint Resolution 170.

Mr. CONIFF. That is correct.

Senator CHURCH. And differing from the position taken by the Fish and Game Department of the State of Idaho, which has gone on record in favor of the enactment of Senate Joint Resolution 171.

Mr. CONIFF. We also support the enactment of Senate Joint Resolution 171. However, we do not take a position regarding what is the quantum of treaty rights. We frankly do not know, and we take no position insofar as attempting to establish the value on this right. We frankly don't know what it is that they have. All we know is

that they have a right to fish for sport purposes and food purposes under the *Tulee* case without a license. Our supreme court in the *McCoy* case says they have a right in the nature of an easement, a right not to be excluded from the fisheries, a right to go across the land of others. Beyond this, I don't know what they have.

But we do support the principle that our Indian citizens should be compensated for any taking of any right, any federally secured right, any right secured to them by virtue of treaties between their tribes and the Federal Government.

Senator CHURCH. You do not believe that Senate Joint Resolution 170 involves any taking, insofar as that right is concerned?

Mr. CONIFF. Insofar as it reaffirms the right of the State to regulate in the interest of conservation, and under the cases that I am familiar with, I do not believe they involve a taking. That would conclude my testimony, Mr. Chairman.

Senator CHURCH. Thank you. Any questions, Senator Simpson?

Senator SIMPSON. No questions.

Senator CHURCH. Senator Mechem?

Senator MECHEM. No, sir.

Senator CHURCH. I wonder if we then could next hear from Mr. Walter Neubrech. You, sir, are the chief of the Enforcement Division of the Washington Department of Game, is that correct?

STATEMENT OF WALTER NEUBRECH, CHIEF, ENFORCEMENT DIVISION, WASHINGTON STATE DEPARTMENT OF GAME

Mr. NEUBRECH. That is correct. I appear here on behalf of the Washington State Department of Game. Additionally, I am expressing the views of many thousands of persons interested in the welfare of the fisheries resource in the State of Washington.

I appreciate the opportunity of appearing and testifying before this committee regarding Senate Joint Resolution 170 and Senate Joint Resolution 171, which are designed to permit an orderly management of a fishery resource that is now being jeopardized by the unregulated fishing of a very small number of our citizens.

The steelhead trout is one of the most prized sport fish in the United States. Last year 112,000 persons sport fished for steelhead trout within the State of Washington. They succeeded in bagging 257,000 of these fish, and in the pursuit added $5 million to the economy of the State.

The steelhead trout confines its limits to the Pacific Northwest, principally northern California, Oregon, Idaho, Montana, and British Columbia, plus Alaska. This species of trout, like the salmon, requires fresh, running water in order to reproduce. The young fry emerge from the gravel bars in the rivers and streams and they remain there in the fresh water for a period of 2 years before migrating downstream to enter the Pacific Ocean. Steelhead then spend the next 2 years feeding in the ocean, growing to weights up to 30 pounds, with an average of about 10 pounds per fish. They then start their long migration to return to their parent stream to spawn in the gravel bars from which they originated.

Some of these fish spawn in rivers relatively close to the ocean. Others enter the Columbia River and swim as far as 500 miles to

spawn in the headwaters of the Salmon River in the State of Idaho. Only on rare occasions are steelhead trout caught in the ocean. When these fish reach the mouth of the stream, after leaving the vast reaches of the ocean, their paths of migration become greatly restricted, comparable to the neck of a funnel. It is in these locations that exists the threat to the future of this species and here, obviously, the means of taking this fish must, by necessity, be regulated.

Our State legislature classified the steelhead, which is a seagoing rainbow trout, as a game fish, and has placed many restrictions on the taking of these fish. The means of catching is limited to only angling with hook and line; seasons and closed areas are established to insure a sufficient escapement for broodstock purposes, the regular stream fishing season is retarded in order to allow safe passage of the immature steelhead back to the ocean, and the bag limit is two fish per day. The State of Washington prohibits the sale of steelhead trout.

The State of Washington has an extensive and costly hatchery program for rearing steelhead and annually plants in excess of 3 million of these 8-inch fish. The management of these fish is costing the State around $300,000 annually. The department of game is charged with the responsibility of the preservation, protection, and management of game fish.

Proper management of the fishery resources faces many problems, such as pollution, dams, and the increasing demands of outdoor recreation.

In spite of these adverse problems——

Senator SIMPSON. Could I interrupt you?

Mr. NEUBRECH. Yes, sir.

Senator SIMPSON. Do you cover your fees into the general treasury?

Mr. NEUBRECH. I beg your pardon?

Senator SIMPSON. Do you cover your fish fees into the general treasury?

Mr. NEUBRECH. No. The State is unique in that the game department is a self-supporting organization, receiving its revenue solely from the sale of hunting and fishing licenses—well, there is Federal aid under the Patman-Robinson and Dingell bills.

Senator SIMPSON. But there is no appropriation in the legislative budget?

Mr. NEUBRECH. No, sir.

Senator SIMPSON. These must be pretty big fish—they cost about $200 per fish to catch, from your figures.

Mr. NEUBRECH. I think that our people have determined that it takes 5 fishing days to catch one steelhead.

Senator SIMPSON. Well, that would make it cost even more.

Mr. NEUBRECH. Shall I proceed, sir?

Senator CHURCH. Yes.

Mr. NEUBRECH. The State has, in spite of these adverse problems, been able to maintain a reasonable steelhead population. In the past few years a most serious situation has developed as a result of an unrestricted commercial net fishery by less than 1 percent of our Indian citizens. They have set thousands upon thousands of feet of nylon and monofilament net in no less than 36 of the State's spawning rivers and streams, claiming immunity from the conservation laws and fur-

ther claiming that these waters were their usual and accustomed fishing stations.

On January 4, 1961——

Senator SIMPSON. Mr. Chairman, may I interrupt?

Senator CHURCH. Yes.

Senator SIMPSON. I do not like to interrupt, but what do you do? Do you arrest them?

Mr. NEUBRECH. Pardon?

Senator SIMPSON. What do you do? Do you arrest them for violation of the State game and fish laws?

Mr. NEUBRECH. In some cases we do. I think Mr. Johnston will cover this a bit later, Senator.

Senator SIMPSON. In that case, go ahead.

Mr. NEUBRECH. On January 4, 1961, 73 nets were found operating in the Nisqually River. Incidentally, the Nisqually is a small river coming into the sound near the city of Olympia, the capital of the State.

Of these 73 nets, 22 were within the boundary of the Nisqually Indian Reservation being operated by individual tribal members. We consider this on-reservation fishing lawful, as in our opinion it is in keeping with the provisions of their treaty. The State claims no authority in regulating the hunting and fishing pursuits of an Indian within the boundaries of his reservation.

Senator SIMPSON. Well, do you understand that the treaty is with respect to the off-reservation fishing, too?

Mr. NEUBRECH. Well, this is the point that is in dispute, Senator.

Senator SIMPSON. It is in the treaty.

Mr. NEUBRECH. The point in dispute, I think, is whether that provision in the treaty prohibits the right of the State to regulate as against extinguishment.

Senator SIMPSON. Yes, I think that is the justification, and I can see very readily the problem that it poses. I can understand that very readily.

Mr. NEUBRECH. The State has no authority, as I say, to regulate the pursuits of an Indian hunting or fishing within his reservation boundaries.

The remaining 51 nets were found in the 4 miles of river between the lower reservation boundary and its mouth. These nets were from 30 to 200 feet in length, their leadlines resting on the bottom of the river, with the cork line floating on the surface, virtually blocking the neck of the funnel in the migration route.

This problem is growing progressively more serious. Within the past few weeks 87 set nets were operated by members of the Yakima Indian Tribe, observed in the Columbia River above Bonneville Dam. The southern boundary of their reservation is located approximately 40 miles north of this fishing site.

We have considered a proposal to further study this problem but have concluded that such a study would take a minimum of 5 years, owing to the fact that the eggs deposited in the stream this fall will return from the ocean 4 years later as adult fish, and that irreparable damage would result during the period of the study.

The most respected authorities on steelhead trout have at various times testified to the fact that an uncontrolled net fishery in the rivers

or streams would seriously deplete the migratory run of fish population.

I wish to make it clear that my comments are in no way to be construed as derogatory toward our Indian citizens. Many individual Indians and several of the tribes work with the State on conservation programs in complete harmony. The State commonly plants fish in streams running through Indian reservations. A number of cooperative State and tribal conservation programs are being operated within Indian reservations with a most desirable effect. I firmly believe that most Indians believe in good conservation practices and are aware that their resources need regulating.

Many of the Indian people interested in this resource have expressed grave concern that the uncontrolled commercial fishing by a few of their members would shortly deplete the runs of fish and have repeatedly asked the State for assistance to correct these abuses.

Within the State of Washington, to the best of my knowledge, there are 23 Indian reservations which encompass in excess of 2,500,000 acres. The population of Indians within Washington is approximately 18,000. There are at least 32 individual tribes. By far the majority of the Indian people are well integrated. Only about two-thirds of this Indian population are members of the tribes that were mentioned in the Stevens Treaty.

Our State well recognizes——

Senator SIMPSON. Say that again.

Mr. NEUBRECH. About two-thirds of the Indian population of the State of Washington are members of the tribes that were mentioned in the Stevens Treaty.

Our State well recognizes that the Stevens Treaty between the U.S. Government and certain Indian tribes located within our State is in full force and effect. The basis for our entire problem is the phrase in the treaty which reads that the Indians may take fish at all usual and accustomed fishing stations in common with other citizens of the territory and have the privilege to hunt on open and unclaimed land. It is the interpretation of this phrase that during the past 2 years has caused so much unrest and court action.

Some Indians claim that this portion of the treaty completely exempts them from all conservation laws beyond their reservation. Being guided by the latest State supreme court case, *State* v. *McCoy*, we feel that the State has a responsibility to equally enforce its laws, regardless of Indian ancestry, outside the reservation boundaries. In 1963 the U.S. Circuit Court of Appeals in——

Senator SIMPSON. Let me ask you a question right there. What about the Indian tribes themselves with respect to nonmembers fishing on the reservation?

Mr. NEUBRECH. The State believes it has the authority to regulate non-Indians fishing within the reservation.

Senator SIMPSON. Does not the tribe also?

Mr. NEUBRECH. Yes; there is no——

Senator SIMPSON. They can charge a fee for the privilege, can't they?

Mr. NEUBRECH. That is correct.

Senator SIMPSON. And confer it into the tribe's treasury?

Mr. NEUBRECH. Right; some of the Indians do this, not all. Our basic problem is that there are so many small reservations on the mouth of the stream.

Senator SIMPSON. But they are subject to State regulation with respect to fees also as to nonmembers?

Mr. NEUBRECH. Yes; nonmembers would be required to have a license.

Senator SIMPSON. So if I go to fish on these reservations, you can make me take a license and the tribe can make me take a license?

Mr. NEUBRECH. Right.

Senator SIMPSON. That is the custom throughout the country?

Mr. NEUBRECH. Yes.

Enforcement becomes extremely complex when one considers the conflicting court cases relating to this subject. Adding to the confusion is the fact that in the Northwest there are Indian tribes who have treaties and reservations, other tribes have treaties and no reservations, some tribes have reservations but no treaties, and still other tribes have neither treaty nor reservation.

Many of these Indian people have intermarried with members of tribes located elsewhere in the United States, Canada, or Mexico, and also have married people of other races, until their degree of Indian ancestry has become diluted beyond recognition.

Who are these people that have special privileges in hunting and fishing? This is a most vexing problem. The U.S. Bureau of Indian Affairs is unable to inform us as to whom the members of the various tribes may be. Of the 32 tribes of Indians in Washington, I know of only 1 that has an official membership roll, that being the Yakimas.

The location of the usual and accustomed fishing stations must be clarified. Usually controversial matters of this nature are settled by court decisions, but the courts cannot be expected to decide on each body of water and each parcel of land within these twilight zones, as to whether or not it is a "usual and accustomed fishing station." Neither could you expect judicial determination in each case where a person claims immunity to State conservation laws to ascertain whether his degree of Indian ancestry or tribal intermarriage accords him treaty rights.

Mr. Chairman and members of the committee, I plead that you take favorable action on the matter before you, and I strongly urge that the Congress of these United States recognize this vexing problem; that it take immediate steps to acquire whatever superior rights an Indian may have relative to hunting and fishing beyond the reservations, and should any person or tribe be damaged by such an act, they should be justly compensated.

Senator CHURCH. Thank you, Mr. Neubrech.

Senator SIMPSON. I have a question.

Senator CHURCH. Senator Simpson.

Senator SIMPSON. What does your last sentence mean, asking that we solve this? Are you supporting both these resolutions, 170 and 171?

Mr. NEUBRECH. I think our attorneys will clearly state our position in that we are uncertain as to whether or not the Indians have any right beyond their reservation boundary, and if it is determined that

they do have rights, we firmly believe that they should be justly compensated.

Senator CHURCH. If that right is extinguished?

Mr. NEUBRECH. Correct.

Senator CHURCH. Well, from my knowledge of the cases, which I think is going to be enlarged considerably by this testimony and other evidence that is presented, I take it that the Supreme Court has held that the Indians do have the right to fish off the reservation without paying a fee to the State. That much is clear, though the language in the Court decisions would suggest that the State has the right to impose necessary regulations equally without discriminating in any way against the Indian people. Now, is that a fair statement of the law insofar as the Supreme Court has declared the law on this particular question?

Mr. JOHNSTON. Yes; in our interpretation, it is. That is our position. It has been our position all along.

Senator SIMPSON. Has the *Tulee* case, along with the *Satiacum* and *Yakima* cases, confirmed that?

Mr. JOHNSTON. Yes; there is a long line of Supreme Court cases going clear back to 1895.

Senator CHURCH. Mr. Johnston, why don't you give us your testimony so you may present it in good order and we can follow it along as we go?

Thank you.

STATEMENT OF MIKE JOHNSTON, ASSISTANT ATTORNEY GENERAL, STATE OF WASHINGTON

Mr. JOHNSTON. I will try to give a good outline of the situation the State finds itself in.

It is our opinion from a long line of U.S. Supreme Court cases that, under the law in the United States, the State has the authority to regulate the treaty Indian when he is fishing outside the boundaries of his reservation. The several treaties that we are concerned with, the treaties made by Governor Stevens in the 1850's in the Northwest, all say more or less the same thing; that is, that the right of taking fish in usual and accustomed grounds and further securities of said Indians in common with all citizens of the territory together with hunting and——

Senator SIMPSON. The treaty antedated the official formation of the State of Washington, did it not?

Mr. JOHNSTON. Yes, sir, it did.

Now, 1895 is the first case that deals with this problem, the first time the U.S. Supreme Court dealt with this general problem of State regulation versus the treaty Indians' authority to hunt and fish outside the boundaries of the reservation. That was the case of *Ward* versus *Race Horse*.

Senator SIMPSON. Off the record.

(Discussion off the record.)

Senator CHURCH. The citation won't be necessary. Just proceed with the testimony. You might include the citation for purposes of the record. If you have them there, they will be incorporated in the record afterward. But to expedite the hearing, why don't you just proceed?

(The citations referred to are as follows:)

Ward v. *Race Horse* (163 U.S. 504, 41 L. Ed. 244, 16 S. Ct. 1076 (1895)):
Provision in treaty with Bannock Indian allowing them to hunt on unoccupied land of the United States held not to prohibit State of Wyoming from enforcing its game laws because Wyoming was admitted on "equal footing" and game control is an inherent right of State sovereignty.

U.S. v. *Winans* (198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905)):
Provision in treaty with Yakimas securing them the right to take fish "at all usual and accustomed places, in common with citizens of the territory" granted a right in the nature of an easement such as would enable the right to be exercised, it granted a right not to be excluded from the fishery, a right that a fee owner of realty could not destroy by erecting a fish wheel that required for its operation exclusive possession of an area of the river. "Nor does it (the treaty provision) restrain the State unreasonably, if at all, in the regulation of the right" (P. —. 1094 L. Ed.).

New York ex rel. Kennedy v. *Becker* (241 U.S. 556, 60 L. Ed. 1166, 36 S. Ct. 705 (1916)):
Held that on land ceded by the Indians in a treaty between Senecas and Robert Morris (with authority from the United States) the Indians held an easement to go upon the land to hunt and fish along with the fee owners thereof but such fishing and hunting was subject to regulation of the sovereign. It answered the Indians' argument that each party to the treaty had reserved to itself a sovereignty by saying such was not a proper construction and it would "so divide the inherent power of preservation as to make its competent exercise impossible." Citing *Ward* v. *Race Horse* and *Winans*.

Tulee v. *Washington* (315 U.S. 681, 86 L.Ed. 1115, 62 S. Ct. 862 (1942)):
Held that the State may not charge a treaty Indian a license fee to fish at his usual and accustomed fishing station and "that the treaty leaves the State with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish * * *"

Village of Kake v. *Egan* (369 U.S. 60, 7 L.Ed. (2d) 573, 82 S. Ct. 562 (1962)):
Held that Alaska has the authority to regulate offreservation Indian fishing and thus enforce its antifishtrap laws. "Even where reserved by Federal treaties, offreservation hunting and fishing rights have been held subject to State regulation" citing *Race Horse* and *Tulee* "in contrast to holdings by State and Federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation."

"True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But State regulation of offreservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams* v. *Lee*. Nor have appellants any fishing rights derived from Federal laws. This court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fishtraps at Kake and Angoon are no local matter."

Makah v. *Schoettler* (192 F. 2d 224 (1951)):
Held that the State could not impose a gear closure on the Hako River because it had not sustained its burden of proving that such regulation was necessary for the conservation of fish. In effect, the court ruled that State conservation laws are unconstitutional when applied to the Indians and that the State has the burden of upholding such constitutionality, not the Indians having the burden of proving the statute unconstitutional.

Mr. JOHNSTON. In the case of *Ward* v. *Race Horse*, the U.S. Supreme Court held that the treaty was not binding to the State of Wyoming against an Indian, who is a member of the tribe that had a treaty, who was hunting outside the boundaries of his reservation.

In 1905 in the case of the *U.S.* v. *Winans*, the Court held that the treaty provision did not restrain the State unreasonably, if at all, in the regulation of fishing rights by treaty Indians outside the boundaries of the reservation. That case also held that the Indians have an easement, a right not to be excluded from their usual and accustomed fishing grounds.

Again in 1961, the U.S. Supreme Court, in the case of *New York ex rel. Kennedy* v. *Becker*, said that treaty Indians who hunted and fished on lands that had been ceded to the United States under a treaty were subject to State conservation laws. This was a New York case.

In 1940, in the case of *Tulee* v. *Washington*, the U.S. Supreme Court held that while a State may not charge a treaty Indian a license fee for the right of fishing in his usual and accustomed ground, the Court said that it leaves the State with the authority to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish.

In 1962, in the case of *Village of Kake* v. *Egan*, the U.S. Supreme Court held that the State of Alaska had the authority to regulate Indian fishing outside the boundaries of the reservation. This was not a treaty case as such because, in Alaska, the Alaskan Indians were not parties to treaties. But Mr. Justice Frankfurter did mention the case of *Tulee* v. *Washington* and said in the *Village of Kake* case that the States have the authority to regulate Indians while they are fishing outside the boundaries of their reservation.

Now, I think the theory is relatively well established by these cases and the problem comes in putting it into practice.

The first problem that the State is faced with whenever we come upon a situation where a person is violating State law, a person who claims to be an Indian and furthermore a person who claims to be a member of a tribe that belongs to a treaty, is that when we go to court we are faced with the presumption that all State conservation laws are unconstitutional and the burden of proof is upon the State to prove that its regulations are necessary for conservation. We have to prove that the laws are applicable to treaty Indians.

Now, the burden of proof——

Senator SIMPSON. You have to prove who is a treaty Indian, too, don't you?

Mr. JOHNSTON. Sir, I will get into that. That is one problem we have, we just simply do not know who a treaty Indian is. We do not have any way of knowing. The only tribe that I know of in the State of Washington that has a certified roll, a roll that has been certified to by the Secretary of Interior—and it is my understanding of the law that he is the only one who can make such a certification—is the Yakima Indians, the largest tribe and, in my opinion, the most well-organized tribe. They are the only ones that it is possible to find out with any certainty who is a member and who is not a member.

The burden of proof the State faces varies from court to court. In 1963, in the case of *Confederated Tribes of the Umatilla Reservation* v. *Maison*—this case arose in Oregon—the Ninth Circuit Court of Appeals has held that the State has to prove that application of its laws to treaty Indians is indispensable to conservation. In other words, it is my impression that as long as there are some salmon remaining the treaty Indians may fish for them.

It further holds that treaty Indians may not be prohibited from violating State law if some other method of conservation is available; for example, closing of commercial fishing or sport fishing. I am of the opinion that this is not conservation at all, because the situation we have to let develop under the doctrine of the *Umatilla* case is that

we have to let the river virtually be fished dry before we can do anything about it. We not only have to shut down the commerical and sport fishing, but we cannot shut down the treaty Indian fishing until the fish population is virtually extinct.

Senator CHURCH. I am sorry, one of the members of the staff was talking to me, and I did not hear that. Would you state it again?

Mr. JOHNSTON. That is the case of the *Umatilla Tribe Reservation* v. *Maison.* The tribe brought an action against the State of Oregon to enjoin it from enforcing its fishing conservation laws against the Indian. They won in the district court, and they won in the Ninth Circuit Court of Appeals. In that case, the Ninth Circuit Court of Appeals said that the State must prove that application of its laws to treaty Indians is indispensable to conservation. That is the word the court used, "indispensable." It is our impression, under the doctrine of this case, that means that as long as there are some fish left, the State may not impose any regulations on treaty Indians.

Senator CHURCH. When was this case decided?

Senator SIMPSON. 1963.

Mr. JOHNSTON. Thank you, Senator.

Senator CHURCH. And certiorari was denied?

Mr. JOHNSTON. Yes, sir; it was.

Senator SIMPSON. Of course, your State failed to show in that instance that its conservation objective could not be attained by restricting the fishing rights of non-Indians only.

Mr. JOHNSTON. Sir, that is the problem we have. We frankly do not care who does the fishing. But the biological problem is where the fishing takes place. Fishing on the spawning grounds and in the streams that are the spawning grounds is absolutely disastrous. I do not think there is any question about it.

Total unregulated commercial fishing can lead to only one thing and that leads to the extinction of the fisheries resources. So the biological point is it does not matter if you shut down the commercial fishing out in the sound or in the ocean and you shut down the sports fishing. If the fish are destroyed when they get to the spawning grounds, it does not make any difference. If all the fish get to the spawning grounds and they are all destroyed, they are still gone.

Senator SIMPSON. Mr. Chairman, this far-reaching decision is indicative of the need for something we are trying to do here. One of the specifics, and I probably trespass on your prerogatives here, but the court held that fishing by non-Indians can be restricted if the restriction is reasonable. Then they went on to say that fishing by Indians can be restricted only if the restriction is indispensable, which is the requirement of the treaty.

Senator CHURCH. Is the language of the Umatilla Treaty the same as the language you have quoted in other cases?

Mr. JOHNSTON. To a certain extent. That was the law that said—they are essentially the same. They were all made by Governor Stevens, but essentially the language is the same.

Senator CHURCH. And it is this test with respect to indispensable, the term "indispensable," that you complain puts the State of Washington under an impossible burden? Is that right?

Mr. JOHNSTON. Yes, I do. It is a burden we cannot carry and still carry on a fish conservation program. If we have to wait until the fish are gone before we can take measures of conservation, we have totally wasted——

Senator CHURCH. What have you done to enforce the law in Washington since the *Umatilla* decision?

Mr. JOHNSTON. At the time the *Umatilla* case was tried and then appealed to the Ninth Circuit Court, we had a case in Washington in which the State brought criminal action against a member of a tribe. The court was still considering *McCoy* at the time *Umatilla* decision came out, so we did nothing. Our State supreme court, in the case we had in our court, in our judgment followed the U.S. Supreme Court and held that what the Indians have is an easement to get to the fishing grounds and the right not to be excluded therefrom. Our State supreme court did not discuss at all the burden-of-proof problem. In the *McCoy* case at the trial, when the State attempted to prove prohibition of net fishing during certain times in the area this man was fishing in was necessary for conservation, the trial judge excluded it, saying that it did not make any difference. The Supreme Court said that the State can prove that.

Now, the question is still open in the State courts of Washington as to what our burden of proof is. If it is the burden of proof laid down by *Umatilla*, I think we are in a great deal of danger.

Senator CHURCH. You are in a situation, then, where there is a conflict of cases between the decision of the State supreme court and the decision of the Ninth Circuit Court of Appeals.

Mr. JOHNSTON. I think that is essentially correct; yes, sir.

Senator CHURCH. Which decision are you following insofar as your enforcement practices are concerned at the present time?

Mr. JOHNSTON. We are following the *McCoy* case, since it is a State law, and we think we are bound by it and not by the ninth circuit.

Senator SIMPSON. In the *McCoy* case, you disavow the Federal court's right of preemption over a State decision, don't you?

Mr. JOHNSTON. Yes, sir; I do not think it is a matter for the Ninth Circuit Court of Appeals to lay down what is in a sense a procedural role for the State of Washington; in other words, who has the burden of proof.

Senator SIMPSON. What are you doing, then, making arrests where the need appears to be great?

Mr. JOHNSTON. No, sir; we are not making arrests where we think the need is great. We have instituted a program of bringing a civil lawsuit, not a criminal lawsuit.

Senator SIMPSON. Do you enjoin?

Mr. JOHNSTON. Yes, sir; we do. We have cases pending on three different streams now.

Senator SIMPSON. Are the Indians complying with the injunction?

Mr. JOHNSTON. On one stream they are. On the other two, perhaps on one; and on the third, they are not.

Senator CHURCH. I take it that it is also your position that the State supreme court decision does accord with the last statement of the law of the Supreme Court of the United States?

Mr. JOHNSTON. Yes, sir; that is our position.

Senator CHURCH. I would like to ask you, Mr. Neubrech, if Senate Joint Resolution 170 would be acceptable from the viewpoint of your department, insofar as you may speak for your department, if it were amended to provide for a State regulation system explicitly requiring that reasonable consideration be given to subsistence—that is to say, noncommercial—Indian fishing?

Mr. NEUBRECH. Mr. Senator, I speak for the department, and I would say we would be most happy with it.

Senator CHURCH. You would be?

Mr. NEUBRECH. Yes, sir.

Mr. CONIFF. I might say such an amendment would be acceptable as a resolution of the problem.

Senator CHURCH. In other words, you are willing to recognize that special accommodations should be given to Indians for subsistence fishing, under State regulation, and your principal objection is to commercial fishing on the part of Indians; is that right?

Mr. CONIFF. That is correct, Mr. Chairman.

(Subsequent to the hearing the following letter was received in regard to the position of the department of fisheries on the amendment referred to above:)

STATE OF WASHINGTON,
Olympia, Wash., August 12, 1964.

Re hearings on Senate Joint Resolution 170 and Senate Joint Resolution 171.

Hon. FRANK CHURCH,
U.S. Senate,
Washington, D.C.

DEAR SENATOR CHURCH: In accordance with your request, I have enclosed copies of affidavits of various fishery biologists to be included in the record of the subcommittee hearings on Senate Joint Resolution 170 and Senate Joint Resolution 171 on behalf of the Department of Fisheries of the State of Washington.

If it is possible, I would like to correct a statement which I made while testifying before the committee relating to the position of the department of fisheries on a possible amendment to Senate Joint Resolution 170 which would provide for a subsistence or food fishery for treaty Indians outside their reservation boundaries at their usual and accustomed grounds. In response to your question, Senator, I stated that the department of fisheries would favor such a proposal.

After discussing this matter with various officials of the department of fisheries, I find that our position is opposed to any such subsistence or food fishery proposal. The reason for our position is simply that it would be exceedingly difficult if not impossible to adequately enforce such a program.

As you are aware, it is legal to deal commercially with salmon while it is illegal to deal commercially with steelhead in the State of Washington. If it were legal for the Indians to take salmon outside the boundaries of their reservation, the Indians could commingle these fish with reservation-caught fish and sell them. Because of the fact that it is impossible to distinguish between a reservation versus an off-reservation-caught salmon, the department of fisheries feels that such a proposal would only complicate an already difficult law enforcement problem in this State.

Therefore I request that my response to your question regarding a food fishery for Indians outside their reservations be changed in the official report from an affirmative response to a negative response and that this letter be inserted into the record in order to clarify the position of the Department of Fisheries of the State of Washington on this matter.

Thank you very much for your attention to this matter.

Very truly yours,

JOHN J. O'CONNELL,
Attorney General.
J. L. CONIFF,
Assistant Attorney General.

Senator CHURCH. Can you tell us how many Indians who would be encompassed by the provisions of Senate Joint Resolution 170 do depend substantially on such subsistence fishing?

Mr. CONIFF. I would have to defer to Mr. Neubrech. My impression is there are around 300.

Senator CHURCH. Can you give us some impression of the number of Indians that do depend on subsistence fishing in this region?

Mr. NEUBRECH. I would have to answer you in this way. Last year at the height of these fishing activities, we did conduct a survey and found that there were 178 Indian people who were fishing beyond their reservation. I should like also to say that this varies from time to time. This is a figure that took place during the height of our fishing. The next day there might have been more and the next day there might have been less.

I should also like to advise that many of these tribes or a portion of these tribes have reservations where they fish within the reservations. So my guess would be that there would be less than 178 people that would be desirous of having fish for personal use and would be required to fish off the reservation to get such fish.

Senator CHURCH. Can you tell us how many Indians are involved in off-reservation fishing practices that are significant hazards to effective conservation? I take it by that there are a number of Indians who are actually employing methods or using the fishing right commercially and taking fish in such quantities as to constitute a significant hazard to effective conservation? Just give us an idea of what the extent of the problem is here, how many Indians are in fact engaged in this kind of objectionable fishing practice?

Mr. NEUBRECH. I would repeat that there were 178 using nets in the taking of these fish. I would have to again give you only a guess that not over one-half of this amount were fishing to the extent that it was very serious to the fishery program.

Senator CHURCH. Well, are you saying, then, that there may be fewer than 100 Indians who are actually engaged in fishing practices that do constitute a hazard to conservation of the fish?

Mr. NEUBRECH. I would, sir.

I think I can clarify this, if I may. One individual, a member of the Puyallup Tribe, grossed $63,000 in a fishing activity last year. The majority of the members who fish there make less than, oh, $1,000 to $2,000.

Senator CHURCH. Earlier, there was testimony that in the State of Washington, steelhead may not be sold commercially.

Mr. NEUBRECH. This is correct.

Senator CHURCH. Does that law apply to other species of salmon?

Mr. NEUBRECH. No, it does not. Salmon is a commercial fish. My figure, sir, for clarification, was dealing primarily with salmon. However, both fish enter this stream and their action is quite similar. So when I used the figure $63,000, I, by necessity, cover the salmon. Steelhead is primarily a game fish and may not be sold commercially in the State of Washington.

Senator CHURCH. Could this problem be dealt with by the State legislature on an entirely different basis by merely making other species of salmon caught in the fresh waters game fish?

Mr. NEUBRECH. Would you like to answer that, Mr. Johnston?

Mr. JOHNSTON. I will try to answer it this way. I think it is biologically unsound to have a fishery for salmon within the fresh water, because that is the transportation area and the spawning area. Fisheries' biologists tell me that that is why they have a prohibition on fishing for salmon in fresh water generally. There is a complete prohibition on net fishing and limited sport gear.

Senator CHURCH. You understood my question?

Mr. JOHNSTON. Yes, sir, I am trying to answer you on the biological sense, not so much in a legal sense.

Senator CHURCH. I do not understand your answer. Presently, you do have regulations that do permit sportsmen to fish for all species of salmon, but your laws declare steelhead to be a game fish that may not be sold commercially. My question is, Has the legislature ever given consideration to declaring all species of salmon that are fished for in the fresh waters of the State as game fish, which may not be sold commercially? And if the legislature has not given consideration to this, why not, and would this form a basis for a resolution of this problem?

Mr. JOHNSTON. I do not think that the legislature has. Why it has not, I do not know. But I would say it would be extremely difficult to enforce such a prohibition, because salmon caught in salt water may be sold. You cannot sell any steelhead anymore in the State of Washington. It is illegal to deal with them commercially. But if you had certain salmon that were dealt with commercially and certain salmon that were not, it would be an extremely difficult practice to enforce.

Senator CHURCH. Why?

Mr. JOHNSTON. How would you prove where the fish came from?

Senator CHURCH. You impose your other game laws by imposing a two-fish limit. You have to impose that on any fisherman wherever he may be found, on any stream or tributary within the State. And you have to prove that he did in fact catch more than two. If you find him with three, and he says that he got the third one from some other fisherman, you still have the burden of proof and a problem of enforcement.

Now I do not see why extending this simply to other forms of salmon is an impracticable or unenforceable problem.

Mr. NEUBRECH. First of all, one of the reasons why the State legislature has not considered this is that there are five primary species of salmon found on the Pacific coast. Only three of these rise to taking of a hook or lure.

The other point, for clarification, is that in spite of the fact that steelhead are classified as a game fish in the State of Washington, the Indians commonly dispose of these fish by taking them with a net and then putting them into interstate commerce, either air traffic to the city of New York, or Chicago. I might say last year the prices in New York were bringing 92 or 93 cents a pound in the State of New York. We do not feel we have the authority to intercept them in interstate commerce.

Mr. CONIFF. There is a further question of whether or not the State has the legal authority to define what this treaty right is. Assuming that the Indians have a right to take these fish under this treaty provision, it would seem to me that they would likewise have the right to

sell or dispose of them in any way they see fit. They do have the right, of course, as far as reservation-caught fish are concerned. This is a matter which is still open and which is being argued presently in a couple of pending cases.

Senator CHURCH. Then it is not your position that the treaty right limits the Indian to fishing for subsistence purposes?

Mr. CONIFF. No, this is what we believe that treaty rights should be defined to mean.

Senator CHURCH. But it has not been so defined thus far in the court cases?

Mr. CONIFF. That is right.

Senator MECHEM. What was the history of the commercial fishing that tied these treaties——

Mr. CONIFF. I do not believe—until 1855, I do not believe there was too active commercial fishing. I believe there was trade in the fish. They salted them and put them in barrels and sent them to the east around the horn. So far as the type of gear the Indians used in the old days, as far as I am familiar with it, in my understanding, it was quite primitive bark nets and wiers of very little construction that would go out during periods of high water. So in essence, that was the way the Indian practiced conservation, because the fish make their way up to the spawning grounds during high-water periods, and this was the time of the year they would go out. So they found a very good balance there.

Senator CHURCH. Any further questions, gentlemen?

Senator MECHEM. No.

Senator CHURCH. We have just been summoned to the Senate. A live quorum has been called. I am afraid that that probably means that we will have to close the hearing for the remainder of the day.

We will resume at 10 o'clock tomorrow morning in the hope that we can then hear from the balance of the witnesses who have come.

If there are no further questions, the hearing will be recessed until 10 o'clock tomorrow morning.

(Whereupon, at 12 o'clock noon the committee was recessed, to reconvene Thursday, August 6, 1964, at 10 a.m.)

INDIAN FISHING RIGHTS

THURSDAY, AUGUST 6, 1964

U.S. Senate,
Subcommittee on Indian Affairs of the
Committee on Interior and Insular Affairs,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:15 a.m., in room 3110, New Senate Office Building, Senator Frank Church presiding.

Present: Senators Church, Jackson, Simpson, and Mechem.

Also present: James H. Gamble, professional staff member.

Senator Mechem (presiding temporarily). The hearing will come to order. We will hear from our next witness, Mr. Robert Schoning of the Oregon Fish Commission, Portland.

STATEMENT OF ROBERT W. SCHONING, DIRECTOR, FISH COMMISSION OF THE STATE OF OREGON

Mr. Schoning. Good morning, members of the committee. My name is Robert W. Schoning and I am director of the Fish Commission of Oregon with headquarters in Portland, Oreg. I am speaking for that organization.

Oregon statutes charge the fish commission with responsibility for managing and perpetuating the food fish of Oregon. For more than a century, Indians have participated in harvesting certain species of fish from waters in which the State has exclusive or concurrent jurisdiction, primarily the Columbia River system.

The most important species present in the Columbia River include chinook, sockeye, coho, and chum salmon and steelhead trout. The life history of all of them follows the same general pattern. After the eggs are spawned and hatched in the streams, the young spend up to a couple of years in fresh water before going to sea. After up to 3 or 4 years in the sea, they return to the streams of their birth to spawn.

Certain species are harvested extensively while feeding in the ocean by the commercial troll and sport fisheries along the Pacific coast from California to Alaska. While on their spawning migration in the Columbia River system they are taken in large quantities by the commercial Indian and non-Indian gill-net fisheries and by sport fishermen.

The encroachment of civilization has continually diminished the natural spawning and rearing areas available to salmon and steelhead in the drainage. The stocks escaping to the natural spawning grounds or to hatcheries are of increasing importance.

Regulations to insure sufficient spawners are becoming more rigid. Strict controls of all harvesting elements are essential to perpetuation of the runs. If one of the river fisheries of significance is not con-

37-688—64——4

trolled, even though all the others are, the future of the resource can be jeopardized.

For a great many years there was an extensive Indian and non-Indian commercial fishery permitted in the Columbia River in the approximately 50 miles between Bonneville Dam and the mouth of the Deschutes River, including the historic Celilo Falls. This was in addition to the non-Indian commercial fishery in the 140 miles below Bonneville Dam, and the sport fishery throughout the system. With the flooding of this famous Indian fishing ground in 1957 by construction of the Dalles Dam, commercial fishing was prohibited above Bonneville Dam by joint action of the Washington Department of Fisheries and the Fish Commission of Oregon to provide for more effective control in the interest of maintaining the runs of salmon and steelhead. This closure has remained in effect to non-Indians since that time, but in the past few years a rapidly growing Indian set gill-net fishery has developed in this stretch of the river with some nets located even farther upstream. The majority of the catch enters commercial channels. If this fishery continues to expand as it has in the past couple of years, the non-Indian commercial fishery below Bonneville will have to be severely restricted and possibly eventually eliminated. Similar severe restrictions on the sport harvest would become essential. If the trend were to continue without benefit of necessary control of the Indian fishery, the future of the runs would be threatened. On the other hand, soundly based management regulations of all fisheries will permit maintenance of these very valuable stocks of salmon and steelhead. We are at the crossroads. Proper control of the Indian fishery could mean the difference between maintenance and depletion of the resource.

Our department is fully cognizant of the treaties of 1855 granting certain Indian tribes "the right of taking fish at all usual and accustomed places in common with citizens of the Territory." We acknowledge that the treaty Indians have certain rights to harvest fish, but we do not believe it was the intent of the treaty to permit them to fish to the extinction of the runs.

Senator SIMPSON. I take it that the phrase in the treaty, "in common with citizens of the Territory," that under that phrase you insist or want to insist upon them subscribing to the same laws that affect the citizens of the territory; is that correct?

Mr. SCHONING. We are not clear, Senator. We are not clear on exactly what rights they do have. But we do feel that it was not the intent that they should be able to—that they had some superior rights over the settlers under certain conditions and in certain places, but not to the extent that they could take all the fish.

Senator SIMPSON. Well, that still does not answer the question. What I am trying to get at is: It is your contention that they have to subscribe to State regulations and State laws for the good of the State's interests as well as their own interests; is that correct?

Mr. SCHONING. Yes, sir.

Senator SIMPSON. And you are advocating compliance with the State regulations propounded by the Fish Commission of the State Oregon?

Mr. SCHONING. Yes. We think this is the ultimate solution; yes, sir.

Senator SIMPSON. Thank you.

Mr. SCHONING. According to some judicial interpretations, they are entitled to do this irrespective of any State conservation regulations. They infer the Indians were here first so all the fish they want are theirs, even if they want the last ones. On the other hand, there have been legal decisions indicating that the States have the authority to regulate Indian fishing off the reservation regardless of whether the site is a usual and accustomed one. This brings us to the heart of the problem.

What are the Indian treaty rights? Who qualifies for them? When and where are they applicable? Are they superior to conservation laws enacted by the States? These questions must be answered in a manner which will apply to all, and leave no room for doubt as to interpretation. This determination must be made soon while populations of fish are substantial.

The Fish Commission of Oregon has worked for several years with the Umatilla and Warm Springs Nations regarding control of fishing by tribal members. All negotiations have been on a voluntary agreement basis. The provisions of the restrictive agreement have been rigidly observed by both sides. These tribal councils have demonstrated their sincere interest in proper management of the runs. They are thus showing in a tangible manner that they realize controls on the harvest are essential to perpetuation of fish for future generations. Their fishing has been conducted with conventional dip nets, although there have been recent attempts by some Umatilla tribal members to expand the fishing to new locations with gill nets.

The Yakima Nation chose not to become party to the agreement, but instead enacted significantly less restrictive tribal ordinances. Compliance has been good, although there are increasing signs of dissatisfaction on the part of some tribal members with the existing ordinances, or any ordinances, for that matter.

Senator SIMPSON. Would you indicate where the Umatilla Tribe is located, and the Yakimas?

Mr. SCHONING. The Umatilla and Warm Springs groups are Oregon tribes, or essentially Oregon, and the Yakimas are in Washington in the upper headwaters.

Senator SIMPSON. Thank you.

Mr. SCHONING. Interest in expanding the fishery to new areas and with more gear is growing rapidly. There are very strong signs that the fishery will mushroom rapidly. The more important the catch becomes, the more difficult it will be to control. Several hundred thousand pounds of salmon and steelhead have been taken for commercial purposes by Yakimas already this year, and the biggest catch is usually made in the fall season, yet to come.

The fish commission's present program of management, control, and enforcement of the Indian commercial fishery activities and regulations is based on several considerations. The most important and overriding one is the need to perpetuate the resource. Other considerations are worked into the program to accomplish this need. Court decisions have not always been in the best interest of the conservation of the resource; legal interpretations of the treaties vary greatly.

The Solicitor's Office of the Department of Interior, in a written opinion of May 16, 1962, stated that treaty fishing rights are tribal and not individual rights and therefore the tribe has authority to establish

regulations which have the status of law. Incidentally, I have a copy of that which I would like to leave for the record.

Senator SIMPSON. Yes.

(The opinion referred to follows:)

M.-36638.

MAY 16, 1962.

OFF-RESERVATION FISHING RIGHTS OF INDIANS IN WASHINGTON AND OREGON

Indian Tribes: Generally—Indian Lands: Ceded Lands—Indian Lands: Individual Rights in Tribal Property.

Off-reservation fishing rights guaranteed by treaties with Indian tribes are tribal rights which may be regulated by the tribes, and a tribal member who does not fish in conformity with tribal regulations would not have a treaty-right defense to a State prosecution for violation of State conservation laws.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., May 16, 1962.

M-36638.

Memorandum to: Secretary of the Interior.
From: Solicitor.
Subject: Treaty rights of Indians in Washington and Oregon to fish at usual and accustomed places off of established Indian reservations.

This is in response to the request for my views concerning the regulation of treaty Indian fishing at usual and accustomed places in Washington and Oregon. For many years disputes have arisen between these States and the Indians over the applicability of the State conservation laws to the Indians fishing off their reservations.

The Supreme Court of United States in *Tulee* v. *State of Washington*, 315 U.S. 681 (1942), held that the off-reservation treaty rights of Indians are subject to restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. Although it has been concluded in subsequent opinions written in *State* v. *Satiacum*, 50 Wash. 2d 513, 314, P. 2d 400 (1957), and *State* v. *McCoy*, No. 2187. in the Superior Court of Washington for Skagit County (1961), that Indian treaty fishing is not subject to State conservation laws, I cannot accept this conclusion. As most recently stated by the Supreme Court of the United States in *Organized Village of Kake, et al.* v. *Egan*, 369 U.S. 60, 75 (1962):

"Even where reserved by Federal treaties [Indian off-reservation hunting and fishing rights have been held subject to State regulation, *Ward* v. *Race Horse*, 163 U.S. 504; *Tulee* v. *Washington*, 315 U.S. 681. The fact that the States have had little success in enforcing their conservation laws against off-reservation Indian fishing does not in any way impair the States rights to enact and enforce such laws. Their difficulty in this respect seems to be in proving that the restriction against the Indian fishing which they seek to enforce is necessary for the conservation of fish. See *Confederated Tribes of the Umatilla Indian Reservation* v. *Maison*, 186 Fed. Supp. 519 (D. Oregon 1960).

At this time it seems beyond argument that the treaty right of Indians to fish at the "usual and accustomed places" off of a reservation is a tribal right which may be exercised by all of the Indians enrolled in the tribe but that such rights are not individual rights so as to be inheritable or alienable as individual property. *Whitefoot* v. *United States*, 293 F. 2d 658 (Ct. Cls. 1961), certiorari denied, 369 U.S. 818 (1962); *Mason* v. *Sams*, 5 F. 2d 255 (W.D. Washington 1925).

When the dams were constructed along the Columbia River, the United States in dealing with the fishing rights of Indians made all of its contracts and purchases with the tribal organizations. Further, with respect to the tribal nature of Indian fishing rights, the Courts of Claims in *Whitefoot* v. *United States, supra*, said:

"While property is vested in a tribe, it is the individual member who enjoys the use of the property. Federal Indian law, supra, 757. As to fishing, this is true. But, like the lands, the interests in the fisheries are communal, subject to tribal regulation" (293 F. 2d 658, 663).

In our opinion it is clear from the foregoing that a tribe may define and regulate its treaty fishing rights. Furthermore, in so doing the tribal group may adopt ordinances to preserve and protect such fishing rights, since the tribe is not bound to sit idly by while individual members commit acts amounting to confiscation or destruction of the tribe's treaty rights. By prescribing the manner in which the off-reservation treaty fishing right is to be exercised by its members, a tribe may afford the basis for State prosecution of Indians who fish contrary to State law in a manner which the tribe has declared to be outside the scope of the treaty right. An Indian who is fishing outside an Indian reservation at a time or in a manner contrary to the provisions of a tribal ordinance would not be exercising the treaty right, and in this circumstance would not have such right available as a defense to a State prosecution for violation of State conservation laws.

FRANK J. BARRY, *Solicitor.*

Mr. SCHONING. Local district attorneys by whom the violations are prosecuted in courts have refused to accept cases unless they violate both a tribal ordinance and a State law, not just a State law.

In summary, Oregon is confronted with this situation: Some tribes presently operate under an agreement with us of questionable status, and within this, prohibit gillnetting by their members. Another tribe establishes its own fishing ordinances by tribal action and permits widespread set gillnetting in areas closed to non-Indians. Some of this tribe's members are actively opposing these restrictions, maintaining that they are improper and contrary to the 1855 treaty.

Senator SIMPSON. Right there, you are mindful of the fact that the Government entered into these treaties with the Indians. You have demonstrated that in your statement. Now, it is not an easy thing for the Government just to break a treaty without giving the people affected enough so they be made whole, or giving them that opportunity to be made whole, as you must understand. What is your attitude with respect to these two resolutions, 170 and 171?

Mr. SCHONING. I have that covered in the next paragraph, Senator.

Senator SIMPSON. If I have anticipated what you have in the statement, just go ahead.

Mr. SCHONING. Yes, sir. We have attempted to establish and maintain a reasonable management program under voluntary tribal regulations which vary considerably among tribes and which differ markedly from those imposed by the agencies on non-Indians.

Furthermore, violations by Indians can be taken to court only under certain circumstances. This is "a heck of a way to run a railroad," particularly when it belongs to all the people—Indians and non-Indians alike—and is threatened with elimination ultimately.

We in Oregon have attempted to make the very best of this very difficult situation. It is obvious that it will not be an acceptable permanent solution. Voluntary regulation by user interests will exist only until the stakes become high enough to force changes for economic and not resource perpetuation reasons.

It is absolutely essential that regulatory authority over a natural resource be vested in established management agencies backed by statutory support. A resource of value and in demand will not long survive under conditions where this authority is lacking.

Senate Joint Resolution 171 provides for purchase of the fishing rights of treaty Indians. Accomplishing it would make all user interests subject to appropriate conservation laws, which is a sound principle and the necessary and logical step in maintenance of the resource.

A reasonable settlement should be made to honor their special rights, whatever they may be.

Senator SIMPSON. And would you collaborate with the tribal councils and the Government of the United States with respect to working out such a solution—your Department would?

Mr. SCHONING. Yes, sir.

Senator SIMPSON. All right. Thank you.

Mr. SCHONING. If and when enacted all treaty Indians would be able to fish truly "in common with the settlers of the territory." Restrictions on location, manner, and extent of fishing would be uniformly administered to all with first consideration being for the resource.

Senate Joint Resolution 170 declares it to be a national policy that State laws for the purpose of conservation of fish outside an Indian reservation are applicable to Indians and all other citizens. Some court decisions have indicated this is already the case, while others have held to the contrary. We wonder if this measure would definitely improve the existing confusion and remove all possible misinterpretation or contrary rulings. It does not appear to us that Senate Joint Resolution 170 is as ironclad a solution as is Senate Joint Resolution 171.

Senator SIMPSON. Let me interrupt you again.

Mr. SCHONING. Yes, sir.

Senator SIMPSON. Have you any suggestions as to how to amend it to make it an ironclad solution?

Mr. SCHONING. No, sir. We feel that the principle—I do have one minor one here—but in one sense, we believe that Senate Joint Resolution 170 does not consider the—I use the term "superior rights" of these Indians, or the different rights that the Indians apparently have, in the eyes of some courts. We don't think 170 takes care of this to the extent that 171 does.

Senator SIMPSON. May I ask a further question. Do you have an amendment or language that you think would do that and take care of what you are complaining about?

Mr. SCHONING. We think that 171 will do it better, for it then puts all people under the same, or subjected to the same conservation laws equally.

Senator SIMPSON. You would do away with Senate Joint Resolution 170?

Mr. SCHONING. We feel—yes. We feel that 171 is a better solution than 170. We are not convinced that 170, as it is written now, or even as we could improve it, is the answer.

Senator SIMPSON. So you would be against 170?

Mr. SCHONING. Let me answer in this way, Senator. In working with the Indian tribal councils and their attorneys and the Bureau of Indian Affairs and the Interior Department, collectively, if they believe that this is the solution, and if they can point it out to us by modifications that collectively all could make in it, then this is acceptable. What we are after, as we pointed out a little earlier, is a method of management of the resource so that it is not a voluntary thing and so that it applies to all.

Certainly, we are not dedicated to 170 or 171. We are asking for a solution that will keep the resource going.

Senator SIMPSON. Well, that is what we are both here for, is it not?

Mr. SCHONING. Yes, sir.

Senator SIMPSON. And you have got to have something to make for this solution, do you not?

Mr. SCHONING. Yes, sir.

Senator SIMPSON. And my interest in finding out what your objection is to 170 is merely because we want to come out with what is needful. If you do have something in mind that will help answer your own complaint, why, we would welcome it here on the committee. Go ahead.

Mr. SCHONING. The addition of the words "location and extent" after "time" in line 8 of page 2 would make it more inclusive. We think this is a minor improvement.

We sincerely appreciate the opportunity to appear before this committee to express our concern about the increasingly serious Indian fishery problem in the Columbia River system, to support the principles of Senate Joint Resolutions 170 and 171, and to advocate congressional action necessary to resolve the existing confusion on Indian fishing rights. Purchase of the fishing rights so State conservation laws apply to all people is in keeping with this country's honorable history of equality and fairplay.

Senator SIMPSON (temporarily presiding). No further questions. Thank you very much, Mr. Schoning.

Now, I understand that the members of the Yakima Nation Tribal Council—Mr. Eagle Seelatsee, Mr. Watson Totus, Mr. Robert Jim, and James Hovis, the tribal attorney, are here. Would you take your places, please? And who will be the spokesman for the group?

Mr. HOVIS. Mr. Seelatsee.

Senator SIMPSON. We will be glad to hear you.

STATEMENT OF EAGLE SEELATSEE, CHAIRMAN, YAKIMA TRIBAL COUNCIL; ACCOMPANIED BY WATSON TOTUS AND ROBERT JIM, MEMBERS OF THE TRIBAL COUNCIL, AND JAMES HOVIS, TRIBAL ATTORNEY

Mr. SEELATSEE. Thank you, Mr. Chairman.

Senator SIMPSON. Do you have a printed statement, Mr. Seelatsee?

Mr. SEELATSEE. No; I will just read out what I have here in my writing.

Senator SIMPSON. That will be fine. If there is anything else that you want to put into the record, just make a request and it will be done.

Mr. SEELATSEE. Thank you.

Mr. Chairman, members of the committee, I am Eagle Seelatsee, chairman of the Yakima Tribal Council. I have with me today Watson Totus, chairman of the land committee; Robert Jim, chairman of the fish and law and order committee; and also with us is James Hovis, tribal attorney, who will be able to give you all the laws on this. Mr. Jim has been working more directly with this fishing problem and will carry the bulk of the discussion today.

I would like at this time, however, to file with the committee a more lengthy written statement and ask that it be made part of the record.

Senator SIMPSON. Without objection, that will be so made part of the record.

(The statement referred to follows:)

STATEMENT OF YAKIMA INDIAN NATION

Senate Joint Resolutions 170 and 171 are regarding Indian fishing rights, and in particular the Yakima Indian Nation is interested in the treaty rights secured to them under article III of the treaty of June 9, 1855. Article II of said treaty provides that:

"The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

The Yakima Indian Nation's usual and accustomed fishing places are basically located on the Columbia River and its tributaries.

The proposed joint resolutions are an attempt to interfere with treaty rights of the Yakima Indians at these usual and accustomed places outside of their reservations. These resolutions are an attempt to interfere with the rights of the Yakima Indians to fish at these usual and accustomed places contrary to the Supreme Court decisions in regard thereto. There is some controversy in regard to the litigation in the courts, but the U.S. Supreme Court in 1942 in *Tulee* v. *Washington*, 315 U.S. 681, held that these rights are superior under the treaty in question to the rights of all other fishermen in the area, and are not subject to the absolute right of the State to regulate under the sovereign power of the State to protect fish and game for all of its citizens.

This being a question of the interpretation of a treaty between the United States and the Yakima Indian Nation, it is subject to interpretation by the Federal court system. In 1963 the U.S. Court of Appeals for the Ninth Circuit, interpreting the *Tulee* decision, supra, in the case of *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation*, 314 F (2) 170, took the following position:

1. The State can regulate Indian fishing only to the extent the regulation is necessary to conservation.
2. "Necessary" means that the particular regulation is "indispensable" to the limitation of fishing in the interests of conservation.
3. The limitation of Indian fishing is not "indispensable" as a restriction if non-Indian fishing alone would accomplish the conservation purpose. In the words of the court: "Restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by the restriction of the fishing of others."
4. Fishing by non-Indians can be restricted if the restriction is reasonable, which is a requirement of the 14th amendment, but fishing by Indians can be restricted only if the restriction is indispensable, which is the requirement of the treaty.
5. That the State in the instant case failed to show that its conservation objective could not be obtained by restricted fishing rights of non-Indians only, and the State law, therefore, could not be enforced against the Indians.

This is the final word in regard to Indian fishing at usual and accustomed places, and contrary to the contention of others has not been modified. The Supreme Court declined to grant a writ of certiorari to review this decision. There are those who contend that the case of *Washington* v. *McCoy*, 163 Wash. Dec. 423, which was decided thereafter by the Supreme Court of the State of Washington, is contrary to the *Maison* decision, supra. This is not correct because no matter what the Supreme Court of the State of Washington said as dicta the facts of the case were clear that with the Indian fishermen harvesting almost the entire run, that it was necessary for the State to regulate the Indian fishing to conserve the fish run in the Skagit River and restriction of non-Indian fishermen could not correct the situation.

In regard to the Columbia River fishing, where the Yakima Indians' usual and accustomed fishing places are located, an entirely different situation appears. Tagging studies have established that the Columbia River and its

tributaries contribute Chinook salmon to a flourishing commercial troll fishery developed off the coasts of northern California, Oregon, Washington, British Columbia, and Alaska. This troll fishery remains prominent today and is the subject of international treaty and considerable controversy, and it has been determined by tagging studies by the proponents of the joint resolutions under consideration that the Columbia River contributes Chinook salmon to all of these fisheries, the importance varying from 16 to 75 percent, depending upon the area involved.

Since 1918 regulations on the Columbia River have been made concurrently by Oregon and Washington pursuant to an interstate compact and other regulations are recommended by the Pacific Marine Fisheries Commission, which was created by compact between California, Oregon, and Washington.

The facts of the matter are that contrary to the conditions of the proponents of this regulation the Indian fishing is not creating any problem in regards to conservation on the Columbia River, but instead other fishermen are encroaching upon the Indians' treaty rights, and unless this fishing is further curtailed, it will destroy the rights of the Indian guaranteed to him by solemn treaty with the United States of America. While early landing records relate to pounds of fish caught, later statistics relate to the number of fish taken. In 1959 in the State of Washington alone, 375,000 Chinook salmon were landed by commercial fishermen and an additional 197,000 were taken by Washington sportsmen. Actually, these landings figures are lower than the average of 574,000 fish commercially taken during 1935 to 1955 and sports catches of recent years which have exceeded 200,000 for the past 6 years, and 300,000 in 1956 and 1957. Fifty to sixty percent of these landings are attributed to the production of the Columbia River where the Yakima Nation has its usual and accustomed fishing places located.

To give you an idea of the magnitude, and these figures are not entitled to be considered as the ultimate in either the commercial or sports fishery, sports fisheries in the interior Puget Sound, on the Straights of Juan de Fuca, Seqiu, Neah Bay, West Port, and at the mouth of the Columbia River are on a constant increase. The number of fishermen's trips of a sporting nature at the mouth of the Columbia River on the Washington side increased from 34,000 in 1952 to 40,000 angler trips in 1961, accounting for 20,500 Chinook and 85,500 silvers for an average catch of 1.20 salmon per angler trip. At West Port, Washington's main coastal sports fishing area, fishermen's trips increased from 32,000 in 1952 to 95,000 in 1961, accounting for 45,000 Chinook and 57,000 silvers for an average catch of 1.08 salmon per angler trip. The same patterns of increase in sports fishing are apparent elsewhere on Washington's coast and on the Straights of Juan de Fuca. In addition to the Washington catch in the commercial fishery and in addition to the troll fishermen, Oregon commercial fisherman also fish in the lower Columbia River, and the combined catch of Washington and Oregon fishermen in the Columbia River, in addition to the troll commercial fisheries, and the sports fisheries heretofore discussed may be found in exhibits 1, 2, 3, and 4 attached hereto. These charts in millions of pounds are from the 1964 status report on the Columbia River by the Oregon Fish Commission and Washington State Department of Fisheries. While landings vary considerable annually in 1958, for example, 123,337 spring Chinook, 85,598 summer Chinook, 143,888 fall Chinook, and 80,528 steelhead were landed in the lower Columbia River area. These figures do not include the Oregon sports fisheries where Oregon sports fishermen have taken from the Columbia River, excluding the mouth of the Columbia, 47,500 salmon and 36,000 steelhead from the Columbia River. Oregon is, like Washington, experiencing a mushrooming public interest in sports fishery, and license holders in Oregon increased from 265,000 in 1945 to over 530,000 in 1959. Most of the fish taken by Oregon sports fishery are taken in the Columbia or from fish that are spawned in the Columbia River or its tributaries. In contrast to these gigantic figures, the Indian fishermen who have a prior right under their treaty, have only taken the following fish from the Columbia River: Last year, in 1963, the Indian fishermen took a total of 9,177 spring Chinook, 4,108 summer Chinook, 22,336 fall Chinook, and 8,383 steelhead. It can readily be seen that in the Columbia River, at least, the Indian fishermen who have the prior right to these fish, are catching a minimum amount of the fish, and are having the fishing guaranteed to them by treaty hampered and encroached upon by non-Indian fishermen. Nothing can indicate this better than by examining exhibits 1, 2, 3, and 4, attached hereto, where the total Columbia River commercial landings, which

include the Indian landings as well, are compared with the landings in zones 1 through 5, which are the non-Indian landings. This is graphic and visual proof of what little effect the Indian fishing is having upon the Columbia River, and how the Indian fisherman, who has the prior right, is having his fishing hampered by the excessive non-Indian fishermen. These exhibits do not include the sports catch. We are sure that it will cause this committee to consider that certainly Senate Joint Resolutions 170 and 171 are not needed in the Columbia River, but that a further study of the fishing situation should be made, as proposed in Senate Joint Resolution 174 so that this committee and Congress can give consideration for the protection of the Indian fishery guaranteed to them by treaty.

The Senate of the United States has duty to protect the treaty that they ratified on the 8th day of March, 1859, and which was signed by President Buchanan on the 18th day of April, 1859. Our forefathers made a treaty with the United States through the Senate and its executive branch, and by that treaty ceded to the United States of America 10,828,800 acres, which is a gigantic parcel of land, encompassing 16,920 square miles. They reserved for themselves a reservation constituting only 1,200,000 acres or 1,875 square miles. The fishing rights that were also reserved were a very important part of this treaty, and article III concerning hunting and fishing rights was the most important part of the treaty discussion. The lands that were ceded were very fertile and constituted our finest grazing, agricultural, and forest lands, and we ask in return that the United States of America keep its word and that we be accorded the treaty rights reserved to us under that treaty. As was said by Justice Hugo L. Black in the *Tuscarora* case "Great nations, like great men, should keep their word." We believe the United States of America to be a great nation, and we know that the Senate and this committee will, like great men, help the United States of America keep its word.

The reason this is so important to us is that we are not just talking about dry legal rights, and only the treaty, even though it be the solemn document that we believe it to be, but we are talking about people. As was brought out in the recent conference in Washington, D.C., on Indian poverty, the Yakima Indians come from an average education level of 3.8 grades, and the dollars derived from the Indian fishery have a ratio of 7 to 1, because these fishermen have no other avenue or trade to fall back on. Many of our fishermen are beyond the age of relocation, vocational training, and haven't the necessary education to earn a living in another way. Are these fishermen to be deprived of their livelihood, guaranteed to them by treaty, by non-Indian landings, and particularly by the sports landings?

In looking at exhibits 1 through 4 you can see the comparison of the present Indian catch compared to 1954 when the Celilo fishery was still in operation. Though permission to inundate certain fishing locations was compensated for by the U.S. Government, the right to take these fish was not sold and was reserved to the Indian fisherman. Present Indian fishing, as can be seen by these exhibits is much less than past Indian fishing, and is no threat to escapement upon the Columbia.

Nor has the Yakima Indian Nation ignored the conservation angle. The Yakima Indian Nation has from time immemorial considered its fish and wildlife resources as one of the greatest assets to its tribal members and has taken every effort to conserve same. On April 11, 1951, the Yakima Tribal Council approved a proposed plan for the development and management of the fisheries source of the Klickitat River. By this agreement the tribe allowed the State to construct a hatchery, fish ladders, and traps to transport salmon to the Glenwood Hatchery, and agreed to restrict themselves to a modified and short fishing season. They also gave up voluntarily, in the interests of conservation, many of their best fishing locations. Again, on the Klickitat River, and by action taken on the 22d day of April, 1957, for the purpose of entering into an agreement to improve the Castile Falls area to open up new spawning areas on the reservation, the Yakima Indian Nation entered into an agreement to make the stream above the falls, consisting of approximately 15 to 20 miles, available for spawning and restricted salmon harvesting in this area and agreed to take part with the State of Washington in the management of this fishery

source. That, though the Indian members of the technical committee who were supposed to help manage this resource, have constantly advocated further management studies in this area, their cooperation is apparently ignored by the State of Washington.

The Yakima Tribe has already taken further action regarding their reservation fisheries, and in May 1951 passed a resolution prohibiting the sale of fish and game and the use of gaff hooks in the Yakima Reservation and also on the Yakima River and its tributaries. These actions have received the commendation of all objective observers, including the Secretary of the Interior, the Commissioner of Indian Affairs, and the area director of Indian Affairs. The Yakima Tribe has, by resolution approved August 3, 1961, taken further action restricting the use of firearms as well as restricting fishing in lakes within the reservation. It has also, on the 9th of September 1961, taken action to prohibit the use of dynamite or any other destructive means on all of its fishing locations.

In special session on April 26, 1962, mainly responding to the cooperation we would be receiving from the Fish Commission of the State of Washington, the tribal council passed resolutions which provide in general as follows:

1. Prohibit gill netting for salmon or steelhead within the Yakima River or its tributaries.
2. Restrict the distance that fishing could be done from fish passageways on the Yakima River.
3. Since it was alleged by State management agencies that boats were harvesting 75 percent of the catch at the fishing places on the Yakima River, fishing from boats or floating devices was prohibited. Further, by resolution dated April 26, 1962, a 3½-day closure was set up at usual and accustomed fishing places on the Klickitat River.

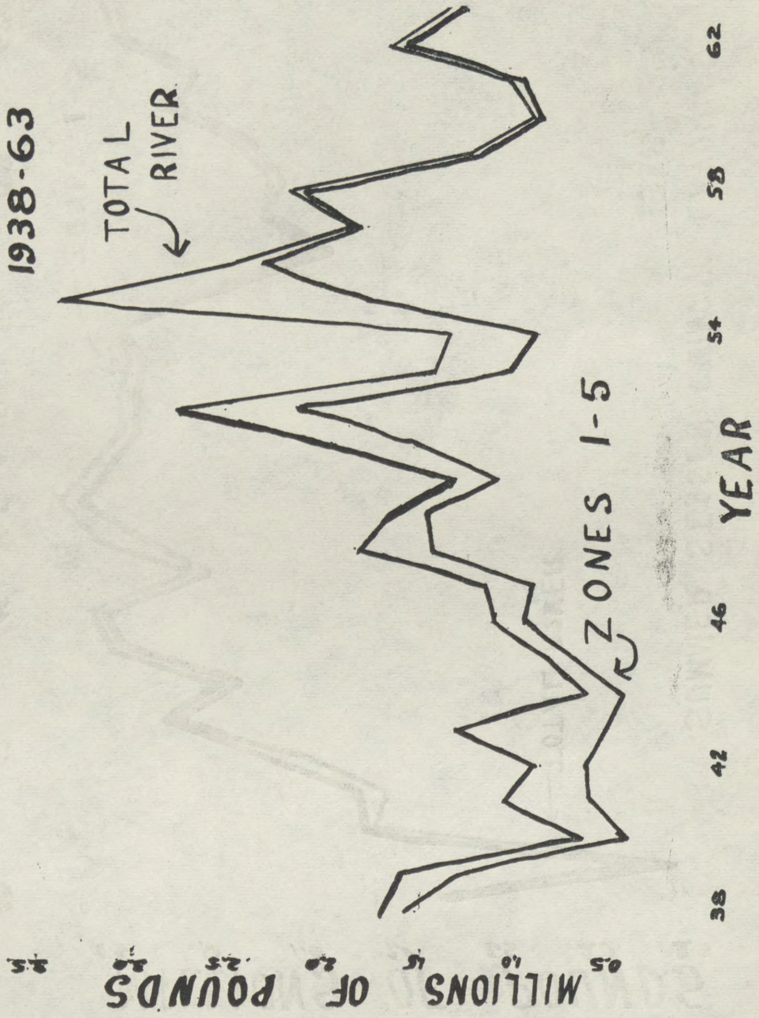
It was during this year and on the 16th day of May, 1962, that the Solicitor for the Department of the Interior held that fishing rights on and off the reservation in regard to time and as to manner may be regulated by the Indian governments and that where an Indian is fishing contrary to the provisions of a tribal ordinance that he would not be exercising a treaty right, and therefore not have available the applicable treaty as a defense to State prosecution his violation of the State conservation laws, said treaty right.

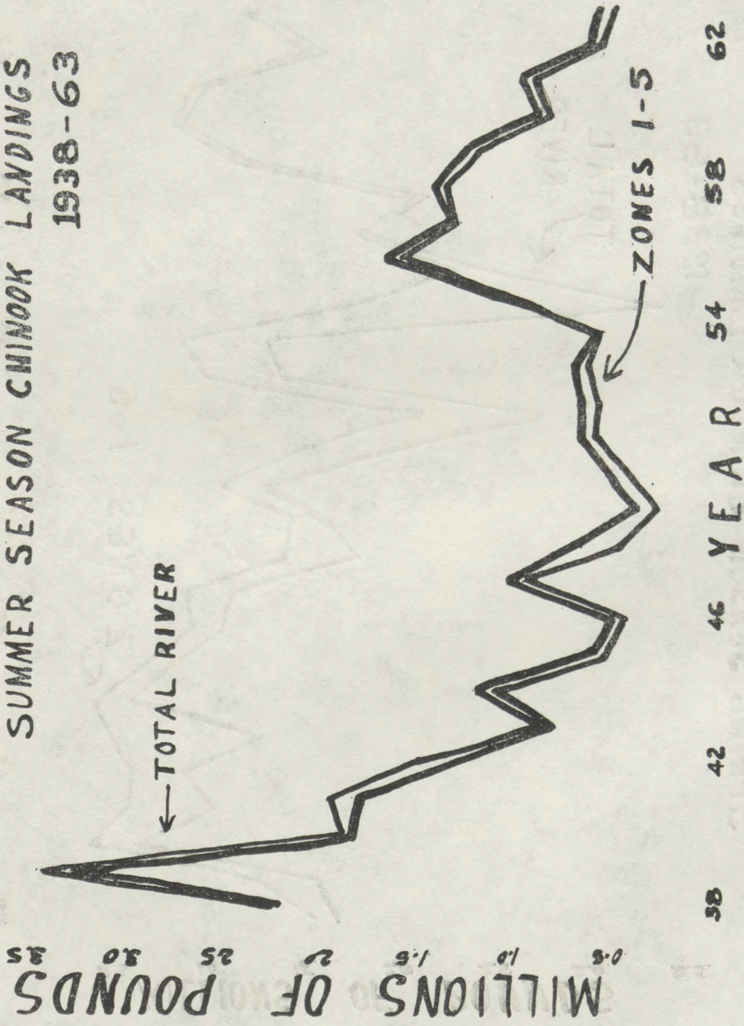
Armed with that authority, the Yakima Tribal Council embarked on studies in a process of tribal regulations to protect and conserve the Yakima Indian fisheries at usual and accustomed places. The Yakima Nation recognizes that in order for them to retain their right there is a responsibility for them to regulate these fisheries. The latest result of this regulation effort is a resolution, T–89–64, passed by the tribal council on the 20th day of March, 1964. In passing these regulations, even though no cooperation was received from either the State of Washington Department of Fisheries, or the State of Washington Game Commission, advice was received from the U.S. Bureau of Sports Fisheries, the U.S. Bureau of Fisheries, and excellent and fine cooperation from the Oregon State Fish Commission. A copy of these regulations is attached hereto and marked "Exhibit 5." These regulations are probably not as extensive as will hereafter be forthcoming, but in promulgating these regulations past runs, escapement, and landings have been taken into consideration. In addition to this resolution, where it appears that an additional closure has been needed, as provided under the regulations, emergency closures have been put into effect.

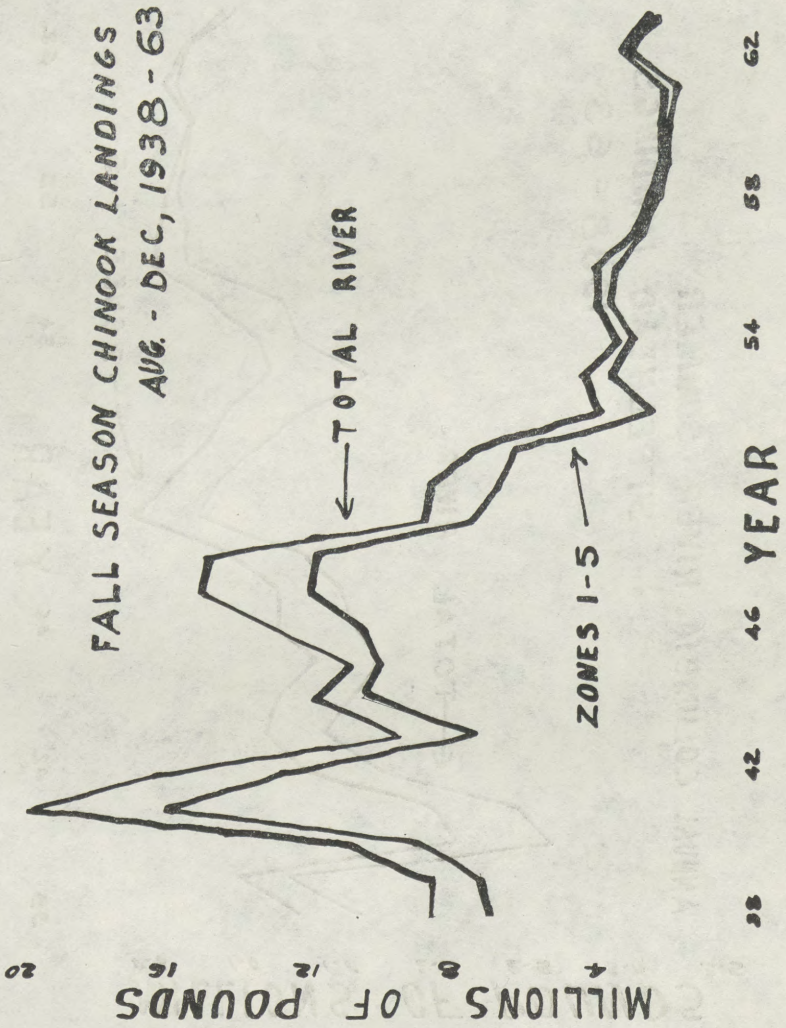
On the 28th day of April 1964, an emergency 4-day closure was put into effect. Thereafter, again on the 11th day of June 1964, the emergency closure was put into effect delaying the season on the Columbia River until adequate escapement was obtained. Fishing season was to have opened on June 14, 1964, but it was delayed until the second day following the day on which the official daily count of Chinook salmon passing Bonneville Dam was 1,500 or more, and the season was not opened until June 21.

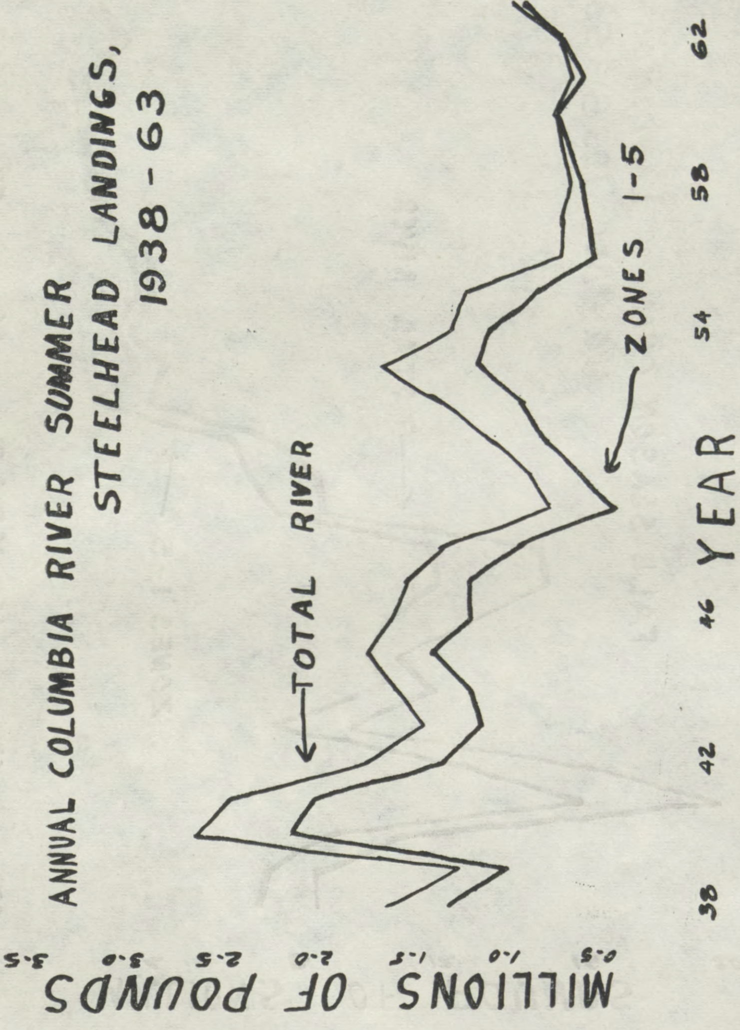
The Yakima Nation is, of course, conscious of the fact that they must continue to regulate their fisheries. We have many problems on the Columbia River and at our other usual and accustomed places of fishing. We have seen these fisheries decreased from the bountiful harvest that we used to enjoy to the present low catch we presently enjoy. We do not feel that this has been because of the Indian landings. Numerous factors affect the conduct of fish such as water temperatures, currents, velocity, chemical quantities, and water quality. In addition to the commercial and sports landings we have seen our fish runs decreased by dams, pollution, overharvesting, and many other factors that have nothing to do with the amount of harvest either by Indians or non-Indians. We have seen the irrigation ditches on the Yakima River full of dead salmon because of the failure of those interested in irrigation to conserve our fishery source. We have also seen water taken to irrigate farms that has delayed and destroyed the fish run. We have seen the effect of the many high dams on migrating salmon, and we have seen the studies that show the destruction of the fingerlings by those dams on the Columbia. We have seen the reports of the committee set up by the Governors of the States of Washington, Oregon, and Idaho which report that it is sportsmen and not the Oregon-Washington commercial fishermen that have been reducing the steelhead run. We feel this is what is destroying the run, but in spite of all this we are doing what we can. We have been complimented this year by Robert Schoning, Oregon Fish Commission director, on March 13, 1964, when he said "Our department has indicated Indians have a treaty right to harvest fish and also a responsibility to share in proper regulation and management of the run. The Yakima Indians have shown a sense of responsibility by adopting their own tribal ordinance." Also, on May 22, 1964, the Indian tribes received commendation from the assistant regional solicitor from the U.S. Department of the Interior and a copy of that release is marked "Exhibit 6" and attached hereto.

In conclusion, we would ask that prior to the time that any further action is taken on Senate Joint Resolutions 170 and 171 that a complete study be made of this entire situation. We are dealing mainly with emotions, propaganda, in discussing this most valuable asset and also the sanctity of a most valuable promise. We would, therefore, suggest that an enactment of any such resolutions as are under study not be considered until such time as there would be a study made by an independent agency regarding these fisheries. We would request that a study such as proposed in Senate Joint Resolution 174, with amendments to consider Indian fishing, be forthwith promulgated and facilitated because we know that when the facts are before this committee, this Congress, the executive departments of the United States, and also before the people of America that they will see that the Indian lands are not destroying this resource, and that they will commend the Yakima Nation for its action taken on the Columbia River.


SPRING SEASON CHINOOK LANDINGS
1938-63
TOTAL RIVER
ZONES 1-5
38
42
46
54
58
62
YEAR
MILLIONS OF POUNDS


SUMMER SEASON CHINOOK LANDINGS
1938-63
TOTAL RIVER
ZONES 1-5
YEAR
38
42
46
54
58
62
MILLIONS OF POUNDS


FALL SEASON CHINOOK LANDINGS
AUG. - DEC., 1938 - 63
TOTAL RIVER
ZONES 1-5
MILLIONS OF POUNDS
4
8
12
16
20
YEAR
38
42
46
54
58
62


ANNUAL COLUMBIA RIVER SUMMER
STEELHEAD LANDINGS,
1938 - 63
TOTAL RIVER
ZONES 1-5
YEAR
38
42
46
54
58
62
MILLIONS OF POUNDS
0.5
1.0
1.5
2.0
2.5
3.0
3.5

RESOLUTION: REGULATIONS FOR YAKIMA INDIAN FISHERIES ON COLUMBIA RIVER AND YAKIMA RIVER, 1964

Whereas the Yakima Tribe of the State of Washington has numerous fishing locations in or on the Columbia River and its tributaries in either or both the State of Oregon and the State of Washington which are usual and accustomed fishing places of said Yakima Tribes of Indians, used since time immemorial and guaranteed forever by the Yakima Treaty with the United States on June 9, 1855 (12 Stat. 951); and

Whereas there has been conferences and meetings held to determine a workable arrangement without prejudice to the rights of either of the States or the treaty rights of the Yakima Tribes; and

Whereas many members of the Yakima Tribe desire to conduct a commercial gillnet fishing above the Bonneville Dam under their treaty right; and

Whereas the Yakima Tribal Council Fish and Wildlife Committee has met with Yakima tribal fishermen and with State agencies and hereby recommends to the Yakima Tribal Council that a regulated commercial gillnet fishing and/or other fishing be allowed for the 1964 season as follows:

Columbia River above Bonneville Dam

Gillnet fishing for any purpose shall be limited to the following seasons:

1. April 12, 1964, 12 noon to May 22, 1964, 12 noon.
2. June 14, 1964, 12 noon to July 24, 1964, 12 noon.[1]
3. August 2, 1964, 12 noon to August 21, 1964, 12 noon.
4. August 31, 1964, 12 noon to October 9, 1964, 12 noon.

It shall be unlawful to take fish for any purpose during weekly closure from Friday, 12 noon to Sunday, 12 noon, excepting in season No. 4 from August 31, 1964, 12 noon, to September 14, closure shall be from noon Friday to noon Monday.

I. Klickitat River

Gillnetting will not be permitted for any purpose on the Columbia River within one-half mile upstream and 1½ miles downstream from the shore of the mouth of the Klickitat River. Further, the gillnetting will not be permitted with the Klickitat River.

II. Big White Salmon River

Gillnetting will not be permitted for any purpose on the Columbia River within one-half mile upstream from the shore of the mouth of the Big White Salmon River to 1½ miles downstream from the fish ladder of the Spring Creek Hatchery. Further, that fishing for salmon and steelhead will not be permitted for any purpose within the Big White Salmon River.

III. Little White Salmon River

Gillnetting will not be permitted for any purpose on the Columbia River within one-half mile upstream to three-fourths mile downstream from the shore of the mouth of the Little White Salmon River. Further, fishing for salmon and steelhead for any purpose will not be permitted within the Little White Salmon River.

IV. Wind River

Gillnetting will not be permitted for any purpose on the Columbia River within one-half mile upstream to 1½ miles downstream from the shore of the mouth of the Wind River. Further, that gillnetting will not be permitted within the Wind River.

V. Herman Creek

Gillnetting will not be permitted for any purpose on the Oregon side of the Columbia River from one-half mile upstream from the shore of the mouth of Herman Creek to the Bridge of the Gods downstream. Further, that gillnetting will not be permitted within Herman Creek.

VI. Eagle Creek

Gillnetting will not be permitted for any purpose on the Oregon side of the Columbia River from one-half mile upstream from the shore of the mouth of

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[1] Minimum size of mesh to be used during Blueback season (June 14–July 24) will be 5 inches.

37-688—64——5

Eagle Creek to Bonneville Dam downstream. Further, that gillnetting will not be permitted within Eagle Creek.

Further, that the distance upstream and downstream from the shore of each tributary will be marked with bright orange and white paint and that the restricted area will be half way across the Columbia River.

Further, that there will be no boats permitted for any purpose between The Dalles Bridge and The Dalles Dam except for transportation purposes to some out-croppings near The Dalles Bridge which shall be 600 feet from the dam. Dip net fishing only shall be permitted between The Dalles Bridge and The Dalles Dam. Dip net or bag set net shall be those operated by hand and shall not have hoop circumference to exceed 20 feet.

Further, no sturgeon under 4 feet in length nor over 6 feet in length shall be taken for commercial purposes; or for personal use, from 3 to 6 feet.

Further, no gillnet or nets will be placed within 400 feet downstream or 400 feet upstream from an established fishing location under this regulation. That each gear and location shall be tagged with name and enrollment number by the respective fisherman. Each season fishing locations shall be marked by fishermen for establishing boundaries and recorded with the Yakima tribal office. Each fisherman shall be required to keep and furnish a catch record for commercial and home use fish and furnish same to the Yakima Tribal Council after each season.

Further, that no gillnet fishing will be permitted for any purpose on the Columbia River with monofilament net or with a net longer than 1,500 feet in length.

Any violations of these regulations will be subject to penalties the same as provided for in chapter 5, section 23, Game and Fish Violations, of the Law and Order Code of the Yakima Reservation. Provided further, that only Yakima members are to be allowed to fish under these regulations on the Columbia River. It shall be against rules and regulations for a non-Yakima fisherman or a non-Indian helper to participate on established fisheries or gear. Any Yakima fisherman who violates this section will be subject to 6 months' suspension of fishing privileges or $250 fine, or both, at the discretion of the Yakima tribal court judge. The non-Yakima fisherman or helper shall be subject to State laws and authorities. Provided further, that each Yakima member shall carry on his person at all times his enrollment card and shall show the same upon demand to any Federal, State, or tribal officer so authorized to enforce fishing regulations. Provided further, that there will be no misuse of or loaning of identification and/or enrollment cards. Any violation of this regulation will be subject to penalties as provided for in chapter 5 sections 46 and 47. Identification Violations of the Law and Order Code of the Yakima Indian Reservation. Provided, however, that this action or the statements herein shall not be in any way construed to deprive the Yakima Tribe of Indians and its members to treaty rights on the Columbia River and will, however, refrain from fishing as noted in sections 1, 2, 3, 4, 5, and 6 for conservation purposes.

Yakima River: Prosser Dam, Sunnyside Dam and Wapato Dam

1. Gillnetting will not be permitted for any purpose at any time in the Yakima River or its tributaries.

2. Only enrolled Yakima Indians may fish for salmon for personal use with dip nets between Prosser Dam and the first bridge below from April 14 through July 4, 1964, except on weekly closure from midnight Saturday until midnight Tuesday. Provided, that no fishing will be done in these waters within 30 feet of the fishways (ladders). Yakima Indians will be allowed to fish at the face of the dam but not within 30 feet below or from the side of these two fish ladders. Said fishing will not be performed from a boat or other floating device. Boats may be used to go to and from fishing locations only.

3. Only enrolled Yakima Indians may fish for salmon for personal use at Sunnyside Dam and Wapato Dam. Provided, that no dip net fishing will be done at the Sunnyside Dam from within 30 feet of the fish ladder in the middle of the river and there will be no fishing on the Wapato Dam (upper dam) from the ladder to 30 feet below. On the west or southwest side of the dam, fishing will be prohibited 30 feet below only. Provided further, that there will be no dip net fishing from any boat or floating device on the Yakima River or its tributaries.

Klickitat River

Yakima Indians may fish for salmon for any purpose or for steelhead for subsistence purposes on the Columbia River Fishing Area No. 2 (Klickitat) from (1) 6 p.m., April 26, 1964, to 6 p.m., May 29, 1964, and (2) from 6 p.m., September

6, 1964, to 6 p.m., October 2, 1964; provided, that it shall be unlawful to take or fish for salmon or steelhead for any purpose during weekly closed periods from 12 noon Friday to 12 noon Sunday; and provided further, that it shall be unlawful to take, fish, or possess salmon or steelhead for any purpose from the waters of the right side of the Klickitat River between points 50 feet below the No. 2 Klickitat fishway and 50 feet below No. 5 fishway: Now, therefore, be it

Resolved by the Yakima Tribal Council in special session on this 20th day of March 1964 at the Yakima Indian Agency, Toppenish, Wash., a quorum being present, That after due consideration hereby acknowledges and approves the 1964 fishing seasons as set forth in the recommendation of the Fish and Wildlife Committee; be it further

Resolved, That the Yakima Tribal Council reserves unto itself conservation powers and authorizes the Fish and Wildlife Committee to enact such measures as deemed necessary for conservation purposes upon 48 hours advance notice to the fishermen, and also the authority to extend seasons as they deem necessary to harvest fish where it will not seriously effect and destroy fish population contrary to conservation of same.

Done and dated on this 20th day of March 1964 at the Yakima Indian Agency, Toppenish, Wash., by the Yakima Tribal Council by a vote of 10 for and 1 against.

EAGLE SEELATSEE,
Chairman, Yakima Tribal Council.

Attest:

LOUIS CLOUD,
Secretary, Yakima Tribal Council.

[From the Oregon Journal, May 22, 1964]

OREGON ENLISTS INDIAN TRIBES IN COLUMBIA FISH CONSERVATION

To the editor:

The wire service story of Indian fishing on the Columbia River (Journal, May 15) tells only part of the story. Yakima Indian commercial fishing on the middle river is not new. In the years before closure of the Dalles Dam the annual Indian commercial catch alone ran to over 2.5 million pounds. Tribal regulation of that fishing is relatively new. Tribal acceptance of State suggestions for improving those regulations is even newer. The latter has resulted largely from the efforts of the Oregon Fish Commission and its director, Robert Schoning.

Before the fish commission began following its present policy, Oregon had had almost no success before the courts in controlling unrestricted Indian fishing. The Federal Ninth Circuit Court held last year that a State may not regulate Indian treaty fishing unless it shows that its regulation is "indispensable" to the conservation of fish.

In recent years the Oregon Fish Commission has attempted to convince Indian tribal groups of the need for more effective regulation of their members' fishing practices. Due largely to the commission's efforts since the close of last year's season, the Yakima Tribe, this year for the first time, invited the State agencies to review tribal fishing regulations before they were enacted and to suggest improvements.

Some of the tangible results of Mr. Schoning's efforts are these: The opening of the tribal spring season was delayed from March 29 to April 12, the opening of the summer season from June 7 to 14; the closed areas around the mouths of hatchery tributary streams were increased in size; the weekly closure was increased from 2 to 3 days for the fall season; for the first time the tribe adopted a 5-inch minimum mesh restriction for nets during the blueback season, thus permitting the escapement of this species which is in danger of depletion. Use of monofilament net has been prohibited; restrictions were imposed on sturgeon fishing; tribal members who permit nontribal members to fish with them under tribal regulations are now themselves subject to prosecution.

When the State agencies imposed a 24-hour shortening of the lower river spring season, the Yakima Tribe immediately imposed an additional 24-hour closure on their fishermen. The tribe is increasing its efforts to compile and furnish the State with more accurate statistics on Indian fish catch. The State needs these statistics to frame proper conservation measures.

The Umatilla and Warm Springs Tribes have gone even further in accepting fish commission recommendations. Since this new policy of the Oregon Fish Commission, the State of Oregon has successfully prosecuted Indians who fish in violation of the tribal ordinances. The tribes have supported and cooperated with the State in this enforcement. The activities of the few persistent violators are being curbed. The legitimate treaty rights of the Indians are being protected and the efforts of the State conservation agencies are becoming more successful.

GEORGE D. DYSART,
Assistant Regional Solicitor,
U.S. Department of the Interior.

Mr. SEELATSEE. Thank you, Mr. Chairman. I next would like the privilege of making a few introductory remarks in regard to this matter.

I am a direct descendant of two of the chiefs who signed the treaty at Walla Walla. One of these chiefs was from the Columbia River fishing area, and the other, on my mother's side, was from the fishing area on the tributaries of that great river. I also thought some discussion along this line would be important because I feel it will give you some idea as to how my forefathers felt about fishing. You see, gentlemen of this committee, all the 14 tribes that signed this treaty were from 9 fishing areas along the Columbia and 5 fishing areas along this tributary of that river. The fishing discussion at the time of that treaty council was the most important thing to my people. This discussion far exceeded any other discussion in toto.

And, just as important, we were promised that we would retain these rights as long as the river runs and as long as the mountain stands. We are here today to resist any encroachment on our rights by non-Indian fishermen and to ask you that you keep your promise with us.

Mr. Jim will not discuss with you the submission of this technical material in regard to the proposed resolutions. I want to repeat that the Yakima Nation will be greatly affected by the enactment of such Resolutions 170 and 171, that would cut our hunting and fishing rights off and within reservation boundaries which have been exercised by our tribal members.

In conclusion, we want to say that we want to ask of you that our treaty with the U.S. Government be respected, and we thank you very much for your kind attention.

Senator SIMPSON. Thank you, Mr. Seelatsee. I understand that your next witness will be Mr. Robert Jim. We will be glad to hear him.

Mr. JIM. Mr. Chairman and members of the committee and the staff of the committee, my name is Robert Jim, and I am chairman of the law and order committee, and we come here representing 5,235 Yakima Indians who are direct descendants under a treaty made and ratified by the Senate of the United States, which was signed by the President, Mr. James Buchanan, in 1859.

Now, if I may submit these exhibits——

Senator SIMPSON. Go ahead any way you wish, Mr. Jim.

Mr. JIM. This exhibit here, exhibit No. 1, as is drawn from our statement in opposition to this Resolution 170 and Resolution 171 also—I would like to explain that exhibit No. 1, when we consider the Indian fishery in the area where we allow commercial fisheries under the Yakima Indian Nation on the Columbia River, the red line and below indicate the commercial catch on the Columbia River, zones 1 to 5

here [indicating], that Mr. Schoning spoke of that he has power and jurisdiction over, which are the non-Indian fisheries.

Now, the green line here [indicating on chart] indicates the total commercial landings which includes zone 6, which is the Indian landings, so now in the total zones 1 to 5 cover 140 miles of river. Other than that, the little space in between here [indicating] indicates that in this section is approximately 90 miles of river.

Now, the difference between these—and as you will see later on into the year it gets smaller and smaller—is the Indian catch. Now, this is the thing that is the reason that we have here another chart. This chart here is drawn, the statistics are made, and these are takings from the Oregon-Washington commercial landings in the Columbia River system where our Indians fish. Zone 6, which is not mentioned here, but it would include this catch in between [indicating].

One of the facts that will be brought out later is that, although this pertains to the run in the Columbia River, this does not include the troll fishery and the sports fishery in the great Columbia River which we in our statement say catch more fish of the same run than the total Columbia River commercial landings, including Indians and non-Indians.

Now, chart No. 1, page 55, shows the spring Chinook commercial landings, zones 1 to 5. The chart shows that the landings varied up until 1957, but are now almost the same—if you will notice, that after 1957 when The Dalles Dam fishery, which is the Celilo—Indian fishing was eliminated by inundation of our Celilo project—then you see that the Indian fisheries were a little smaller, and so this indicates that now more than ever the Indians' landings are a smaller threat than any to any run of fish in the Columbia River.

In the second chart, the summer Chinook landings, I think that this line speaks for itself. It indicates that there is the same pattern, or even less so than in 1957, that the lines stay parallel or closer together and indicate that the Indian fisheries in this very small space here [indicating] never was a threat to the run as the commercial landings or perhaps the sport landings which would have a—sports fishing and the troll fishing in the ocean—which would have a more far-reaching effect upon them, the same fish that come up into the Columbia River.

Now, the fall season landings, which are a little more varied, in the fact that they were more varied back before 1957, and again this indicates that now we are more consistent, we of the Yakima Nation regulate this area.

Now, I think when you consider the summer annual Columbia River steelhead landings, the steelhead—again the catch here [indicating] shows that the Indian fishery was almost nil as compared to landings in zones 1 to 5, which is not Indian. Again the catch does not include the troll fisheries who catch the same fish we raise; and, No. 2, the sportsmen's catch, whose fisheries are expanding at an alarming rate, as is indicated in our statement, and these sportsmen and troll catch more fish than all zones 1 to 6, and as a result of a special committee in 1961, this very steelhead—the three State Governors of Washington, of Oregon, and of Idaho appointed a committee to find out in the Columbia River who was destroying the game fish in Washington and the commercial fish in Oregon.

This committee in 1961 got up and brought out a report that it was the steelhead sports fishermen who are destroying the steelhead run, not the commercial fishermen, and not the——

Senator SIMPSON. Could I ask a question here, Mr. Chairman?

Senator CHURCH (presiding). Surely.

Senator SIMPSON. Is that report before the committee?

Mr. JIM. I think we have within our statement——

Senator SIMPSON. A quotation?

Mr. JIM. We have in our statement that Mr. Seelatsee submitted, in there.

Senator SIMPSON. The material you are referring to will be in there or will be furnished.

Mr. JIM. Yes.

Mr. SEELATSEE. Yes.

Senator SIMPSON. I would like to see it.

Mr. JIM. It is indicated in a newspaper article that we have and also in the statement in regard to Senate Resolutions 170 and 171. They have already been included in the record.

Senator SIMPSON. Thank you.

Mr. JIM. Now, again, when I finished, we will offer this chart as an exhibit. It does not include the troll fisheries or the sports fisheries, who are the major factors in the catch of this run, and we think that is one of the facts that should be before this committee if they are to consider who is depleting the run, and also these charts prove that Indian fishery in the Columbia River where we allow a commercial fishery is not a threat and it never has been, and we think that we shouldn't be blamed for a fact that we can prove by the findings of other—commercial research men and Oregon and Washington State departments. Those will be offered so as exhibits, Mr. Chairman.

But to finish, you as the Congress must act as the conscience of this United States, to honor this treaty declared as the law of the land, and to who we appeal to not break the negotiated solemn document in which we ceded 10,828,800 acres of prime land as an unwilling seller, and where we reserved the right to fish.

We don't ask that that land be returned but rather we think of justice. Many of my people depend on the salmon as they have in the past as an important part of their diet and their economy. You cannot compare the present-day catch of our tribe now as a threat to the salmon or steelhead when previously we caught up to three times as much as we do today.

We recognize within the Yakima Tribe that with the right of fishing or any treaty right, there is a responsibility. The Yakima Nation as early as 1951 had approved an agreement, an agreement on the Klickitat River which begins in the headwaters that are in the reservation, allowing ladders, hatcheries and traps to be constructed by the Washington State. They stated at that time that in 10 years that these traps, ladders, and hatcheries would solve the problem of the fisheries in the Klickitat River. Yet today they continuously ask us for a 3-day fishery in our usual and accustomed place, which we honor and we still have in effect.

We passed a resolution in 1951 prohibiting the sale of fish on the Yakima Reservation and on the river and prohibiting other destructive means of fishing. In 1962 we prohibited the gillnet within the Yakima

River and its tributaries, and that would also prohibit fishing within the distances from the ladders which allow the salmon to pass. And also we have prohibited boat fishing on the Yakima Reservation and we prohibited it from our usual and accustomed place off the reservation because the State alleged that this was accounting for 75 percent of the take within the reservation.

In 1962 we had an initial meeting, initial and only meeting regarding the conservation of fish with the Washington State Department of Fishery, in which they brought to our attention the fact of our gillnetting, then we established the first commercial gillnetting regulations against our people down on the Columbia River.

Thereafter, we had to only rely upon the staff of the Oregon State and Director Horning—we didn't take the attitude that we could fish unlimited all the time. We had to go to Oregon to get technical information to draft our regulations in regard to gillnet and commercial fishing and others.

Then in 1962, which is the last fishing season and still in effect, we approved in the tribal council 28954. Within this resolution, not included within the others, are these facts: We established closure days, we established the length of seasons, we established the type and length of gear, which didn't include monofilament net. We closed a mile and a half of rivers downstream and half a mile upstream, the same with hatcheries and other areas; where the fish tend to mill in the Dalles pool. We closed that to commercial fishermen. We established regulations governing the sturgeon limit, catch, and personal use.

We also require that our fishermen furnish catch records and personal use records, and one of the facts that was brought up yesterday that we, as the Yakima Nation, allow only Yakima Indians to fish—now, we alone, I think, have a special law governing enrollment. We determine who is an Indian by Public Law 706 of the 79th Congress, and this law has the support of our Nation, and we have determined who can enjoy our treaty rights, as limited to members, so that only those of Indian encestry participate, unlike many tribes who don't have it, and also, in philosophy, this law, which requires a quarter-degree Yakima Indian blood to belong to our tribe, was upheld and voted unanimously to oppose any amendment by the Washington State sportsmen in the 104th quarterly meeting in Vancouver, Wash., the 12th and 13th of March 1960.

We have, as entered into our statement on S. 170 and S. 171, used 289, which includes the emergency closure clause. We have used this on our fishermen by extending the weekly closure days on season No. 1 which is included in the statement. We have added an additional 4-day closure and on season No. 2 we have delayed the season to allow for fish escapement over the dam.

And one of the facts that I think has been overlooked here, more or less, is that there has been in season No. 2 which is the summer Chinook run, although the commercial fishermen below were held to a 2-day season and the Indians were more or less, we allowed them a 20-day season, but we did cut a week off of that to allow sufficient escapement, as according to the recommendation of the biological staff of Oregon—but nowhere did anybody say that before, with all the reasoning, that the troll fisheries should cut down on the same run of fish, during all

the time did anyone cut the sports fishermen that were still affecting the same run. I am sure that they catch many fish, as we have indicated in our statement, that they were never curbed, although the commercial fishermen were curbed. That shows that even though they say that, "Let's get the Indian fishermen out of the river," which is a very small percentage of the catch, even within the State and within their departments, they don't agree on one overall goal.

We of the Yakima Tribe recognize that we must regulate and we will continue if possible to go on working with the staffs of the Oregon or Washington if possible to regulate our Indian fisheries with their recommendations.

We show that the Indian landings are low percentagewise as compared to the commercial landings, and sportsmen or any other, especially the troll; yet we who regulate our people and have the right to fish near the spawning area, say they must allow for the catch as it is the same salmon caught by the non-Indians in the below river and the ocean—these salmon who spawn in our area. Do they want to just have us rear fish and not participate in the landings?

No one yet can prove, as was shown in the *Umatilla* case, that Indians with their fisheries have destroyed a run of fish. But the non-Indians, through their dams, their irrigation, and other projects, have at one time or another, as is indicated by the *Umatilla* case.

We urge you to look at all factors before you consider a closure. We, as is indicated here, catch the least.

In conclusion, gentlemen, Resolutions 170 and 171 are not needed. What is needed is a recognition by the game and fish regulatory bodies and the special interests that they represent, that the Indians do have, by law and by treaty, a legitimate fishing right. This is a right that can be allowed for in fish management practices.

The answer is cooperation with recognition of the Indian rights. Everything is not perfect. We have a continuing problem and we feel we are not being accorded a proper percentage of the landings. The important thing is that we should continue talking together with everybody in a spirit of compromise and fair dealing. Is it too much to ask that we be allowed to continue in this spirit? Thank you, gentlemen, it has been a pleasure to appear and present our testimony.

Senator CHURCH. Thank you, sir, very much. Are there questions by the Senators?

Senator MECHEM. I did not fully understand the extent to which both reservation and off-reservation fishing were included in your charts. Are they both included in here?

Mr. JIM. No, sir; this is only the approximately 90-mile area from the Bonneville Dam to McNary Dam on the Columbia River where we allow Indian commercial landings. Now, the rest—we have the Yakima River, we have the Klickitat River, we have two fisheries on the Yakima River, and one fishery on the Klickitat River, which begins on our reservation and runs down there for about 40 miles, and then the Yakima River and its tributaries, with the exception of Klickitat, we don't—within the Yakima River and all the tributaries near the reservation—we do not allow commercial fishing, salmon, or steelhead. This doesn't include the subsistence fishermen, that is, that caught by our people. It only indicates the commercial landings on the Columbia River.

Senator MECHEM. This then includes the commercial in all of the reaches of the river you fish in, where you allow commercial fishing?

Mr. JIM. Yes.

Senator MECHEM. This is the total catch?

Mr. JIM. This is the total catch up here [indicating on chart]; this includes everything, this green line includes everything; but the red line includes the white fisheries that Mr. Schoning and Mr. Starlund in Washington State—they govern this catch here, which is the biggest percentage.

Now, in between, here, is the Indian catch, right here, and as we see in 1957 when the Celilo was taken out by an act of Congress, the lines come close, so close that they are almost one, this [indicating] shows the Indian catch.

Senator MECHEM. Do you license the subsistence fishermen?

Mr. JIM. We don't license our subsistence fisheries. They only have to have, as I indicated, a Yakima enrollment card, and we don't allow any other tribe to fish within that area on our reservation or our usual and accustomed places, only the Yakima Tribe.

Senator MECHEM. You do license your commercial fishermen?

Mr. JIM. We require them to get a permit, a tag, and they mark the location on the river where they fish, and turn in their catch records and their personal use records.

Senator SIMPSON. Is that on the reservation?

Mr. JIM. This is off the reservation.

Senator SIMPSON. And do you charge a fee for the off reservation fishing?

Mr. JIM. No, we do not. We don't charge a fee for it.

Senator SIMPSON. I am confused, then, evidently. What do these people have to do to fish off the reservation in commercial fishing?

Mr. JIM. They have to come before my committee, the fish and wildlife committee, and mark their spots where they are fishing. If they are fishing here [indicating] they mark that spot with their enrollment number. First, they must make application, then we check it over and put the enrollment number, then we give them a tag, a metal tag made by our law and order department at the jail, the tribal jail. With this tag—they indicate how many nets they have in the river, how many tags they get, how many nets they can run, then if they have these places, then they can only be allowed in these places that are marked.

And so then they have the tags, they have the permission, and they mark the nearest landmark where they fish on the ground so that a regulatory enforcement officer could come and see that, and the Yakima Nation would give them the enrollment number, and this is how it is done, how the patrol is made.

Senator SIMPSON. I take it, then, Mr. Jim, that you are in disagreement with the Washington Fish and Game Commission with respect to the depletion of the fish in the various rivers; are you?

Mr. JIM. Yes, when the chart such as this from the findings of the Washington-Oregon State can prove that we are not a major cause for the depletion.

Senator SIMPSON. Well, I am not saying that. Are you saying—do you think that there is a depletion?

Mr. JIM. I think there is the depletion, which is due to the increased troll and the increased sports fishery, which is enlarging at an alarming rate, and that is jeopardizing everybody.

Senator SIMPSON. And that depletion is going to affect the Indian just as well as the non-Indian, isn't it?

Mr. JIM. Yes.

Senator SIMPSON. And what proposal do you have to help cure this problem?

Mr. JIM. Well, we don't have a proposal, but we discussed this, that perhaps we could have one regulatory head to allow a little more for the Indian catch than there has been, but not have a conflict of interest such as the sportsman and the commercial.

Senator SIMPSON. Well, this is a problem. You have a treaty which antedates all the others, the law and the other rights that have accrued since, the Indians have the prior right under the treaty. Now, these resolutions attempt to resolve that by, in one, recognition of the States' right to regulate, and the other by virtue of purchase. You are opposed to both of those?

Mr. JIM. Yes.

Senator SIMPSON. Now, you admit that depletion is going to affect the Indians of the various tribes. Is your solution to this cooperation in a committee between the States and the Federal Government and the Indians, or how do you propose to help cure this problem, including your tribal council and the Indians in the council?

Mr. JIM. We, as the Yakima Nation, have recognized the fact that we must have conservation management in order to prolong our fish, no matter if the other factors are growing at an alarming rate, or not, and we felt that if the Secretary of the Interior was to regulate all fisheries in this area where most of the rearings come from our tributaries, our reservation, the regulation of the Columbia River, the commercial below landings, the Indian fisheries and the sporting fisheries and the troll fisheries, something like that perhaps could do it.

Senator SIMPSON. You want the Federal Government to do it rather than the State governments in which the waters lie?

Mr. JIM. Yes.

Senator SIMPSON. That is all.

Senator CHURCH. I want to apologize for being late, and I will explain why Senator Jackson and I were late, but I need not go on the record.

(Discussion off the record.)

Senator CHURCH. And I appreciate your opening the hearing and permitting these witnesses to commence with their testimony before our arrival. Thank you. Now, I believe the next spokesman is Mr. James Hovis.

Mr. HOVIS. My name is James Hovis, and I am counsel for the Yakima Tribe, and I do have a statement I would like to present with your permission, Mr. Chairman.

Senator CHURCH. Very well, Mr. Hovis.

Mr. HOVIS. Yesterday's testimony from the Washington departments made most clear that the committee is not having placed before it here the proper background to enable the committee to make a proper determination that is up to the standard of this committee.

First, it was certainly an incongruity to hear the testimony of the purported representatives of the State of Washington when they say that they felt that the Federal Government was interfering with their sovereign rights from court actions, and that they did not want Federal supervision of the fishing areas in their jurisdiction. Why, therefore, may we ask, are they here, and why, therefore are they asking the Congress of the United States for passage of this proposed legislation?

The problem and the answer is that they do not really represent the State or the people of the State of Washington as a whole. These are departments that represent two different harvesters of the fish runs of the northwest streams. These departments themselves cannot get together on what a fair share of the harvest of certain fish is.

For example, this year on the Columbia River, when it was necessary to shorten the season, the department of fisheries cut back the commercial season, the Indians cut back their fishermen, but the game departments did not restrict the sport catch at all. They are joined togther, these two departments, only by one common purpose, and that is to stop Indian landings by any means that they can. They do not have any interest in the Indian landings whatsoever. And I think that the in-court testimony of Dr. Rayner, an expert cited yesterday by Mr. Coniff, is most enlightening. This was given in the case of *Maison* v. *Umatilla*, and I will read this:

> In Dr. Rayner's view, "conservation" is a term which involves a compromise of the competing interest of the many groups of society in that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that by "conservation," the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word "conservation" in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, "I believe that the regulations are necessary to conserve the fish for commercial and sports fishermen, disregarding the needs of the Indians altogether."

I must report to the committee that it is the opinion of many objective observers that this kind of attitude is even more firmly held by the fish department and the game commission in the State of Washington. I think this is best pointed out by our experience in the past. However, our experiences with their unfairness would fill books, and perhaps it is best for me to use an example that is easily verified by the committee by their talking with the members of the Department of the Interior who have been closely connected with this problem.

Contrary to their present position, these departments just 4 short years ago were blaming the Interior Department for failure to take affirmative action to control Indian fishing. When through Mr. Carver's office a definite effort was made to give some guidance in this area, they reversed their position. They found out that the Interior Department was trying to be fair and they refuse to work with them in our area.

I want to tell this committee this, that they do not want regulation for conservation. They want to stop Indian fishing by any means that they can use, whether it be by their undisputed power to regulate, or by purchase. We do not want to be regulated by any such department which possesses this attitude. Can you blame us? And we do not feel that this committee will blame us.

Now, this attitude does not meet the wholehearted endorsement of all——

Senator SIMPSON. May I interrupt you?

Mr. HOVIS. Surely, Senator.

Senator SIMPSON. We all agree that there is a problem. No one questions that—right?

Mr. HOVIS. That is true, yes.

Senator SIMPSON. And you advocate no subjection to the State regulations. Now, are you saying that the tribal council can regulate the thing better than anybody else can, and that they should be sufficient unto themselves?

Mr. HOVIS. Yes, sir. This has been my feeling on the proposition that, in the first place, I think the law gives the Indian people a prior right to these fish.

Senator SIMPSON. What law is this?

Mr. HOVIS. The treaty and its interpretation by the Supreme Court.

Senator SIMPSON. Yes. You have the prior right. No question about it.

Mr. HOVIS. And then, I think that the other areas, the other parties to the case, must allow for Indian landings.

Senator SIMPSON. Well, that's well and good—and that is not in derogation of the depletion of the fish, because that is going to hurt the tribe, too.

Mr. HOVIS. I don't believe that it can ever be shown—and if it can be, then they should stop that fishing under the existing court decisions. But it cannot be shown.

Senator SIMPSON. Now, you say that pretty definitely. That isn't so, is it, Mr. Hovis? There is so much confusion in the opinions of the courts that there absolutely isn't any prospect of stopping it except temporarily.

Mr. HOVIS. Well, Senator, I am not confused by the decisions.

Senator SIMPSON. Well, you stand out above both sides, so that is very interesting, and I am glad you do——

Mr. HOVIS. I'm not confused by the decisions, and I think there is some indefiniteness.

Senator SIMPSON. Well, do you interpret the decisions to say that the State has the right to regulate——

Mr. HOVIS. Where regulation——

Senator SIMPSON. Regardless of treaty rights?

Mr. HOVIS. Regardless——

Senator SIMPSON. Or regardless of anything else?

Mr. HOVIS. Regardless of anything else, Indian treaties or anything else, where that regulation is necessary or indispensable to stop the depletion of the fish run.

Senator SIMPSON. Well——

Mr. HOVIS. The Supreme Court says that.

Senator SIMPSON. I don't see why a lot of people are complaining, then.

Mr. HOVIS. I don't either.

Senator SIMPSON. Go ahead, sir.

Mr. HOVIS. Now, this attitude of the two departments does not have the wholehearted endorsement of all officials in the State of Washington. The Governor of the State of Washington, in March of this year,

said that he felt that the matter of Indian fishing rights was one that was a matter that was best left to the courts.

We are, however, I want to report to this committee, recognizing some change in the attitude of the State of Oregon. And don't get me wrong on that. I am sure that the State of Oregon would, like the State of Washington, want to have absolute control over the division of the fish runs. However, contrary to the departments of the State of Washington who were here testifying, they have begun to give some recognition to the fact that the Indians do have a treaty right that enables them to harvest fish. And with their recognition of that right, they are attempting to work with the tribes and work with the Department of the Interior to allow an Indian harvest and still obtain the necessary escapement. We commend them for that change of attitude, and while there are many problems to iron out, we are working together under a spirit of cooperation.

Secondly, I would like to point out to the committee: What principle of law is it that would accord credibility to the contention given from the department of fisheries yesterday that the State courts control this situation?

This being a question of the interpretation of the treaty with the United States of America, the decisions of the Federal courts must and do control. The *McCoy* case, relied on by these witnesses, cannot be said to be controlling.

However, when regulation is necessary then it is proper. Why don't the States try just once to promulgate regulations that take these principles into consideration? They do not have one regulation to regulate Indian fishing, they only have regulations that prohibit Indian fishing. Those are the only regulations that they have, I repeat.

With the commercial and sports fisheries in the State of Washington, for example, taking 95 percent of the landings in that State, no court attacking this problem with fairness will hold, nor should they hold, that such regulations are necessary and reasonable.

All of the decisions on this subject show that the Indians who have a treaty right have some prior right to these fish. Now, I will admit that it is not clear definitely just what this right entails. But no one, with exception of the witnesses testifying for the State of Washingon, will dispute this fact. The decisions are clear to this point.

And, now, if they do have a prior right, it must be considered. But the States for the present refuse to go where they can regulate, to control fisheries, the commercial fisheries, and the sports fisheries, to maintain runs.

They will not further hamper the interests that they represent, and they therefore wish to foreclose by 170 and 171 Indian fishing in the State of Washington.

The State can, and it was admitted yesterday, is obtaining injunctions prohibiting Indians fishing where those regulations are necessary for the conservation of the run. They may want and do want more, but we respectfully submit to this committee that they are not entitled to any more.

Senator CHURCH. That concludes your statement?

Mr. HOVIS. Yes, sir.

Senator CHURCH. Senator Jackson, any questions?

Senator JACKSON. No questions.

Senator CHURCH. Any questions, Senator Mechem?

Senator MECHEM. These injunctions that you have referred to, do they regulate the amount of fish that can be taken, or do they prohibit the taking of fish?

Mr. HOVIS. They completely prohibit the taking of fish and—I am not completely cognizant of all, but in at least one of these areas they completely prohibit the taking of fish.

Senator MECHEM. They are all temporary and not permanent, are they?

Mr. HOVIS. They are all temporary. And this matter—whether the court will decide or not, I am unable to comment on.

Senator MECHEM. That is all, thank you, Mr. Chairman.

Senator CHURCH. Senator Simpson?

Senator SIMPSON. Mr. Hovis, how do you interpret the phrase in the treaty, the right of taking fish at all "usual and accustomed places in common with citizens of the territory"?

Mr. HOVIS. Sir, I would interpret that portion of the treaty as interpreted by *United States* v. *Winan*, in which the Supreme Court, in one of the earliest landmark decisions, pointed out the Indians had a prior right to these fish and had the right to fish in the usual and accustomed places.

Senator SIMPSON. And did the opinion go on to say, "subject to State regulation"?

Mr. HOVIS. No, sir.

Senator SIMPSON. You are opposed to any State regulation?

Mr. HOVIS. No, sir.

Senator SIMPSON. You are not?

Mr. HOVIS. No, sir.

Senator SIMPSON. Well, you are against it except when, as you say, it is necessary. You would not sell the Indian treaty rights to anyone?

Mr. HOVIS. I don't have anything to sell, Senator.

Senator SIMPSON. I mean your people.

Mr. HOVIS. But I am sure my people wouldn't.

Senator SIMPSON. That is not the answer to the question. I am not being facetious.

Mr. HOVIS. I know that, Senator. Neither am I.

Senator SIMPSON. I am asking you—you are their lawyer. Are you recommending that they sell this or not?

Mr. HOVIS. No, sir; and I will tell you one of the reasons why, and why I think it is unfair.

The Yakimas have been regulating their fishing, and they have been taking a small share of the runs. Now, coming back to 171, to say that they are entitled only for reimbursement for the amount that they have been taking, is to punish the people who have been conserving and to reward those groups who have been taking a lot of fish.

Senator SIMPSON. Well, you wouldn't sell it for any amount of money?

Mr. HOVIS. No, sir.

Senator SIMPSON. So you are opposed to 171 in any form?

Mr. HOVIS. This has been the position of the Yakima Tribe in the past.

Senator CHURCH. I would just suggest to you that the question of the amount of money is entirely open at the moment, and past settlements, as you know, have been very substantial. If the States were to provide by law a provision that would permit the Indians, the Indian people, to continue subsistence fishing in a way that others, non-Indians, may not, that is, by a special allowance for subsistence fishing and, in addition, would pay the Indian people for their treaty right, your position would nevertheless be that this would definitely be against the best interest of the people you represent?

Mr. HOVIS. Yes.

Senator SIMPSON. This commercial fishery is that valuable to you?

Mr. HOVIS. Yes, it is.

Senator CHURCH. Now, you are quite sure that it is?

Mr. HOVIS. We have had that experience, Senator, in The Dalles Dam settlement. We were paid there. We were paid there over the protests of the tribe, and they fought the dam, fought the thing all the way along for years, and finally they came to where they had to make a settlement. At that time they were paid $16 million.

Senator CHURCH. How much, $16 million?

Mr. HOVIS. Yes, $15 million, for just the inundation of these fishing locations. Now, that meant $3,720 for each member of the tribe. You can see how much our fishing has been decreased since that time. There were many people who had made their livelihood by that.

Well, now, they got $3,720 to fix up their house, or to spend some other way. But then—well, Senator, they are untrained. They are untrained and they are going to be a public charge.

Senator JACKSON. How much did the Umatillas get?

Mr. HOVIS. They got the same amount, on a per capita basis.

Senator JACKSON. No, I meant the total amount. There are more Umatillas.

Mr. HOVIS. They got, I think, about $4 or $5 million—yes, it was $5 million.

Senator CHURCH. Can you supply this committee with any statistics showing the economic value of the commercial fishery to these Indian people, what it means in dollars and cents, a real fiscal evaluation of this, so that we can have some measurement of its economic importance to the tribe?

Mr. HOVIS. We have a summary of the report on all the people who were fishing at the time of The Dalles dam taking, of the settlement.

Senator CHURCH. No, I mean now, because that is over with and finished.

Mr. HOVIS. Well——

Senator CHURCH. I mean with regard to the present rights that might be purchased under Senate Joint Resolution 171, for example, so that we can have an idea of the economic value presently to the tribe and what impact such a resolution might have upon them, upon the tribe.

Mr. HOVIS. Yes, we could furnish that material. But, Senator, I think that does not give a true idea. We have many more people who would like to go back to fishing if there wouldn't be so much encroachment upon this run by the white sports fishermen and by the commercial fishermen and the troll fishermen, and if it could become more economical, we have a lot of people who would like to go back to fishing.

Senator CHURCH. You think that this is realistic, to assume that this encroachment can be eliminated?

Mr. HOVIS. No. We are cognizant of the fact that we are a small minority and that——

Senator CHURCH. What I am trying to get at is this. You are, and these Indian people are, trying to ascertain their best interest——

Mr. HOVIS. Yes, sir.

Senator CHURCH (continuing). Realistically and in the face of the present situation and what you might anticipate will be the future situation. Now, I would like to have some hard data which would demonstrate that in the light of present facts and future anticipation that the commercial fishery is of such value as to sustain the position that you take here that it would be definitely against the interest of the Indian people to adopt any other course than the one that you have now adopted, that is, one of unqualified opposition to either approach suggested by either of these resolutions. That is all. And I would just like to get some real data which would sustain this position and make it convincing.

Mr. HOVIS. I want to make it clear that what I am saying is not just my recommendation to the people. I happen to concur. But this is the feeling of the people themselves. They ask me for my idea and they depend on me.

Senator CHURCH. What I would like to see is some economic data which would tend to sustain the situation—this position. I know that there has been some very strong feeling that is involved here that dates back for a long, long time to the original treaties, customs, practices that figure in.

Senator JACKSON. Mr. Chairman, I think one of the fundamental problems here is what are the rights? The court decisions have been a bit difficult, so if you are to implement the legislation of the prior rights, what should the measure of damages be? I think this is the troublesome problem that is before the committee. The courts have gone in so many different directions and have left so many doors open that we do not have many guidelines to follow. I just make that general observation.

Senator CHURCH. I think, too, on the basis of yesterday's hearings—we have not been supplied with the kind of data that we need in terms of what percentage of these fish are being taken by Indian and non-Indian fisheries. What percentage is being taken commercially and what percentage is being taken by the sports fisherman and so forth. I think all of this data has been rather vague and insufficient.

Mr. HOVIS. In our written statement that we filed we have a breakdown, fish by fish, of what has been taken in the Columbia River and so forth.

Senator CHURCH. That is fine. We will look at that. The testimony yesterday by the departments, both Federal and State, indicated that their surveys have been very limited.

Senator SIMPSON. Mr. Chairman, I would like to ask this. I do recognize that there is a problem. The tribes recognize there is a problem and that there is the question of jurisdiction and that it is a muddy one. Mr. Jim advocates that the Department of the Interior do the regulating to the exclusion of the States.

Do you subscribe to that?

Mr. Hovis. It certainly would be good fish management practice to have one agency managing the entire fisheries, particularly on the Columbia River and on the ocean as well. There are now five agencies managing the same fisheries.

Senator Simpson. I take it your answer is the Federal fisheries would be the ones you advocate to do it. Your statement is pretty strong against the State agency and it does not look like any grounds for cooperation between the tribes and the State agencies from what you say.

Mr. Hovis. My statement was primarily directed to the State agencies in the State of Washington.

Senator Simpson. And that is where the bill emanated from. Senator Magnuson recognizes the problem and is trying to resolve it. The prospects seemed a little dim from the testimony I heard here. It seems that the Government is going to have to do something about it in as fair a manner as possible, if it is to be done.

Mr. Hovis. Yes, sir.

Senator Church. Mr. Jim.

Mr. Jim. I would like to present Mr. Watson Totus.

Mr. Totus. My name is Watson Totus. I want to speak on the fishermen, the commercial fishermen on the Columbia River. These people fished down there and that was the livelihood for the Indians. They don't have any education. These fishermen are not employed in other ways. We do not want to see our people be on welfare. What money they make is to support their families. We have fishermen in other tributaries that fish for subsistence to support their children and whatever my other colleagues have stated and we have on the petition, I agree 100 percent with their statements.

I will say this: When my great-grandfathers made the treaty with the United States in Walla Walla, at that time I know from my grandfather, who told me, that if anything, any trouble—we made the treaty with the Government, we gave the land for the people to settle on. We reserved for our children and children that are coming yet—for hunting, fishing, and gathering berries where the old people used to go.

Now, today we hear that these Yakima people on these two bills which are before us—we are not going to move any place, my tribe people, my people are going to live there until the Creator changes the world and we would like to have our treaty protected and exercised by our people. We are here to protect our Indians so that they can go down and get some fish. These commercial people who exploit our people, they ask the Indians to give them the fish. They offer them the money. My grandfather said they had a different kind of money, not like they have today. It was square. They offered them a shirt. They didn't want the money. They wanted blankets or a shirt—that was more of interest to my people.

I will close my statement and I would like to have you look at my treaty. If the treaty says this is as far as it is, we terminate. Then the State comes in and says whoever wants to buy our treaty rights, we don't want to sell our rights, because my people are still growing as long as the sun is going.

That is my concluding statement, gentlemen.

Thank you.

37-688—64——6

Senator CHURCH. Thank you very much. You certainly made your position clear and stated it most eloquently.

Senator SIMPSON. I want to say that these gentlemen have been wonderful spokesmen for the Yakima Council. Mr. Hovis made an excellent statement, and the statement of all of these gentlemen comes from their hearts and from their knowledge, and were very good, and I want to compliment them on their fine presentation.

Senator CHURCH. I want to thank you for coming.

Our next witnesses come from the Makah Tribal Council.

First, Alvin J. Ziontz, who is the attorney, and you have Mr. Charles Peterson and Mr. David Parker with you.

Mr. ZIONTZ. That is correct.

STATEMENT OF ALVIN J. ZIONTZ, ATTORNEY FOR MAKAH TRIBE

Mr. ZIONTZ. I know you will be covering the same ground. We have already furnished the committee a rather lengthy statement which I think summarizes our position. I would like to make some remarks to the committee to emphasize certain points and to rebut.

Senator CHURCH. The full statement will be included in the record.

(The statement referred to follows:)

STATEMENT OF MAKAH INDIAN TRIBE

I

The Makah Indian Tribe of Neah Bay, Wash., is deeply concerned about Senate Joint Resolutions 170 and 171 now under consideration by the Senate Subcommittee on Indian Affairs. We are concerned because these resolutions would directly affect the welfare and livelihood of over 18,000 Pacific Northwest Indians. We are further concerned because these resolutions are put forward in the name of fish conservation, a subject about which we believe we can contribute some knowledge. Finally, we are concerned, because these resolutions once again bring into question the integrity of the U.S. Government with respect to its treaties. In this respect, the resolutions are a matter of concern not just to the Makah Indians, nor just to the Pacific Northwest Indians, but to all American Indians.

HISTORICAL BACKGROUND

We believe that a proper understanding of the impact of these resolutions requires at least a basic understanding of the historical setting out of which they arise. As is well known, the Northwest Indians of America, residing along the Northwest coasts, inlets, streams, and rivers, were a fishing people. Their culture was oriented around fishing and from time immemorial fishing was their main source of sustenance.

During the treatymaking period in American history, these Northwest Indian tribes ceded large areas of land to make room for the coming of the white man, and withdrew to reserved areas. Typically, the coastal reservations are small in area. For the most part, the land on which they are located is wholly unsuited to agriculture. Some of the reservations are fortunate in having some marketable timber, and apart from fishing, this is the only resource to which the Indian has been able to turn for economic sustenance.

However, it is historically indisputable that all of the tribes of the Northwest coast negotiated their treaties with the U.S. Government to attain one principal right: the right to continue to fish as a way of life. The Indians were deeply fearful that confinement to a reservation might in some way limit this right. In Washington, they were assured by the then U.S. Government Agent, Governor Stevens, that this right would be forever secure. It was only upon receiving this assurance that the tribes entered into the treaties. Furthermore, this fishing right had reference primarily to the usual and accustomed grounds and stations outside of the reserved areas, since in many cases, the reservations themselves did not include rivers and streams which would provide sustenance from fishing.

It is for this reason that all of the treaties affecting these Indians contain the following covenant: "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory." The "in common" phrase has been a source of difficulty to the Indians ever since because the States have attempted to interpret this phrase to mean that State regulation was applicable to Indians and non-Indians alike. However, in *U.S.* v. *Winans*, 198 U.S. 371, (1905), the U.S. Supreme Court held that this view was untenable, saying:

"The right to resort to the fishing places in controversy was a part of the larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which these rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a granting of rights to them but a grant of right from them—a reservation of those not granted. Citizens might share it, but the Indians were secured in its enjoyment by special provision of means for its exercise.*" [Emphasis supplied.]

While the policy of the U.S. Government toward American Indians has shifted radically among a number of objectives since the time of the treaties, one factor has remained fairly constant. That is, to teach the Indian the ways of civilization in order to raise him out of a primitive barter economy, and bring him into a money economy. The Indians were relatively quick to learn. At the time of these treaties, that is to say, around 1855, the Northwest Indians fished, using spears and fish traps, dip nets, even gill nets woven from whale sinew. By 1893 Indians were using seines and drift nets, and by 1900 were using gill nets and selling fish commercially. But by this time, as fishing took on commercial significance, the white citizens of Washington began, what was to be a continuing clamor to eradicate the Indians' treaty fishing rights.

In practice, this campaign meant arrest of Indians for fishing by State fish and game wardens; harassment and intimidation, all designed to discourage the Indian from fishing. In many cases the campaign was successful. Many Indians did not fish certain rivers and streams for years because of fear of arrest. But, periodically, when arrested some Indians had the courage, and occasionally the funds, to challenge these arrests, and the result is written in the legal history of the State of Washington and of the U.S. Supreme Court.

As early as 1905, the U.S. Government went to court to enjoin a number of Washington residents who were excluding the Yakima Indians from their "usual and accustomed grounds" on the Columbia River. This was the case of *U.S.* v. *Winans*, 198 U.S. 371. The Supreme Court found that the defendants had, on several occasions, taken court action against the Indians for trespassing, and claimed exclusive possession of fishing areas under licenses granted them by the State of Washington. The Court enjoined the defendants from obstructing the Indians in the exercise of their fishing rights on the Columbia River, and as mentioned above, rejected the contention that the Indians had no greater right than any other white citizen of the State.

The archives of the Washington Historical Society show that in 1915 the U.S. Indian agent of the Tulalip Reservation made an eloquent plea to the Washington Legislature to honor the Indians' treaty rights and to cease the policy of trying to harass the Indians out of fishing. The appeal has been to little avail.

In 1942, Indian fishing in the State of Washington was again before the U.S. Supreme Court. The case was *Tulee* v. *Washington*, 315 U.S. 681. The Washington statute provided:

"It shall be unlawful to catch, take or fish for food fish with any appliance or by any means whatsoever except with hook and line * * * unless license so to do has been first obtained * * *."

The Supreme Court denied that the State had any right to exact a fee from a treaty Indian for fishing with a net and rejected as "too narrow" the State's contention that the Indians enjoyed not greater right than other citizens with respect to its fishing regulations. The Court held the Washington statute invalid as applied to Indians.

In the case of our own tribe, State fish and game officials prevented us from fishing on the Hoko River from 1933 to 1951, when the Ninth Circuit Court of Appeals restrained the State of Washington in the case of *Makah* v. *Schoettler*, 192 F. (2d) 224. The Hoko River, about 10 miles each of our reservation, is part

of the area ceded by our tribe to the United States, and is a "usual and accustomed fishing ground." In 1933, State officials stopped our fishing on the Hoko by threatening to arrest fishermen and confiscate their fishing gear and equipment. They succeeded by these threats in intimidating us from fishing on the Hoko until we finally prevailed in court. The State argued that the Makahs were subject to the regulation which prohibited fishing except with hook and line. But the State had to admit that since salmon could only rarely be taken in the river with hook and line, its regulation in effect amounted to closing the river to the Makahs. The ninth circuit court granted us an injunction and held that the State had failed to show that its regulations were necessary for the conservation of fish on the Hoko River.

Thus the historical pattern is clear. From the time that fishing became a commercially significant industry in the State of Washington, the white citizens of the State have been reluctant to share the valuable resource with their Indian brethren and have found sympathetic ears in State officials with law enforcement powers who resented any exception to the uniform dominion of State law over all persons. Always, the effort has been to clothe this campaign with respectability and this has been accomplished under the banner of "conservation." There has been what we feel to be a shameful effort to paint a picture of the Indian as deliberately wasteful and greedy of the resource, and unwilling to accept sound conservation management practices. We sincerely feel this characterization to be false, and we believe a fair examination of the facts concerning the fish resource will show this to be so.

II. PRESENT STATUS OF LAW CONCERNING INDIAN OFF-RESERVATION FISHING

In the preamble to Senate Joint Resolution 171, it is recited that litigation has not resolved the issues presented by State regulation of Indian fishing. No doubt there are many groups in the Northwest which feel that the issues have not been resolved satisfactorily to them, but we believe it inaccurate to say that the issues have not been resolved. In a long line of decisions, including the *Tulee* case, above referred to, and the recent case of *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation*, 314 F. (2d) 170, the nature of the Indian's right under these treaties to fish off the reservation has been spelled out. The law of these cases is clear: when *indispensable for the conservation of fish*, the State may impose reasonable regulations upon Indians fishing off their reservations, provided the State meets the burden of proving that such restriction is necessary and the resource cannot be maintained without such restriction.

These cases, however, have not said that in regulating for such purpose, the State may treat the Indian as having no greater right than the non-Indian. And it is no doubt this refusal to totally eradicate the Indian's treaty rights which has frustrated these groups and has caused them to call upon Congress for help.

The critical factor is the right created by the treaty. Again and again the State authorities have urged the courts to hold that the right to fish at usual and accustomed places in common with other citizens of the State meant that the Indian enjoyed no better right than any other citizen of the State. Again and again, the courts have rejected that argument. It is obvious that such a construction would make the treaty negotiations a sham, and the express language of the treaty, a fraud. As said by the Supreme Court in *U.S.* v. *Winans*, such a construction would mean that the Indians acquired no rights under the treaty but such as they would have without the treaty. Said the Court, "This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more."

III. THE FISH RESOURCE AND FISHING PRACTICES

In discussing Indian off-reservation fishing, we are dealing primarily with the salmon. It is well known that these fish are hatched in fresh water rivers and streams, spend varying amounts of time in the rivers or streams feeding, and then migrate to the sea. There they attain most of their growth, and, after ranging far out to sea, they return to the streams of their origin to spawn and die. Although these fish feed while at sea and immediately prior to entering the spawning streams, once they have commenced their journey up the stream, they do not ordinarily feed. This latter factor is significant since it means that for the

most part, salmon cannot be caught with hook and line in streams and rivers, since they will not take bait.

The nature of the salmon life cycle determines the method of fishing. Under Washington fishing laws, the only commercial fishing which is permitted is offshore fishing. Such fishing is done by commercial boats equipped for either trolling or netting. The only exception is a commercial fishery which is permitted by State law on the Columbia River. State law forbids the use of any nets or fish trap device upon any other rivers or streams in the State.

Therefore, in order to engage in commercial fishing under Washington law, it is necessary to own or operate a commercial fishing boat equipped and rigged to fish with nets or trolling lines. These boats operate from northern California to Alaska, and in their effort to make a living from the sea, American commercial fishing boat operators must compete with Canadian, Russian, and Japanese fishermen. The commercial fishing industry has in recent years suffered chronic economic poor health. A commercial fishing boat usually represents a very substantial investment. As foreign fishermen modernize their fishing fleets, it is necessary to invest in more elaborate equipment and to engage in more extensive operations in order for fishing to be economically feasible. As matters presently stand, an investment in a fishing boat is an extremely risky proposition and the results often do not justify the investment. Many American commercial fishermen stay in the industry only because it has become a way of life with them. In addition, commercial salmon fishing on American inland waters is highly competitive, and the American fishing fleet comprises several thousand fishing vessels.

Washington fishing laws make no provision for Indian fishing. Under Washington law, those who fish for their livelihood must acquire a commercial fisherman's license, purchase a commercial fishing boat and fish offshore. Net fishing is prohibited on rivers and streams. As a practical matter, salmon cannot be fished with hook and line in rivers and streams. It is clear therefore, that if the fishing Indian is to survive, he must fish with nets or similar gear in rivers and streams. The only alternative for him is to somehow find capital to purchase a commercial fishing boat, and embark on this venture, ranging far from home, and being gone for months at a time.

IV. VALUE OF THE RESOURCE

It is well known that salmon are an extremely valuable resource to the State of Washington. According to the 1960 report of the Washington Department of Fisheries, the wholesale value of salmon to Washington fishermen was in excess of $20 million in 1955. At that time a survey of the fishing industry in the State showed a total capital of investment of almost $64 million, and the activities of the fishing industry contributed a net addition of over $34 million to the incomes of State residents. This indicated a capitalized value of the industry estimated at approximately $693 million. But these figures do not tell the whole story. As world population grows, the demand for this resource increases, and their relative scarcity makes for constant friction among the groups competing for the resource.

Wholly apart from the commercial value just mentioned, it is necessary to consider the sport fishery. It is impossible to evaluate the salmon sport fishery with any accuracy. However, we do know that with respect to studies made of two broods of hatchery fish, the sports catch ranged from 70 to 77 percent of the total catch of the brood. There are thousands of dedicated salmon sports fishermen in the State of Washington and their number increases each year as the State's population grows. The sports fishing also has an extremely heavy impact on tourism. One of Washington's major tourist attractions is the fine salmon sport fishing available. Tourism is an extremely valuable economic asset, being Washington's second largest producer of out-of-State dollars. The result is that the needs and desires of sports fishermen have far-reaching impact. They involve not only the sports fishermen themselves, but in addition, motel and resort operators, hardware and sporting goods stores, and communities which rely upon the sports fishermen and tourism for their livelihood. This is reflected in the Washington State Sportsmen's Council, an extremely powerful organization well organized and well financed to promote the interests of sports fishermen.

The members of the committee are no doubt familiar with the battle among competing interests for the salmon resource. This is reflected on the State

level by a constant struggle between commercial fishermen and sports fishermen for the resource. State regulatory officials have an extremely difficult job in trying to keep both groups satisfied. And this would continue to be the case even if there were not a single American Indian living in the State of Washington.

V. FACTORS AFFECTING THE MAINTENANCE OF THE RESOURCE

The task of maintaining the fish resource through sound conservation practices is intensified by the increasing competition between sports fishermen, American commercial fishermen and foreign commercial fishermen. But in addition to the ever-increasing pressures among these groups, the problem is made far more complicated as a result of the byproducts of an expanding population.

Natural salmon propagation requires a delicate balance of conditions in streams and rivers. This balance has been upset and salmon production severely curtailed and in many cases destroyed, by the inevitable result of expanding civilization. For example, water pollution due to industrial waste and contamination, and due to urban sewage pollution, has contributed heavily to elimination of spawning grounds. As the demand for electric power increases and more dams are built, the result is further reduction of spawning grounds. Even sophisticated efforts to establish bypasses and fish ladders have not been wholly successful in maintaining salmon runs. Finally, logging and urban development have destroyed required spawning conditions as a result of physical interference with the rivers and streams, and erosion due to logging and land-clearing operations have disturbed the balance of nature.

All of these factors can be controlled, although unfortunately in many cases, it is too late.

We have been deeply concerned with the problem, since fishing is such an essential part of our life; and we are concerned not only for ourselves but for our children and our children's children. We have availed ourselves of the services of the U.S. Fish and Wildlife Service and of competent scientists at the University of Washington. Recently, in a report made to us by the fishery management biologist of the U.S. Fish and Wildlife Service, in connection with our interest in a Makah fishery program, this official summarized his views as follows:

"The reasons for general decline in salmon stocks are varied and complex. It is extremely difficult to measure one factor against another to determine the major cause of the decline. Some general obstacles to maintaining large spawning areas are obvious. Following are a few:

"1. Increased industrial pollution of streams.
"2. Increased migration barriers (dams, logjams, etc.).
"3. Increased diversion of water for irrigation and industrial use.
"4. Watershed destruction.
"5. Rapidly increasing, and difficult to control, fishing pressure."

VI. INDIANS AND FISH CONSERVATION

The modern American Indian is vitally concerned with conservation of natural resources. Unlike too many of his white brethren, he has long been aware that nature's balance, once destroyed, cannot be resurrected. He is particularly concerned when, in the case of our Northwest Indians, he realizes that destruction of the resource may very well mean starvation for himself and his children. This is not to say that there are some Indians, just as there are some whites, who are shortsighted and unwilling to practice self-restraint. But ordinarily in this country we do not punish a group for the misbehavior of some of its members.

In assessing the role of Indian fishing in the overall fish conservation picture, it is important to realize that the overall Indian catch is less than 5 percent of the total catch. It will no doubt be argued by some that even if the Indians only take a small percentage of the total catch, nevertheless the percentage which they take represents a significant proportion of the brood stock going upstream to spawn. We believe that with a few exceptions, this is not a correct description of the facts. For example, a 5-year study of the Hoko River, fished by our Makah Indians, gives a more realistic picture. The study covered the period 1953–58 and during this period the statistics compiled by the Washington State Department of Fisheries showed that of the salmon spawned in this river which were returning, sports and commercial fishermen caught 45 percent; 40 percent were permitted to escape up the river to their spawning grounds. The fish caught by the Makah Indians represented 15 percent of the total number

of fish returning to spawn. At the same time these statistics showed that the salmon run was maintained at a relatively stable level despite the absence of State regulation of our fishing.

Our tribe has fishing regulations in effect for the purpose of conservation, as do most of the tribes of Washington. But tribal regulation of fishing is not and under present conditions cannot be a satisfactory solution to the problem. Tribal councils find it extremely difficult to establish and particularly to enforce these regulations against their own tribal members for several reasons. First, tribal law enforcement officers do not have any law enforcement powers outside of the reservation. Second, and perhaps most important, tribal councils have no way of knowing what regulations are actually necessary for proper conservation. Fisheries management is an uncertain science at best. But certainly no control measures can be established without first having some basic factual information necessary to establish an overall plan.

As pointed out by the representative of the U.S. fish and Wildlife Service whom we consulted, before a fishery program could be designed for our tribe, a comprehensive biological study would be necessary. We are told that this study will determine the range of conditions which exist in a given stream system and complete information must be obtained about the environmental factors through review of literature and records, through verbal interviews, and in addition field data must be collected regarding temperatures, waterflow, spawning ground conditions, fish populations, etc. As much as our fish-producing streams contribute to the overall economy of the State, little has been done by either the State or Federal fisheries agencies to perpetuate the runs of salmon originating on Indian streams and rivers. Few biological studies have been made of Indian streams and rivers. There has never been a determination as to how logging and roadbuilding operations in the watershed of our streams affect the eggs, fry, fingerlings, and salmon of our streams. All of these things and many more should and must be known in order to arrive at a program to assure a sustained run of salmon. Without this biological information, it is impossible for Indian tribal councils to establish regulations with any confidence that they represent valid conservation measures. Furthermore, since State fisheries officials have never acceded to the idea that the Indian is entitled to a fair share of the salmon, it is difficult for the Indian to escape the feeling that the restrictions requested by the State are imposed merely to provide more fish for sports and commercial fishermen with no allowance for the Indian economy.

VII. STATE REGULATORY POWER OVER INDIAN FISHING UNDER PRESENT LAW

As we pointed out, there are examples which can be found of Indians in the State of Washington who have refused to exercise self-restraint in their fishing practices. While we may understand the reasons for their behavior, we do not condone it. Nevertheless, we do not believe that the Indian citizens of the State of Washington and of the Pacific Northwest generally should be made the scapegoat for the practices of a few. Likewise, we do not believe that the Indian fishermen should be made the scapegoat for salmon depletion, when every reputable study of the problem clearly points to other factors.

Under present law, State officers can arrest and convict any Indian fishing off the reservation by establishing that the fishing regulation imposed is indispensably necessary for conservation of fish in the stream or river involved. While this may be an uncomfortable burden for State officials, nevertheless it is a responsible and workable one.

The State officials in Washington, however, would like to end all Indian commercial fishing on streams and rivers for all of the reasons we have mentioned earlier. They would prefer not to have the responsibility of studying these streams and rivers to determine whether in fact restriction of Indian fishing is indispensable to conservation. We state unequivocally that where the State can demonstrate that restriction of Indian fishing is indispensable to conserve salmon in a given stream or river, that such restriction should be imposed, and any Indian violating it should be arrested and penalized.

VIII. SENATE JOINT RESOLUTION 170 AND SENATE JOINT RESOLUTION 171 ARE UNJUST AND UNSOUND

We believe that Senate Joint Resolution 170 and Senate Joint Resolution 171 are unjust, unsound, and unnecessary. They represent a hasty and poorly thought out approach and, if enacted, would create problems of a far greater magnitude than any which they might resolve.

Senate Joint Resolution 170 declares that any State legislation enacted pursuant to it is in furtherance of and not in derogation of the treaties involved. However, analysis of the language of the resolution makes it plain that it is utterly in derogation of the treaties involved. Under the language of this resolution, the Washington State Supreme Court would have no difficulty in finding that all present State fishing regulations are effective and applicable to Indians fishing at usual and accustomed grounds, and all such fishing could be immediately terminated by a wave of arrests. This would follow since the resolution merely requires that if State regulations are "for the purpose of conservation of fish," and are "equally applicable to Indians and other citizens without distinction," they are "in furtherance of the purposes" of the treaties. Since present Washington law declares that it is for the purpose of conservation of fish, and since the law makes no provision for Indian fishing, all such law would become immediately applicable.

As pointed out above, this would have the effect of making the Indian treaties meaningless. Specifically, the "equally applicable" language of the resolution would destroy the Indian treaty right in its application, simply by virtue of the fact that State regulations applicable to non-Indians prohibit net fishing on rivers and streams. A regulation is not consistent with the treaty merely because it applies to all persons indiscriminately. The rights reserved to the Indians were important and substantial and since they were reserved rights, they were and are substantially greater than the rights of non-Indians. It follows, that to limit the Indian's rights in this area to that of the whites is to take away those rights reserved by the treaty. This precise question was before the Court in the *Tulee* case, where the State of Washington argued that since its license laws do not discriminate against the Indians, they do not conflict with the treaty (315 U.S. 681 at p. 684). The U.S. Supreme Court held that the Washington law was in conflict with the treaty, and was therefore not valid as applied to the Indians.

In addition, the phrase, "for the purpose of conservation of fish" would seem to have the effect of doing away with the necessity for the State to show that the regulation in question was indispensable, or even necessary for the conservation of fish.

If, in a given case, Indian fishing on a particular stream was not damaging to maintenance of the salmon run on that stream, it would be of no help to the Indians involved, since their fishing would be prohibited in any event under the general State law prohibiting commercial or net fishing, which is declared to be for "the purpose of conservation of fish."

The effect of Senate Joint Resolution 170 would be to immediately end all Indian offreservation fishing in the State of Washington, regardless of whether Indian fishing on a given river was depleting the run of fish or not. It is therefore either a gross error, or else a mockery for the resolution to state that such regulation is "not in derogation of the treaties involved." This is tantamount to saying simply that A is not A.

Senate Joint Resolution 170 would strike a death blow at the treaties governing some 18,000 Indians in the area involved. It causes us deep concern and is a source for deep resentment among the Indian people who feel that they have fulfilled their obligations under the treaty.

It is difficult to consider the circumstances under which such harsh and punitive legislation would be justified. But certainly, it cannot be justified in the absence of solid factual studies, showing that this is the only solution to the problem. As we have pointed out, there is a glaring absence of such factual studies, and much needs to be learned about our salmon resources before plunging boldly ahead in this field. In this connection, we strongly feel that Senate Joint Resolution 174, introduced April 23, by Senator Warren G. Magnuson, is a step in the right direction. This resolution calls for a survey by the Bureau of Commercial Fisheries of the Department of the Interior to determine the commercial fishery resources of the United States and the entire extent of the commercial fishing industry in the United States, and to recommend regulations or precautionary measures deemed to be necessary or advisable for the protection, conservation, and management on a sustained yield basis of the fishery resources. It does not behoove the Congress of the United States to unilaterally abrogate solemn treaty rights with a dependent people on the basis of generalizations rather than solid facts.

Likewise, we believe that Senate Joint Resolution 171 is an unjust and unnecessary resolution. It would authorize the purchase of Indian fishing rights and

spells out a formula for compensation. Once again, we state that no such drastic step should be considered until and unless biological studies of our streams and rivers demonstrate that there is no other alternative. For we are confident that such studies would show that the white citizenry of the State of Washington can live very well alongside their Indian brethren who fish for a livelihood, if the State officials are willing to resist the pressure of interested groups, and to acknowledge that the Indian is entitled to a share of the fish resource.

Although Senate Joint Resolution 171 would seem to present the Indians with the possibility of a windfall, we believe that if carried into effect a program of purchase by condemnation might create short-term wealth, but long-term poverty. By taking away from the Indian the economic base of his existence, the Federal Government would merely insure the worsening of Indian poverty. Furthermore, the compensation formula spelled out in Senate Joint Resolution 171 would operate to reward those Indians and Indian tribes which in the past had fished without restraint, and would penalize those tribes which had acted responsibly. For these reasons, and for the reasons which we have outlined earlier, we believe that like Senate Joint Resolution 170, Senate Joint Resolution 171 is premature, unjust, and unnecessary.

IX. SOCIAL EFFECTS OF SENATE JOINT RESOLUTIONS 170 AND 171

If Indian fishing were to be terminated under either Senate Joint Resolution 170 or Senate Joint Resolution 171, the social consequences upon the Pacific Northwest Indians would be far-reaching. In our own case, every one of the approximately 500 tribal members living on the Makah Reservation would be personally affected, since all of us depend to some extent on fishing as a livelihood and as a means of sustenance. Recently, we had the pleasure of attending a national conference on Indian poverty held in Washington, D.C., at which time we heard an address by Secretary of the Interior Udall and other officials of the Federal Government, all to the effect that the massive resources of the Federal Government were mobilizing to meet the problem of Indian poverty. This was explained to us as part of the general war on poverty in our society. It makes no sense to us, therefore, for the Federal Government on the one hand to spend millions of dollars and thousands of man-hours of highly skilled personnel to attack the problem of Indian poverty by attempting to develop an economic basis for Indian subsistence, and then on the other hand to enact legislation taking away from the Indians the very economic basis upon which their lives have revolved from time immemorial.

Furthermore, such legislation would seem to us to conflict with the stated goals of our Government with respect to Indian development. These goals have been, as we understand them, to transform the Indian from a helpless, economically dependent ward of the Government, to an economically self-sustaining group. The effects of either of these resolutions, would be to further weaken the American Indians involved, to make them more dependent and to deepen what is already serious poverty. It is our prediction that if the Congress passes either of these joint resolutions, thousands of Indian families will have no recourse but to go on the welfare rolls of the States involved.

X. ALTERNATIVE APPROACHES

First and foremost we believe that biological studies of the rivers and streams involved are an absolute prerequisite to any legislative action in this field. To do otherwise would be to work injustice and create hardship. We believe that such studies should be conducted by a Federal agency such as the U.S. Fish and Wildlife Service for obvious reasons. In this connection, we heartily endorse Senate Joint Resolution 174 and suggest that it be made more specific to direct the survey to include Indian rivers and streams in particular. Such studies would even relieve the burden of which the State of Washington presently complains, in that it would provide the State and the Indians involved with the facts and figures concerning these fish resources and would lay a proper and solid foundation for imposition of conservation restrictions on Indian fishing. It would avoid doing violence to the treaties between the Indians and the U.S. Government as the State now advocates.

Further, we believe that a substantial amount of good will and understanding must be substituted for the vindictive approach which presently exists. The white citizens of the State of Washington, and in particular the State officials

who are in sensitive positions in this area must be willing to accept the fact that the Indian is entitled to a fair share of the fish resource in order to support himself and his family. Considering that past records show the overall Indian catch to be approximately 5 percent of the total catch in the State of Washington, we do not believe this is asking too much.

We suggest that after studies have been made of Indian streams and rivers, that Federal conservation standards be jointly arrived at between the agency conducting the study and the Indian tribes involved. A program of Federal enforcement of such agree conservation measures could be worked out.

XI. CONCLUSION

To the American Indian, the treaty is a living document. Though often ignored, circumvented and trampled upon, the treaty continues to occupy a position of prime importance to the Indian. It is difficult to convey the depth of feeling of the American Indian on this subject. It is indeed unfortunate that once again in our history, our non-Indian neighbors have found it so difficult sharing, even in the most unequal proportions, the natural bounty of this country. It is sad indeed that the Indian is again called upon to defend against another onslaught, one of the remaining precious assets left to him under his treaty. Nevertheless, we are here for just that purpose. We know there are men of good will among all the groups who urge you to pass Senate Joint Resolutions 170 and 171, but we are confident that if they knew all of the facts they would realize their mistake. We hold no brief for those few Indians in our State and elsewhere who demonstrate callous disregard for sound conservation practices, but we feel that the States involved have full power to regulate and where necessary convict such offenders. We ask only that all of the Indian people not be condemned for the acts of a minority. In the final analysis, we rely upon your sense of fairness and honor.

Mr. ZIONTZ. Thank you very much, Mr. Chairman.

Let me begin by saying, as I have listened to the testimony given this committee yesterday and today, I have been struck by the one characteristic, and that is we seem to be dealing with a good many generalizations.

A lot of the general statements had, unfortunately, a paucity of facts to back them up. We know, for example, that this legislation is really at the request of the authorities of the State of Washington to the Congress asking for help. To hear the people from the State of Washington Department of Fisheries and Game, present the case, one would come to the conclusion that the State of Washington is faced with a crisis, unprecedented in its history, requiring drastic action, action which would, as admitted by these officials, take away some valuable rights of the Indians.

Now, I think it might be of some assistance to this committee if I were to probe some questions of how much a real crisis this is. I believe that one of the officials from the Bureau of Indian Affairs put in evidence with this committee a letter dated 1889 in which this problem was treated as a pressing problem in the same period. My own research has shocked me when I look at documents dating back to 1905, 1915 and they sound as contemporaneous as the testimony we heard yesterday.

The cry that the depletion was critical, that if the Indian fishing was permitted in the State of Washington, the run would disappear in a short time.

In other words, the point that I make is that I do not believe we are faced with the crisis as seen by some of the officials responsible for maintenance of the fishery sources in the State of Washington. All one has to do as a lawyer is just look at the line of cases stretching back

to the *Winans* case in 1905 and going down to the *Umatilla* case in 1964 to see that the State of Washington has been before the courts again and again raising this issue and making the same contentions; namely, that fishing by Indians is unregulated, that unregulated fishing equals a threat to the run and destruction.

Furthermore, urging the courts in case after case to construe the treaty language, that portion which provides that the right to fish—urging the courts to construe this to mean that the Indians have no greater right than other citizens of the State, only to be turned down by the courts because this would have made the treaty meaningless. There would have been no need for the treaty.

I point out that these factors are here because I think this can give us a little perspective on the situation that we have here today. I do not sit before the committee and contend there are no problems in the area. There certainly are. There certainly are Indians in the State of Washington and perhaps elsewhere who have not exercised self-restraint.

Senator SIMPSON. Is that only common to the Indians?

Mr. ZIONTZ. I do not believe so, Senator. I assure you there are Indian poachers and others. Nevertheless, we do not try to punish the majority for the acts of the minority.

One of the factors that has, I feel, not been directly touched upon in the testimony thus far is what is really at stake here. The generalizations made by the representative from the attorney general's office in Washington run along this line—that we need regulations for conservation. These are very abstract terms and regulation is a word constantly used, and I think we ought to examine the specifics of this word "regulation."

The State of Washington by regulation doesn't mean, in practice, a modification of restriction in some way—lessening of the privilege. If we examine the existing State laws with regard to fishing, we find that this is the fact: That the State of Washington's laws declare that it is illegal and prohibitive everywhere except on the Columbia River for anyone to fish for salmon except with a hook and line.

In other words, there are only two categories of legal fishing regulations in the State of Washington. Either you are a sportsman out there with a hook and line or you are a commercial fisherman licensed by the State and fishing offshore under the regulations and provisions imposed upon commercial fishermen. So that the regulations of the State of Washington—the regulations that they have would, in effect, if it were applicable, if there were no treaty standing between the State and Indians, would immediately stop Indian fishing, except for the hook and line, but, there is the irony, and there is the rub, because the fact of the matter is, that it is impractical to catch salmon on the rivers and streams with hook and line because the salmon on the rivers and streams are coming back to spawn and when they are coming back to spawn they generally do not feed and do not take bait. So that in fact this type of regulation really means prohibition and therefore, if regulations were applicable as proposed by Senate Joint Resolution 170 the result is not regulation, but closure, total destruction of the right.

Senator CHURCH. You said this was applicable to all streams and rivers except the Columbia. Will you distinguish the State law as it affects fishing on the Columbia River?

Mr. ZIONTZ. Yes; I will. The States does permit a commercial net fishery on the Columbia, although I understand there are plans to severely restrict that in the very near future. One of the reasons I don't have great familiarity with the situation on the Columbia—I should say I would like to present to the committee a map showing where our reservation is and the area with which we are concerned.

This area on the lower right hand is the extreme northwest tip. Prior to the admission of Alaska this tip was the extreme northwest corner of the United States. This area marked out by the double red line is the ground of the Makah Tribe. This tribe ceded this entire area under the treaty of 1854 and removed themselves to this reservation which was a very small reservation in the extreme northwest tip. Historically the Makah Tribe is a fishing, sealing, and whaling tribe. Historically they go thousands of miles to sea in dugout canoes to hunt seals and whales as far as the Pribilof Islands. This has all been terminated by international treaty. The Makahs confine their present fishing to the rivers and streams immediately adjacent to the reservation. This would be the Hoko River at the extreme edge here, the Sekeiu River, the river here, and here. This is immediately adjacent to the reservation.

I point up that we are not directly involved or concerned with the Columbia River.

Senator CHURCH. They also fish along the sea?

Mr. ZIONTZ. Yes; adjacent to the reservation, that is. It would be our interpretation that Senate Joint Resolution 170 would take away even the right there because these areas are for the most part closed to commercial fishing and only sports fishermen are allowed to fish in this area under State regulation.

I would be happy to introduce this map as part of the record.

Senator CHURCH. Without objection it will be made part of the files.

Mr. ZIONTZ. I was referring to the regulation. The reality of regulation as preexisting under Washington law is that it is not really regulation because, as pointed out by previous witnesses, there is no provision for Indian fishing. You are forced into one of two categories, sports or commercial. You cannot fish with nets on the rivers and streams.

Now, another issue that was raised by the State and which I personally believe is a special one and is the question of who is an Indian. The State claims we don't really know. It is impossible for us to administer this system. I haven't heard this raised before. The State, I believe, is using this as a legal stratagem in the cases now pending. I would like to show a card to the committee, a tribal identification card. The tribe has a roll, although some of these rolls are old, but the tribe maintains a list of who are recognized as tribal members and legally we know that these treaty rights, the right to fish in the usual places, are not individual rights, they are tribal rights. They are regulated by the tribe. If an individual exceeds those regulations he is acting without tribal sanction and without legal authority—he is acting as an individual.

Another question I would like to take up at this point is the question of whether the law is a state of confusion. I am quite familiar with the cases and I know that the cases have certainly not spelled out the quantum of the rights. They do not spell out the age of the fish which the Indians are permitted to take under the treaty. I think it would be unsual for a court to do so. I don't think there is any real confusion to the effect that the courts have said that this right, this treaty right, is subject to regulation by the State. It does impose certain burdens on the State of Washington which the State is rather unhappy with. It requires them to assume a burden of proof. The State doesn't like to be burdened with the proof because it would require that they show depletion.

We can look at some of the actual cases where the State has had to introduce that kind of testimony and see to what level that has risen.

In the *Maison* v. *Confederated Tribes of the Umatilla Indian Reservation*, which the members of the committee have displayed great familiarity with, they will recall that the Federal court found that the State of Oregon's expert witnesses, when called to testify, admitted that although as a general proposition unrestricted fishing could intentionally destroy the run, in fact that was not happening. On the contrary, Mr. Thompson, this witness, admitted that the Indians had never shown a disposition of marked intensity. He admitted they had been increasing in the streams. Then, in the absence of depletion there would be no need for regulation.

Senator SIMPSON. What is the basis for that increase? Is that evident in the testimony?

Mr. ZIONTZ. No; it is not indicated in the opinion.

Senator SIMPSON. Was it State planting, or did you find this was due to a bigger run, or what?

Mr. ZIONTZ. No evidence of any State planting. The opinion indicates that this was a completely unregulated situation; that is, except for Indian self-regulation.

Again, the testimony is replete with the kind of generalization we have been hearing here. There is no evidence that it did result in depletion. Again, I would point out another example of this kind of generalization when put to the test, how it fell to the ground.

As to our case, *Makah* v. *Schoettler*, 1951, in that case the State's witness admitted that their regulation would result in effect in the closing of the stream altogether to Indian fishing, and it appeared to the court that the regulation was not necessary for the maintenance of the salmon run in the stream.

The court pointed out that if there was a need for regulation there could be a partial closing for a period of 2 months, but it stated—the State said it was too expensive for it to administer that kind of system. They wanted a full closure. They did not admit it in so many terms or words but they thought in terms of imposition of State regulations resulting in total closure.

The State admitted that they had in effect, with other tribes, entered into a cooperative noncompulsory system, but in the case of our

tribe they wanted to take the trouble to do so. They stopped fishing on the Hoko River from 1933 to 1952. The court said:

We cannot commend Washington's many years of denying the Makahs the fall salmon necessary for their food and support without at least seeking to make such a cooperative agreement with them.

In other words, our position is this: We believe that under the present law the State has all the power that it needs. We don't equivocate when we say if, in the case of any Indian or tribe which is fishing to a degree that will result in depletion, the States finds that this is the fact, they should stop that fishing, they should bring those Indians into court, whether it is criminal or otherwise, and they have done it. There are a number of cases. We say that is perfectly proper. We don't protect anyone who is ignorant or ignoring conservation practices. But we say that this type of legislation, 170 and 171, is punitive, premature, and not founded on solid fact—and it is unnecessary. This is a clean sweep in the field and I am sure they don't want to take individual cases up.

If any tribe such as ours could prove conclusively that our fishing in any way did this it would be of no help to us at all, because the result of 170 would be that any State law that desires and declares it is for the general purpose of conservation, that is, is applicable to Indians without any special recognition of a treaty right and the general State law in Washington as I described, outlaws Indian fishing, as I pointed out.

Senator SIMPSON. Would the resolution be acceptable if the provision was made excepting the Indian treaty?

Mr. ZIONTZ. I am not sure I understand.

Senator SIMPSON. If you make it subject to the rights of the Indians under the treaty.

Mr. ZIONTZ. Then I would see no point in any resolution.

Senator SIMPSON. You would be against the resolution in any event?

Mr. ZIONTZ. Yes. I would point out to the committee another thing, too, which certainly would result in litigation if the resolution were to be enacted. It strikes me as dubious legality for Congress——

Senator SIMPSON. How do you interpret the phrase "same rights as other citizens"?

Mr. ZIONTZ. Meaning this: that no discriminatory legislation can be enacted which restricts Indian fishing to a greater extent than white fishing.

Senator SIMPSON. How about regulations?

Mr. ZIONTZ. The reverse doesn't hold true. That is tricky. If you say this is not inconsistent with the treaty because the law applies across the board without exception, what you have done is cut it out and eradicated whatever superior rights existed and this court held for many years is simply not the case.

At this point I would like to ask Mr. Parker to give the committee some of his views on the need for further information in this area.

Senator CHURCH. Very well. Mr. Parker.

STATEMENT OF DAVID PARKER, REPRESENTING MAKAH TRIBAL COUNCIL

Mr. PARKER. I am David Parker, Makah Indian.

I have fished for in excess of 20 years, fished the rivers and I have fished this area that was outlined around that was ceded to the Government.

I have also always lived on the reservation. I have been within our tribal council for in excess of 20 years. I have been involved in fisheries, on fishery committees, practically all that same amount of time.

I have six children, two grandchildren. And these two bills that are up for consideration, and you people are looking for information that would help make up your minds—regarding our fishing, we have had regulation for a number of years.

Senator CHURCH. Tribal regulations?

Mr. PARKER. Yes. We have adopted ordinances that we would more or less try to guarantee that we would have a sustained run of salmon year after year.

In trying to figure out how to adopt true conservation regulations, it becomes a problem, because we lack information on our streams. To begin with, we have not had any studies on our streams either performed by the State or the Federal Government. It wasn't until 2 years ago that the Bureau of Indian Affairs saw fit that there was a need to have competent people come out and take a look and try to solve this problem, because of pressures exerted by the courts, commercial people, and everybody else. They saw fit about 2 years ago to send out or appoint one man, a biologist who works for the State, to become a fisheries management specialist.

Now, this man—I would imagine his duty is to take care of all the fishing problems in the Pacific Northwest. He is tied up in the office, where actually he is of no help to us. We would like to know a number of things and I think this is real important to arrive at a true conservation regulation and this is the problem right now.

We are expected to draw up regulations that would guarantee these things.

First of all, we don't know what the actual production of our streams are.

Senator SIMPSON. Let me ask you. Do you know the people on the tribal roll?

Mr. PARKER. Yes, I know every one of them.

Senator SIMPSON. It is difficult to get on that roll, is it not?

Mr. PARKER. They have to meet the qualifications.

Senator SIMPSON. If they meet them you put them on?

Mr. PARKER. Right.

Senator SIMPSON. It just is not accorded anybody because he claims to be an Indian or claims to be a member of the tribe?

Mr. PARKER. No, it is not.

Our problem is that we know nothing of our streams. We don't know, say, how many spawning salmon we should allow to go up in arriving at a good fisheries management program. I think this is vital. We don't know, actually—this has been going around—we

blame the sportsmen, we blame the commercial fisherman, we blame foreign countries, we blame the logging industry, we blame pollution. When they get tired of blaming the Indian, they will blame pollution. When they get tired of that they will blame commercial people. But it is because of this lack of information which could be, I imagine, gotten after a study, or if they would look into this problem—in our case there are some studies.

Senator CHURCH. I agree with you. We need more information on this whole picture than the testimony thus far. I should think we are going to need it. We are going to need it, but everyone is going to need it. Your main complaint at the moment is that you have never been given sufficient criteria based on competent studies to know how to regulate your own fisheries so that you can be guaranteed of this sustained yield, is that right?

Mr. PARKER. Absolutely right. It is one of our responsibilities as councilmen, to draw up regulations that we hope might guarantee us a sustaining run of salmon and because of the lack of this knowledge—this is an awful hard thing to sell to anybody where we are left with this study and responsibility to try to draw up these regulations. We don't know the proper amount of fish that is being allowed to escape for brood stock. We may allow too many. There is always this possibility. We may allow, say, enough, or we may not allow enough. We don't even know which category we fit in. As long as we don't have these studies, any regulation that any tribe—any regulation that is offered to us without these biological studies—and this is something that is entirely lacking and I think this also points the picture to the problem that the State does have.

Senator SIMPSON. Let me ask you, Mr. Parker, were you or were any of the tribes a party to the investigation and study made by the three States in 1961? Were you invited to join in that study?

Mr. PARKER. No, we haven't been invited to attend any study. We have been trying to get studies.

As I pointed out, we have one fish management specialist. I guess he is a fisheries management specialist. So far under—and they recognize there is a problem. Our problem is, with this one man in there, his job is to say, advise all the reservations, or advise all the tribes that do have a fishery.

As was said, he is tied up so that actually he does advise us all right, and apparently he has realized that there was a need for increase in personnel, so the Federal Fish and Wildlife Service has assigned one of their men to him and he is the man who is actually doing some studies on our reservation now.

Senator CHURCH. I see.

Mr. PARKER. But there are so many tribes that are going to be standing in line and if this is a problem as serious as everybody says it is, then by the time he gets down to this end of some 40-odd tribes this could be within the next 50 years going at the rate they are going now. I say that if this is the problem, then what we should do is get enough personnel in, make studies on these streams and decide who is actually contributing, say, the greater amount.

If the Indian is responsible for, say, contributing overly to depletion, then it is time that we change ourselves to go along with any

recommendation that is made by these people, these people who know fisheries.

Likewise, if other people—the commercial fisheries, sports fisheries, or pollution or the logging or the watershed, the building of roads along our watersheds—if any of these other people are responsible for depletion, I think we should put percentages as to who is contributing what percentage, and if they are shown, well, then, they likewise should be restricted or corrections be made.

Senator SIMPSON. Off the record.

(Discussion off the record.)

Senator CHURCH. Did you have anything further?

Mr. PARKER. That covers it.

Senator CHURCH. Fine.

Mr. Peterson.

STATEMENT OF CHARLES PETERSON, REPRESENTING MAKAH TRIBAL COUNCIL

Mr. PETERSON. I am Charles Peterson, a member of the Makah Tribe.

I served on the council for 22 years. I commenced commercial fishing in 1929.

I think the State has failed to recognize Indian regulations. We have, oh, ever since I can remember, regulated our streams on the reservation and as the court determined, we were allowed to fish on the Hoko River, we were told to get together with the State and work out a workable regulation to govern the Hoko River, which we did, and we will submit a copy of those regulations for the record.

The State keeps mentioning the fact that the Indian fishing is unregulated. I believe this is merely because they don't have, in effect, the power to regulate these streams themselves. We feel that we are not qualified to regulate them, but I think that as far as studies go, we have just as much qualifications as they have. They haven't really gone into any biological survey on the reservation or any of the usual things to determine just what type of regulation should be made.

Repeating what Mr. Parker said, we feel that this is important and I would like to bring it out again. I think the pollution factor, logging, in the off season—I have done an awful lot of logging, put a main line road right up the river there and you can tell as we built the road, the spawning grounds were injured, gravel was taken right out of the road, bulldozers and draglines in there to assist the logging company in making the roads.

These things were never interfered with by the State. The logging company seems to be able to go ahead and do as it pleases.

We have a copy of a report by the Fish and Wildlife Service and pictures to show some of the logging that is being done at the present in the upper reaches of the rivers here where the logging company is dragging logs right across the rivers. It seems to us that if you are a large enough corporation, then the State regulations don't affect you.

The sport fishing industry in our area is growing to where now the Indian in the chart we showed you, surrounding reservations, has hardly a chance. The competition is too severe.

Last year the sport regulation, I believe, allowed—the State regulation allowed the sports fisherman three per day and six per week. We see once in a while out there, maybe once every 2 weeks, or once every 3 weeks, a fishing enforcement officer. This past season, the one that we are in now, they changed the regulation, so this year they allowed you to take two fish and you are obligated to carry a punched card.

Now, the sportsmen, rather than coming out there with their partners, he takes maybe 2 or 3 with him or maybe the rest of his family and each one carries a card instead of maybe taking 6 in the party or a dozen or 15 or 20 salmon. I think on the reservation the sportsmen go out and if they get the limit in the first day, they will have it canned, shipped out, cured, and shipped home so that they never are caught with over the limit of what they are allowed.

I think there is too much emphasis put on the Indian portion of the depletion of fish. By their own statistics they admit we never catch over 5 percent of the fish in our streams. In our area it is probably less. One commercial fishery in the area will catch more than that in the entire system. This is one boat. And there are hundreds of those.

I think that these two bills, 170 and 171, are not so much to the depletion of fish, but just to eliminate the Indian fisherman. That's my impression of them.

Senator CHURCH. Have you had experience in recent years in your own usual customary fishing places as to definite depletion in the number of fish?

Mr. PETERSON. You mean over a period of years? I would say that the fish fluctuate so badly that you cannot determine whether one particular factor is, say, causing the depletion. I know in my own kind of fishing, in my time, years have been bad. No biologist, Bureau of Fish and Wildlife Service, nor the State, can account for any particular decline in any one specific run.

A year ago, in the early part of the season there was a tremendous amount that migrated to the sea. In the fall they didn't come back. There are other factors that enter into these things.

The foreign fishing industry plays an important part in the fish that we catch in the State of Washington and is a real factor that has to be considered. The Japanese offshore fishing in the North Pacific is a tremendous factor.

I fished in the Gulf of Alaska and I know that the salmon we caught with the hook and line, a great percentage of them have run through the Japanese gamut and probably escaped. But you could see there was a tremendous amount that had been affected by that particular run. The Japanese themselves have sent two biologists into the Bristol area to determine just how much fish the Americans were catching in that area. If they were actually doing it right to sustain the run of fish—in 1958 the Japanese figured that the Americans weren't taking enough of the fish. They were allowing too much to escape in the Mackinac areas. They said if this is going to happen continually that they would take their portion out of the organization because it is just a waste. I happened to be in that area at that time and I knew that these things were happening. Then, of course, in the following year the Americans wondered what happened to the fish. Well,

the offshore fishermen snapped it up. They said that that was it. We can do it with tremendous effort.

I think a good, sound study, a good sound biological study, to look over the spawning areas, and checking the logging, pollution of the water—all of these would give us a better idea of how to control our fish and who is actually causing the greater run of depletion. There is no question but what we have said if a biological study shows that we are the major factor, then we will go along with them.

Mr. ZIONTZ. May I briefly say something?

Senator CHURCH. Yes.

Mr. ZIONTZ. I simply want to point out that despite some isolated examples which can be found in the State of Washington, by and large we are dealing with people who are economically marginal people, dealing with people whose average annual income is $1,500 or $1,600 a year. In the case of our tribe, a substantial amount of that is derived from fishing.

I note that the House is now considering the poverty program. This is the war on poverty. It seems incongruous for the Federal Government to be undertaking a massive program to resolve the problem of pockets of poverty when we have here a hard core of poverty, Indian poverty, which has been with us a long, long time, and to enact a bill to take away from these people, we are taking away their economic base. All we are doing is transferring money from one pocket to another and putting these people on welfare, by and large. It seems to us that just doesn't make sense, because certainly one of the long objectives was to encourage the economic independence and not dependence of the Indian people, and this is the reason why we oppose 170 and 171 which would make us a more dependent people.

We appreciate very much the opportunity to have appeared before the committee and we are confident that the committee will give our position careful consideration.

Senator CHURCH. Thank you.

The committee is going to have to stand in recess now. The Senate has gone into session. But, in order to accommodate witnesses who have come long distances, who still have not been heard, we are going to ask the Senate for permission to take up again at 2 o'clock this afternoon. We hope we can secure that permission and hope we can finish today.

(Whereupon, at 12:05 p.m., the committee recessed to reconvene at 2 p.m. of the same day.)

AFTERNOON SESSION

Senator CHURCH. The hearing will come to order.

We will call first upon the members of the Puyallup Tribal Council. Mr. Frank Wright, chairman, Mr. Silas Cross, vice chairman, and Mr. Malcolm S. McLeod, attorney.

Mr. McLeod.

STATEMENT OF MALCOLM S. McLEOD, ATTORNEY, PUYALLUP TRIBE

Mr. McLEOD. Thank you, Mr. Chairman.

Mr. Cross will be here in just a moment.

This is Frank Wright, the chairman of the tribal council on my right, and Mr. Cross will be here in just a minute.

I might say that I have marked some maps showing where this tribal area is, and it is different than the other cases, the other tribes you have been hearing from.

The Puyallup River flows into the southern end of Puget Sound at the city of Tacoma. There is approximately a population center there of 225,000, so that our problems are a little different. It is right in the center of a metropolitan area.

Now, I have prepared a short statement here. We would like at a later date to put in some additional material.

We have several cases. I noticed that one of the earlier witnesses discussed the right of Congress to regulate the Indians and one of the principal cases holds that Congress does have a right to regulate or abrogate a treaty and that is the *Lone Wolf* v. *Hitchcock* case.

I have the citation of it here, which is 187 U.S. at page 553 from 565 to 566. A 1903 case.

Now it is true that Congress has the power to abrogate a treaty. But I would like to quote from that case. It says:

> Presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding stipulations of the treaty but may demand in the interests of the country and the Indians themselves that it should do so.

I believe the Government should demonstrate objectively that there is a necessity for this abrogation of this treaty. These Indians come under the Treaty of Medicine Creek entered into in 1855.

The State of Washington became a State in 1889. So there is no question that these rights are established. I have briefly two cases here I would like to make a part of the record. They are the *Pioneer Packing Company* v. *Jack Winslow*, found in the Washington reports. Also I believe that is found in 294 Pacific at page 557.

I have made a copy of that case, and it says briefly:

> The right and the title of the Indians in and to the fish in the streams and their reserve lands was not abrogated on the admission of the State into the Union in view of section 4 of the enabling act in which the State expressly disclaims all right and title to the unappropriated public lands and to all lands owned or held by Indians or Indian tribes unless the same shall be extinguished by the United States.

Senator CHURCH. Your position in regard to these two cases is it simply affirms the fact that a treaty right exists?

Mr. McLEOD. Yes.

Senator CHURCH. Whatever that right may be?

Mr. McLEOD. That is correct.

Senator CHURCH. Very well.

We will accept those cases and make them a part of the record by reference. Your prepared statement will be printed at this point.

(The statement referred to follows:)

STATEMENT OF MALCOLM S. McLEOD, PUYALLUP TRIBE OF INDIANS

The United States took 2,236,000 acres from the Indians under the Treaty of Medicine Creek in 1855 and gave back a fishing right the Indians already owned without restriction—now this sole asset of this tribe is seized by the State by intimidation, arrest, and jailing of all Indians who dare to fish although the treaty guarantees protection by the United States.

That the United States took 2,236,000 acres from the Indians under the Treaty of Medicine Creek (Sha-nav-ham Creek) in 1855, 6,000 Indians were assembled at Medicine Creek near Olympia at the mouth of the Nisqually River by Gov.

Isaac Stevens who was also the area military commander and the treaty was read twice to the Indians by way of interpreters from English to Chinook jargon (with a 300-word vocabulary consisting of French, English, and Indian words) to the Salashan language. It is readily apparent that the Indians had no idea what the treaty contained and in any event the United States had failed and refused to keep a single provision of the treaty. The grossly inadequate consideration has never been paid and the United States has just finished the first 100 years of shameful neglect of these Indians. Now, the Indians are coming to the end of the trail, to be stripped of their sole remaining asset, their fish. The Puyallups were approximately 80 percent fisheating in their aboriginal state, today to get 5 percent of their diet on salmon they must risk being jailed, arrested, thrown into the drunk tanks of local jails, and constantly harassed and humiliated by members of State game commission, State patrol, and members of State fisheries patrol.

Should citizens be jailed for exercising a right guaranteed by treaty?

What barbarous philosophy of an enlightened democracy allows its police power to be so recklessly applied to a sovereign minority? Why has the Indian Bureau looked the other way when the Indians have asked for relief from invasion of their reservations, arrests, and jailings? The Indians I am proud to report have kept every provision of the treaty although the United States has not, and the Indian Bureau of the Department of Interior has unilaterally scrapped the treaty and abandoned the fishing rights of the Indians to the political pressure of the commercial fishermen and the sports fishermen, who use the State police power for the convenience and necessities of their investments on the one hand and pleasure on the other.

The BIA has refused to face the moral question of interceding on behalf of Indians arrested and jailed for fishing on their own reservation.

On January 6, 1962, three dozen State game department officials with a dozen automobiles, a reconnaissance plane, radios and State patrol vehicles invaded the Nisqually Reservation and the usual and accustomed fishing grounds of the Nisqually Indians where they seized the net and equipment and fish of Melvin Iyall, a member of the Nisqually Tribe. To this date the BIA Portland area office has done nothing on this and many other cases. Melvin Iyall's fishing gear was held 65 days and the criminal case against him was dismissed. This storm troop seizure of this member of the Nisqually Tribe and his gear was closely geared to front page press all over the State of Washington. Meanwhile, during the 65 days that the State of Washington illegally held Melvin Iyall's gear, his family was deprived of the means for a livelihood. The attached photographs in exhibit A will verify the press coverage of this shock troop attack on this innocent band of 100-percent original Americans (second class).

Is it unreasonable for Indians to ask for help from the BIA from these type of raids on Indian fishing locations?

The Portland area office of the BIA can be likened to a certain priest and Levite for their attitude in helping Indians protect their fishing rights. Like "a certain priest" and "likewise a Levite" who left a man half dead on the road from Jerusalem to Jericho and "passed by on the other side," so the various officials of the Portland area office and the U.S. district attorney passed by on the other side hoping that no one will see or report their compromise. President John F. Kennedy adopted a very commendable policy on Indian rights: "There will be no change in treaty or contractual relationships without the consent of the tribes concerned." He also promised that his administration would: "Discharge its moral obligations to our first Americans."

Unfortunately, this enlightened legacy of our martyred President has never penetrated the BIA which has honored the traditional abandonment of the Indian fishing rights.

Pollution and dams are killing the salmon but the Indians are blamed.

The city of Tacoma recently admitted using copper sulfate in quantities resulting in extensive fish killing in the Green River and they have been using it for algae control (see news article in exhibit A). The city of Tacoma pumps the bulk of its sewage into the Puyallup River from its plant near the Lincoln Avenue Bridge. The State of Washington recently enjoined Heath Plating, Inc., from dumping waste chemical acids into a creek or ditch which drains into a branch of the Puyallup River. These two instances of grossly negligent use of highly toxic wastes are only a small fraction of the regular daily pollution of this important salmon producing stream. The white man is destroying the fish runs and squandering this great resource according to the same pattern

evolved for the buffalo. Since there are presently in excess of 30 industrial concerns which make a daily contribution in some degree to the pollution of the Puyallup River they should be required to shoulder some of the responsibility and expense of preventing or reducing pollution as well as rehabilitation of the salmon runs in the river which they have helped destroy. Considering the effect of dams, industrial users, and pollutants, commercial fishermen and sportsmen, the Indians can expect the same carnage to be applied to the salmon runs as the plains Indians experienced in losing their greatest subsistence recourse—the buffalo.

The Puyallups can expect the same careful "planning ahead" and the same "conservation" which the BIA has practiced in the past on the preservation of the buffalo, to be applied to their salmon runs. Is it morally in the public interest to sacrifice the livelihood of these Indians for the benefit of these groups? We should never concede that the true public interest and the moral behavior of our Government agencies are incompatible. Might does not make right, as we dearly demonstrated in the Second World War. This problem should never be referred or relegated to the BIA or any other agency of the local or Federal Government but by an organization that can give it a competent, impartial study and review so that our statesmen can give this problem the vigorous and reasonable approach it deserves. The Stanford Research Institute or the Brookings Institute could make an objective study of the extent and nature of the fish runs in the Puyallup River and devise a rational formula for preserving the run as well as the dignity and the honor of the United States. It is true that the Congress of the United States can unilaterally abrogate the treaty of Medicine Creek, but it should be done only when there is shown an overwhelming need for such abrogation. This need to wipe out the economic base of a small tribe of Indians must be objectively demonstrated by an impartial and competent group of experts. Because fishing is a way of life with the Puyallup Indians, the denial of their last remaining source of livelihood is a devastating blow to their economy. Since last November when they were enjoined from fishing the tribe has developed a "pocket of poverty" from which there is no foreseeable relief. Congress should intercede on behalf of the Indians until there is an objective demonstration of the need for so drastic a remedy as an injunction closing off fishing.

Isn't it time that we honor the personal promise of President John F. Kennedy by having the Department of Justice move to dissolve the injunctions forthwith? J.F.K. said:

"Indians have heard fine words and promises long enough. They are right in asking for deeds * * *."

That this impartial investigation should evaluate all of the factors adding to the fishery as well as all factors detracting from the fishery, so that before any rash legislative action is taken it may be done on the basis of logic rather than the emotion of the moment of any particular group.

[From the Seattle Post-Intelligencer, Jan. 6, 1962]

Palefaces Raid Indian Fish Nets on Nisqually

(By Stan Reed)

Wild West days—with a reverse twist—returned yesterday to the lower Nisqually River country between Tacoma and Olympia. A band of palefaces ambushed unsuspecting Indians.

Equipped with a dozen automobiles, a reconnaissance plane, radio communication, and a battle plan painstakingly worked out during the past 2 months, three dozen State game department members combed the area for Indians illegally fishing for steelhead.

When the raid ended after more than 8 hours of sorties in wet brush and on the muddy, swollen stream, five Indians had been arrested and charged with operating set nets capable of taking game fish.

Ellsworth O. Sawyer, field commander who synchronized operations of units stretched along a 4-mile strip of the river from its mouth, said war was declared on the Indians because:

"The number of steelhead taken in the river with gill nets by nontreaty Indians put our reproduction program in jeopardy."

Treaty Indians are those with fishing rights guaranteed by the Medicine Creek Treaty of 1855. They include the Nisquallys, Puyallups, and Squaxins.

Sawyer, game department protector, said his department "has been working months to identify treaty Indians.

"We lean over backward to protect their rights," he said. "But nontreaty Indians have no right at all to net game fish in these water. They must be stopped, or game fish eventually will disappear."

Peace terms in the new war on the Nisqually will have to be worked out in court. The five arrests are expected to result in test cases that will determine whether the State or the Indians are right.

Ernies Gleasson, 62, Chehalis Indian taken into custody by the warring wardens, mildly protested his arrest.

"I'm married to a Nisqually and I've fished in this area most of my life," Gleason said. "I never have overfished the river. But I have a tableful of children to feed. This will be hard on them."

Another Indian, though not affected by the arrests, voiced strong disapproval of the raid.

"There is going to be a lot of starving because of this," she said. "My grandfather fished here and his father fished before him. We can't survive without our fishing rights.

"And what are we going to do about the canoes that were taken? We're dead without them."

Nets, boats, outboard motors, fish, and all gear of the five arrested Indians were seized by the game department to be held as evidence.

One disgruntled Indian, allowed to continue with his fishing, placed the blame for the warfare squarely on the shoulders of the sports fishermen.

"Their rights are considered above ours," he said. "So we lose our livelihood simply because they won't give up even a small part of their recreation. It isn't fair."

And, as has been the case immemorially in the ranks of the besieged, there was dissension among the Indians, themselves. A few of the unscathed treaty Indians expressed pleasure in the prospect of having less competition on the waters of the Nisqually.

But there was no division in the game department forces. All, from recruit protectors to John Biggs, department director, insisted the job had to be done.

Voice of the People—Fish Depletion

To the Post Intelligencer:

Wittingly or unwittingly we in Washington State are involved in the ancient and dishonorable practice of scapegoating—a technique old as history itself. We, the perpetrators, will find in the long run, we, too, are its victims. For one day we will pay the price for our delay in meeting the real problem and of conquering the challenge of fish depletion—and a heavy toll it will be indeed.

Our State department of fisheries tells us that the Indians take only 2½ percent of our fish altogether; 87½ percent goes to the commercial fisherman and 10 percent to the sportsman. But the Indian is defenseless so we point the finger and accuse him of creating a problem not of his making.

The true despoiler of our fish and streams are the dams and industries—the paper mills—the lumber mills whose waste products pollute the streams. Who tackles these difficult problems? It's easier to bark up the wrong stream and scapegoat the Indian. So we violate our solemn treaties, and erode away our honor. The Indian loses his livelihood and we delay the day of reckoning.

The sports fisherman take three times as much of the salmon as does the Indian; however, sports fishing is closely interwoven with the tourist industry and no one has seriously dealt with the ramifications involved.

The courts have spoken. The Supreme Court of the State of Washington ruled in July 1955, in *State* v. *Satiacum* that if the Indians treaty guaranteed fishing rights are curtailed, he must be compensated.

The Federal court ruled in the *State of Oregon* v. *Mason* that if conservation of fish is necessary then sports fishing must be curtailed before Indian treaty rights to fish in usual and accustomed places are violated.

We continue to scapegoat the Indian. We engage in illegal costly activity which precedent says the courts are unlikely to uphold. And we do not solve

our problem for even if all Indian fishing were stopped, the problem of salmon run depletion would be with us still. Let's bring reality back into focus and take another hard long cool look at our problems.

SARA D. KAPLAN.

MERCER ISLAND.

[From the Seattle Times, July 19, 1964]

TWO RECENT FISH KILLS LAID TO CHEMICAL

Two recent fish kills on the Green River probably were caused by copper sulfate put in the river by the city of Tacoma to destroy algae and improve water taste, a State game department official said yesterday.

Carl Crouse, assistant director of the department, said the dead fish have not been analyzed yet but "I am quite confident the chemical was to blame."

Cliff Erdahl, director of Tacoma utilities, said that he is concerned about the fish kills, but he added that the use of copper sulfate is a widespread and an accepted method of improving a city's water supply.

"We'd like to review our procedure, and in the meantime we have agreed not to use copper sulfate," Erdahl said.

Crouse said that the normal procedure is for the party responsible for the dead fish to pay for replacing them.

"It is a very small item, in terms of dollars and cents," Erdahl observed, "but I'm sure we'll meet our responsibilities as they come along."

Erdahl said that Tacoma never had had difficulty with copper sulfate. Crouse agreed that it is the accepted chemical for algae control. "But it has to be controlled carefully * * * an overdosage could be quite damaging," Crouse said.

The first kill, reported June 23, occurred below the Howard Hanson Dam and killed mostly trout and whitefish. An accurate count could not be made, Crouse said.

The second, July 17, occurred on the north fork of the Green River. Crouse said that one angler reported counting 80 dead native cutthroat trout.

Copper sulfate, Crouse said, does not affect the edibility of fish.

The city of Tacoma will test the chemical in the river tomorrow with observers from the State Pollution Control Commission and the State Game Department present.

"We're sincerely interested in trying to solve the problem," Erdahl said. "We're not purposefully trying to create any."

Mr. McLEOD. At this time I would like to have Mr. Cross present his testimony before the committee.

Senator CHURCH. Fine. Mr. Cross, we are happy to welcome you here today.

STATEMENT OF SILAS V. CROSS, VICE CHAIRMAN, PUYALLUP TRIBAL COUNCIL

Mr. CROSS. First, I would like to present my identification card.

My name is Silas V. Cross, and I am a member of the Puyallup Tribe. Our roll is not up to date but there is a card we use to identify us.

Senator CHURCH. Fine.

Mr. CROSS. I have been delegated to appear for the fishing committee.

I have been delegated to a task force meeting in Spokane, Wash., in 1961, at Norway Center in Seattle, Wash., on April 18, 1962, and at the Tacoma Indian Mission, and I believe this committee should get the individual tribal views from other than the Bureau of Indian Affairs. We have given our views on different problems and requested assistance but the BIA has failed to respond in almost every case.

We are not biologists nor lawyers. The only way we can present our evidence is by the newspapers, State records, court records, and through the records of previous hearings.

We ask that the records be kept open for further evidence sanctioned by the Puyallup Tribal Council for the Puyallup Tribe.

I have two compositions besides this statement to turn in for the record.

The first is composed of pictures of the sport catches with a statement included. It also shows a small map above the reservation boundary of the Puyallup Tribe. The map shows the sportsmen fishing areas in the spawning grounds. This is only a small portion of the spawning grounds, but all the spawning grounds are closed to the Puyallup Indians.

On Nos. 40 and 41 (see Sports Fishery in appendix), on the top of our reservation, the sportsmen fish on the spawning grounds above there, we fish about a mile below that, near the mouth of the Puyallup.

Senator CHURCH. Fine. Since the pictures as such cannot be published in the record of the hearings, this document will be placed in the file in connection with the hearing where it will be available for reference.

(The material referred to will be found in the committee files.)

Mr. CROSS. Over 1 million salmon were caught by sport fishermen in Washington waters in 1963. The record catch included 437,000 humpies which showed in astounding numbers in numerous ocean and Puget Sound areas. Estimated silver catch of 1963 was 428,000, second only to the record catch of 1957.

Last year's Chinook sport catch of 265,000 was exceeded only in 1956 and 1957. Salmon take at Westport, pegged at 173,791 salmon was topped by the catch in 1962. In 1952 this figure was a mere 2.5 percent and in 1962 it was 36.3 percent, one-third of the total catch in the State of Washington. The Columbia River catches hit an all-time high of 148,000 salmon. The total catch in the Puget Sound and San Juan Island region was figured at 555,723, the highest ever recorded here. This is only a part of the total sport catch as there are possibly hundreds of boat launching areas that are not checked by the fisheries patrol officers.

The irony of it is that these sports people do not eat all the fish they catch but just fish to pass away their leisure time and they catch the fish just to kill them. But the Indians fish for their own existence, or subsistence.

The second composition is composed of articles on the Tacoma News Tribune, Seattle Times, Fishing and Hunting News, other papers, statements from the records of the Washington State Department of Fisheries, also letters of correspondence from the BIA with the Puyallup Tribal Council.

I have two copies of that.

Senator CHURCH. Very well. These documents will be included in the file where they will be available for reference.

(The material referred to will be found in the committee files.)

Mr. MCLEOD. I believe most of those are printed and I think they probably could be made a part of the record.

Senator CHURCH. I think in view of the bulk it would be best to take note in the record of their availability so that any member of the committee will have access to them.

Mr. CROSS. These articles have been publicized in the form of propaganda conspiracy against the Indians in order to get Congress to take away their fishing rights.

The State is trying to intimidate us out of our fishing rights rather than pay for them.

There are 10 different pages of explanation on the different articles in the book. (See news stories to Senator Jackson.)

The first few pages show part of the 2,236,000 acres of land the Indians gave up to reserve their fishing and other rights. There are thousands of acres of spawning grounds in this area.

The Puyallup Indians catch fish which come from all over the lower Puget Sound. Fish which come from as far as the Deschutes River in Olympia, Wash. The actual catch which comes through the river is only a small percentage of the fish caught by the Indians. The fishing in Commencement Bay is only nighttime fishing. The Indians use a large size net for kings, 8 to 8½ inches, which allows an escapement of fish up to 18 pounds. This size net is too small for the larger size king salmon. This large size net allows an escapement of silvers and pinks except the extra large size. When the Indians fish silvers, they lose the kings because the gear is too small to hold the kings. This testimony is in the 1961 record of the hearings held in Tacoma, Wash., in October of 1961.

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.

The commercial fishermen in Washington took $23 million during the 1963 season. Of this total, 31,114,500 were pinks. Commercial netters in Puget Sound hit it big, taking 93,042 Chinook or king salmon, highest Chinook total since the 1937 catch of 93,000 fish. One purse seiner is capable of taking over 13,000 fish in a single day.

West Beach, at the northwest tip of Whidby Island, produced nearly 2 million humpies for the netters, while another 2 million were taken in other sound areas. Chum salmon catch in Seattle, Rolling Bay, and South Puget Sound areas reflected an all-time record for the commercial fishermen.

The sportsmen fish 7 days a week from dawn to dark without much restriction. After they get a day's bag limit they take them home and go back for more.

The sportsmen take an average of 14,000 up to 18,000 steelhead per year from the Puyallup River while the Indians take from 900 to 1,500 fish on the average. The sportsmen take these fish right behind the Puyallup Indians. They took 18,000 fish that passed right through all our fishermen. Although the sportsmen claim the Indians kill off the fish runs, it is obvious from this catch that the sportsmen get the lion's share of the fish.

The State fisheries and game department has no intention of ever cooperating with the Indians. They slapped an injunction against the Muckleshoot Tribe and it worked despite the court decisons in order to protect their fishing rights. The State slapped injunctions against

the Nisqually, Skagit, and Puyallup, even though our fishing areas are on the reservation.

The contention that the Indians take all the fish has been refuted time and time again by the State of Washington's own figures.

Robert Robinson, fishery administration officer for the department of fisheries, has, without justification, sworn under oath an affidavit of the fish records of the Puyallup Tribe. He has raised and added the total yearly catches on the Chinook salmon from 2,000 to 5,000 fish. He has raised and added the yearly catch from 8,000 fish to 14,956 on the silver salmon. He just added these figures on to our records to make them higher and make it look like we were taking more fish. He picked them out of the air, because their published figures show their discrepancies.

The Puyallup Tribe is now served with an injunction, and has been restrained from fishing the Puyallup River by misleading facts, misleading statements, false testimony, sworn under oath by the State game and fisheries department.

I think this committee should recommend our injunction be lifted until a future study can be made by an uninterested independent source.

Senator CHURCH. Thank you very much, Mr. Cross.

Mr. CROSS. I have some tribal ordinances and fishing regulations I would like to insert at this point, also a resolution.

Senator CHURCH. They will be printed here.

(The data referred to follow:)

PUYALLUP FISHING RESOLUTION

Whereas under the treaty of Medicine Creek the Puyallup Tribe of Indians has fishing rights on the Puyallup River, Commencement Bay, where they have fished since time immemorial on all usual and accustomed grounds and stations; and

Whereas the fishermen within the tribe have requested the Puyallup Tribal Council to establish law enforcement of the Puyallup tribal fishing rights. The council has the power to conduct fishing operations on their usual and accustomed stations for and on behalf of the tribes; and

Whereas in the interest of conservation and with the idea and intention of cooperating with the Indian Fisheries and Game Commission: Now, therefore, be it

Resolved, That the Puyallup Tribal Council is hereby authorized to enact ordinances and request assistance from the Interior Department of the Bureau of Indian Affairs to assist on the procedure for establishing a tribal judge and patrol officer to act on violations of fishing ordinances.

THE JUDICIARY ORDINANCES OF THE PUYALLUP INDIAN TRIBE, TACOMA, WASH.

Be it enacted by the Tribal Council of the Puyallup Tribe:

SECTION 1. There is hereby created the Puyallup Court of Indian offenses which shall consist of three members of the Puyallup tribal council, other two members will act as alternates. Members of the court shall be elected by majority vote of all the members of the council and each shall serve for a term of one year respectively. A vacancy in the court shall be filled by the tribal council for the remainder of the unexpired term in the same manner as original members are elected. The first election of the court shall be called, held and supervised by the tribal council within ten (10) days after approval of this ordinance. Thereafter election of members of the court shall be held at least sixty (60) days prior to expiration of terms of office of the members.

SEC. 2. Immediately after their election, the court members shall select one member who shall preside over court proceedings for the entire term of office.

All members of the court must be present and vote upon matters brought before the court. A majority vote of the court members shall be necessary for the rendering of a decision as to any matter brought before it.

SEC. 3. The court shall meet within ten (10) days after complaint is made to any member of the court that a violation of any ordinance duly adopted by the Puyallup tribal council has occurred, and may meet at such other times as the court may determine necessary to carry out its duties. Meetings of the court shall be held at a place designated by the tribal council as a regular meeting place. The court may adjourn from time to time as it may deem necessary.

SEC. 4. The court is hereby authorized and is vested with jurisdiction to hear, try, and determine, and pass sentence upon all matters concerning the violation by any member of the Puyallup tribe of any ordinance duly adopted by the tribal council. Any person accused of violating any such ordinance shall be served with a notice that a complaint has been made against him, the time and place of the court hearing, and the nature of alleged violation. Such accused shall be entitled to present testimony and witnesses in his own behalf.

SEC. 5. The court shall make its determination as to the guilt or innocence of the accused five (5) days after holding a hearing as to any alleged offense and its decision shall be final. Any person, feeling himself aggrieved by the decision of the court may appeal to the superintendent of the reservation to review the case. The superintendent shall within ten days thereafter render a decision approving, disapproving, or modifying the sentence of the court. Both the court or defendant shall have the right to appeal the decision of the superintendent to the Secretary of the Interior.

RULES AND REGULATIONS OF THE PUYALLUP TRIBAL FISHERMEN

These rules made up by the fisherman and adopted by the Puyallup Tribal Council on June 26, 1962. The rules and regulations cover the Puyallup River within the original boundaries and all usual and accustomed grounds on the ceded area of the "Medicine Creek Treaty."

1. One set net per Puyallup fisherman in operation.
2. One drift net per Puyallup fisherman in operation and all drift nets shall have right-of-way of the channel.
3. No set net closer than 600 feet apart, except at a natural eddy.
4. No set net to have more than 20 feet shorelines, combines net and line limit not to exceed 200 feet.
5. Only a Puyallup Indian or the legal spouse of a Puyallup Indian may fish.
6. Length of drift net in the river shall not be more than 35 fathoms.
7. Length of drift net on all salt water fishing shall not be more than 1,800 feet and said drift net shall not be closer to east shore of Commencement Bay than one-half of a mile.
8. No Puyallup Indian can hire any outside fisherman to help him or run anyone's gear.
9. Thirty-six hours of closure for conservations shall start at 6 p.m. Saturday and end at 6 a.m. on Monday.
10. All fishermen are to pay $10 per year plus 6 percent of the selling price of all fish caught on the Puyallup Indian country.

For future conservation these laws can be amended by the council or by majority vote of the tribe.

FISHING ORDINANCES GOVERNING FISHING RULES AND REGULATIONS OF THE PUYALLUP TRIBE, TACOMA, WASH.

Be it enacted by the Tribal Council of the Puyallup Tribe:

SECTION 1. Any member of the Puyallup tribe violating any provision of the rules and regulations of the Puyallup tribal fishermen duly adopted by the Puyallup tribal council on June 26, 1962, and as thereafter amended, which rules and regulations are hereby declared to be and are adopted as a part of this ordinance, shall upon conviction thereof by the Puyallup court of Indian offenses, be punished by withdrawal of all fishing privileges and/or confiscation of fishing gear as a member of the Payallup tribe as follows:

(1) For the first such offense, all such fishing privileges shall be withdrawn for a period of not less than one week and not more than one month:

(2) For the second such offense, or for the conviction of three or more offenses at the same trial, all such fishing privileges shall be withdrawn for a period of not less than one month, nore more than one fishing season:

(3) For the third such offense, all such fishing privileges shall be withdrawn for the remainder of the fishing season. The period for withdrawal of such fishing privileges shall commence from the time of sentencing or in the event that an appeal is taken, from the time a final decision is rendered following the appeal.

Senator CHURCH. Do you have Mr. Wright here?

Mr. McLEOD. Yes, the Chairman of the Puyallup Tribe.

Senator CHURCH. May we hear from you, Mr. Wright?

STATEMENT OF FRANK WRIGHT, CHAIRMAN, PUYALLUP TRIBE

Mr. WRIGHT. We appreciate the right and privilege to petition the United States on behalf of our tribe. Our tribe opposes Senate Joint Resolutions 170 and 171. We oppose any bill which prohibits the Puyallup Tribe from the taking of their fish.

The Puyallup Indians have already experienced the devastating economic impact of a closure of their fishing practice.

Many of our people have lost their homes, their cars, appliances, and in some instances their wives and families due to their loss of income.

They have been forced to scramble for any type of jobs available, which usually means picking berries for as little as $1.80 a day to a little more or if they are fortunate they would get a farmhand job for as little as $0.80 to $1.25 per hour.

This seems a disgrace to the people of the United States to force the Indians into an existence such as this, for thousands of citizens make an excellent living off the lands that were taken from these same Indians.

The State has refused to give temporary public assistance to the Indian people, of whom many have never before been forced into the humiliation of having to request public assistance. Many rely upon fishing for their subsistence, and many supplement it by fishing.

It seems that God has created the salmon, with an instinct to spawn in fresh water; for a reason. A logical reason could be that they were meant to be harvested in the fresh water. Most of the salmon harvested by the Puyallup Indians are sold on the market as a fresh food product.

To harvest these salmon in fresh water, it takes, in comparison, far less gear than it would to get them in salt water. They are fully matured and in excellent condition for the table when they are taken in fresh water.

It seems that in man's greed, and desire to be ahead of the other, he has ventured into the bays and then to high seas to harvest these salmon. Still it is common knowledge that in a very short time these salmon will be in an area where they can be harvested with far less gear and expense.

In 1962 the State of Washington sold a record number of commercial fishing licenses; 1,294 gillnet boat licenses were sold, and 452 purse seine boat licenses were sold. The number of troller boat licenses is not recorded, nor is the number of Indian fishing boats.

The Russian and Japanese fleets are increasing continually, and they number into the thousands. The Japanese caught 135,000 metric tons

in 1962. They use gillnet and purse seine boats and operate from a mother ship and process their fish at sea.

The U.S. gillnet boats all use 1,800 feet of nylon gillnetting. The fish get their head and gills caught in this type of net and then cannot back out. There is no limit to their depth, nor is there a limit as to how far apart these boats must fish. These boats operate at night during the salmon run. The waters when they are fishing look like a floating city—dotted with the navigation lights and net markers of these boats.

The purse seiners have a net that is 1,800 feet long, made of nylon. The salmon are circled with this net. Then the bottom is closed leaving absolutely no escapement from this type of gear. These boats are equipped with the latest type instruments for navigation and for locating the salmon. Some use airplanes to spot these fish. These boats are capable of taking up to 13,000 salmon in 1 day. These boats cost from $35,000 to $150,000.

In addition to the Russian and Japanese fleet the Canadians, the U.S. high seas fishery, the Straits of Juan De Fuca, upper Puget Sound, lower Puget Sound, and the sport fishery located in all these areas operate in front of the Indian fishery. They all get first crack at the fish and the sportsmen behind the Indian fishery also; that is, the river is lined on both sides for miles with sport fishermen.

The salmon, after passing through all of the previously mentioned fishery, become extremely warry of all types of netting, and they must know how to evade them to reach the Indian fishery. Therefore, many of them are able to evade the Indian fishery also, only to be caught by the sports on the spawning grounds of the Puyallup miles above the Indian fishery.

In view of this the Indian is still accused of literally exterminating the salmon. The facts and figures prove otherwise.

The Puyallup Indians are now fishing less than 10 percent of the area they had reserved for themselves in the treaty of 1855. The reason is because they have been harassed and intimidated out of their area by the newspapers, the sportsmen, and the State of Washington law enforcement officers.

This not being enough they have been denied their choice of counsel to defend themselves in the courts of the State of Washington. The BIA chooses their counsel and denies the Puyallups their unanimous choice.

We feel that an unregulated fishery can be a serious problem to the salmon run.

We feel a poorly regulated fishery can be just as detrimental to the salmon as no regulation.

To regulate to allow no Indians over 90 percent of the salmon catches even if they practice closures does not seem to be the answer to the problem, not to mention pollution and logging.

The fact that the United States has paid $30 million on Celilo Falls for off-reservation fishery damage to the Yakima Nation, proves the position of the U.S. Government, conclusively demonstrating that off-reservation fisheries is the property of the tribe. If the United States paid $30 million for off-reservation fishery, why should we let the State steal it or intimidate us out of it?

Since the salmon was 80 to 90 percent of their diet the Puyallup Indians held a cultural festival or religious ceremony in honor of the salmon.

At this ceremony they barbecued the first salmon of the run over an open fire. It is then parceled out to all, in small morsels or portions so all can participate. Doing this, all bones are saved intact. Then in a torchbearing, dancing, chanting and singing procession they proceeded to the river where they cast the skelton of the salmon into the stream with its head pointing upstream, symbolic of a spawning salmon, so the run of salmon will return a thousandfold.

The Puyallup Tribe cannot bear up under the constant financial pressure of having to defend themselves in courts of law and hearings on bills designed for seizure of their livelihood without protection for their civil rights and a policy of intimidation by illegal use of the police power by the State.

We request this committee and Congress to uphold our treaty rights by defeating these bills, and we request assistance to develop our fishing industry and their sanctioning of our authority to police our own fishing areas for which we have been seeking from all branches of the Indian Bureau since 1954.

We also petition for the right to free choice of counsel for the Puyallup Tribe.

Senator CHURCH. Very well, thank you very much.

Mr. CROSS. I have copies of letters from the Bureau of different statements. I compiled them all together because I wasn't, I am not used to this.

Senator CHURCH. That is fine. We are happy to receive the exhibits and the statements that you have made and your testimony has been very helpful.

Mr. MCLEOD. Senator, I wanted to add a few remarks. I have cut out intentionally about two-thirds of my presentation because prior counsel have covered this.

Senator CHURCH. Well, your whole statement has been inserted into the record.

Mr. MCLEOD. Yes. I would like to emphasize to this committee that this problem has become economically devastating to this tribe. They practically are wiped out as Mr. Wright has said. Many of them are losing their homes and automobiles and appliances because of this deprivation of their means of livelihood, this fishing right.

Now, the focus is on them because they are in a metropolitan community, and I believe that you will notice as a part of my statement I have included some pictures. Also a letter appended to my statement describing the Indians as "scapegoats."

Senator CHURCH. Yes.

Mr. MCLEOD. And they were on the front page of the Seattle Post-Intelligencer in January of 1962, and I believe that I have an extra copy of those pictures for Senator Simpson.

They demonstrate the methods used by the State of Washington. They used aircraft, they used the State patrol, they used over—according to the newspaper account—three dozen officials who came on to the reservation, threw the Indians in jail, and——

Senator CHURCH. Was this pursuant to the enforcement of an injunction, a court injunction?

Mr. McLEOD. No. This was pursuant to their, what they feel is their, right to regulate the fishery. This was not pursuant to any injunction.

Now presently they have enjoined the Puyallups from fishing on their own reservation. They have also invaded the reservation and arrested Puyallups for fishing.

The Puyallup Indians gave up as a part of the Medicine Creek Treaty over 2,236,000 acres. They have a small area left. They still have their fishing right insofar as they can exercise it, which is practically nil at this time.

Senator CHURCH. The question is presently in the courts in Washington?

Mr. McLEOD. Yes, it is.

Senator SIMPSON. Are these treaty or nontreaty Indians?

Mr. McLEOD. These are treaty Indians.

I have represented this tribe, various members, for over 15 years, and I have personally tried dozens of their cases as well as cases for 15 to 20 other Northwest tribes.

Senator SIMPSON. The article goes on to say that nontreaty Indians have no right at all fishing in this water. They must be stopped or the game fish eventually will disappear. That is a quotation and it speaks as if it is totally nontreaty Indians.

Mr. McLEOD. Well, no. Who you see here in the picture is a member of the Nisqually Tribe, Melvin Iyall; this man right here, getting into the State patrol car. He is being arrested in this picture by the State. He is a member of the Nisqually Tribe of Indians. They arrested him, threw him in jail, and later found he was a Nisqually Indian and let him go. They held his gear 65 days and then released him.

Meanwhile, of course——

Senator SIMPSON. You aren't taking exception to the action against the nontreaty Indians but to the treaty Indians?

Mr. McLEOD. The treaty Indians; yes. We take exception to the State using these methods on any citizen. Why should they have to go to jail to prove these rights?

Senator CHURCH. These are matters for which there ought to be a remedy in the courts of Washington.

Mr. McLEOD. Yes, indeed.

Senator CHURCH. And I am sure you are pursuing it.

Mr. McLEOD. I think it is a shameful thing. I have had to take various members of this tribe out of jail. They set the bail high on them. Up in Skagit it is worse; they set it at $500, $250, $300. These Indians don't have that kind of money. So what it means is they stay in jail. With the Puyallups that hasn't been true, but in Skagit County, when an Indian is arrested, a Skagit Indian, they go to jail because they can't pay the fine. The fines are frequently the maximum and they always get substantial jail sentences—longer, I mean. Sometimes it is the limit of whatever the statute says.

Now, I think that is shameful, and I think as Americans, the original Americans, I think it is fantastic that they should have to go through this kind of humiliation when the United States is their guardian and it is a sovereign right to fish. Now one thing I would like to point out, the Bureau of Indian Affairs does nothing to help. If they

would take some leadership in this situation to get the parties together it could be remedied. But they abandoned the Indian, especially when he gets in trouble, and especially this kind of trouble where there is some political measure of pressure from sportsmen and commercial fishermen.

Senator CHURCH. I think this emphasizes the need to find a more satisfactory solution to this problem, whatever that may turn out to be.

Mr. McLEOD. I have in my statement gone into this at greater length. I also feel that if a study is to be made of this particular problem that it should be made by an independent organization. I have mentioned that there are two groups that this whole program was designed to protect—the commercial fishermen and the sports fishermen.

The commercial fishermen have admitted they take at least 87 percent of the catch. The sports fishermen take 10 percent of the catch. The Indians take 2 percent or maybe as much as 5 percent of the catch, depending on the figures you look at.

Now that in itself is very revealing. Who is getting the lion's share of the fish? Now remember those sportsmen on this river take the bulk of the fish behind the Indians; that is, up river on the spawning grounds of the salmon.

Now, Mr. Cross, in his testimony, brought out the fact that the sportsmen took 14,000 to 18,000 steelhead salmon in the State of Washington in the Puyallup River. According to the figures, from 900 to 1,500 of them were taken or caught by Indians; that is, they took that many salmon, and they, the sportsmen, want to wipe out that balance. Is that fair? I think it patently obvious that the State of Washington doesn't have a case against the Indians. Where are their scientists? Where is the evidence for their unwarranted conclusion—that the Indians take all the fish.

Now we testified before another committee, and I have the record of it right here, in October 13, 1961, before the Commerce Committee on Northwest Salmon Fishery Resources. It was a joint hearing before the Senate Committee on Commerce, House Merchant Marine and Fisheries Committee, and our testimony there is on page 40, page 62, and Mr. Williams, who is also going to testify here today, testified and gave some excellent testimony in that hearing.

I think that should be incorporated into the record.

Senator CHURCH. Very well, without objection that will be incorporated in the record.

(The statement referred to follows:)

TESTIMONY OF MALCOLM McLEOD, ATTORNEY AND COUNSEL FOR INDIAN INTERESTS

Mr. McLEOD. Thank you. I would first like to say that I appreciate the opportunity of testifying before this committee, and also the Indians appreciate the fact of the unusual procedure that has been taken by this committee to come out here to Seattle and Tacoma rather than holdings these hearings in some remote building in Washington, D.C., 3,000 miles removed from this area.

This committee has seen fit to come to the Puget Sound area to hold their hearings and we are very grateful for that, because for the most part the tribes I represent have no funds, they have no industries, they have largely logged-over, useless land or the bottoms of gorges. Their land is either straight up and down or useless for other reasons, so they have no funds and no facilities to present a

case properly, and since the committee has seen fit to come here, we have this opportunity of presenting the Indians' side of this problem.

I might say that there are many tribes in Washington that have no treaties who also gave up a lot of land. I heard from some of the prior witnesses the term "special privilege" was used, and I think that is an unfortunate phrase, first because it is inaccurate, and secondly because it does not tell the story; it gives a false impression. That special privilege of having the right to fish on certain rivers or certain waters of Puget Sound was paid for, and very dearly, by these Indians. In fact, the ground that we are sitting on at this minute was taken from the Medicine Creek Tribe, that is the Puyallup Tribe. The Federal Government took 2,800,000 acres from the Medicine Creek Tribe, and what did they give them in exchange? Nothing.

They gave them a treaty that secured to them the right of taking fish at all of the usual and accustomed fishing grounds and stations. Now, that is a right they already had, so in effect what the Federal Government did, they bamboozled these Indians out of 2,800,000 acres-plus and they got nothing for it.

Another incredible result of this unfair, unrealistic, and impossible treaty arrangement is that this treaty has not been enforced.

Now, there is also the fact that this free enterprise at the expense of the Indians is still taking place. We happen to be located here in this beautiful County-City Building in the city of Tacoma. The light and power that we are enjoying here in this room was taken at the expense of some Indian tribes. Now, that is still going on. The power produced right here and dispensed by the city of Tacoma at a very handsome profit was taken from the Nisqually Tribe on the Nisqually River and from the Skokomish Tribe on the Skokomish River.

Now, their latest attempt in the same field—it is not an attempt, it is an accomplished fact—is to take away from the Cowlitz Indians the power potential and the fishery of the Cowlitz River. This is important because here is a tribe, the Cowlitz Tribe, that was given no treaty; they have no reservation; they were given nothing. They were just run off their land and without so much as a "thank you."

Now comes 1961. They have a fishing right on the Cowlitz River which they exercise between arrests from the State of Washington and interference from others. Now the city of Tacoma proposes to build and is building dams on the Cowlitz River. Their application before the Federal Power Commission indicates that they will make over a million dollars a month on this project. And what are they paying the Indians? Not one thin dime. So there is another side to this question of the fisheries and what the Indians got.

For a hundred years they have gotten nothing. They were guaranteed a treaty right which they never have been able to exercise without interference, and this is also at the expense of their civil rights. They are arrested, they are thrown in jail. In fact, right in this city for exercising a treaty right, some of these Indians were thrown in jail. And where did they place them? They placed them in the drunk tank. Now, 1 or 2 days in the drunk tank would not be so bad but 30 of them, especially if you don't drink, it is pretty harsh. It is a cruel and unusual punishment to put to people who are entitled to a treaty right.

Here we have a treaty that is supported by the Armed Forces of the United States. It should have all the honor and efficiency of the United States behind it. But the difficulty with these treaties is that they seem to deteriorate with age; they sort of waste away with antiquity. And I would like to cite just briefly one case in point which I think is really devastating, and that is the case of the Seneca Nation in Pennsylvania. [Reads:]

"In 1794 George Washington signed a treaty with the Senecas and briefly in that treaty he said under the seal of the United States, that 'the Seneca Nation was granted' this strip of land and that they would never be disturbed, they would have the exclusive use of it forever, and that it would never be taken from them without their consent."

Well, 1794 was when George Washington signed that treaty. It is now 1961, and what is happening? They are taking that land for the Kinzua Dam. Now, the dam is all right in that particular instance. However, the Indians, through their supporters, presented an alternative plan that would have been just as economical, in fact more economical than the plan that the Corps of Engineers in the Federal Government had proposed.

Well, to make a long story short, the dam is being built, the Indians are being flooded out of their land, and the treaty has been broken, and the honor and the

dignity of the United States apparently is of little value because it has been ignored.

Now, that is a case that we can look at objectively because it is on the other coast of this country, but it is no different than this situation right here. Our treaties are just as good and just as binding, and if we allow organizations like the city of Tacoma to go in and build a commercial enterprise that makes net, it nets a million dollars a month.

Now, that project is worth $150 million. So what you are doing is giving, what Congress is doing and the Federal Power Commission is doing is giving a license to either a private power company or a public power company, they are giving them a license to build this business at the expense of the Indians.

Now, I think that the city of Tacoma, I think they ought to put on that sign out there, "The cheapest power in the United States," they should say, "through the courtesy of the Nisqually Indians, through the courtesy of the Skokomish Indians, and through the courtesy of the Cowlitz Indians." Now, that would be more descriptive of the situation.

I might say with reference to these fishing rights, the dams are built, the Indians are ignored, and the fish are lost.

I have heard the prior witnesses attribute the loss of the fishery to the Indians which, I think, it is just about as logical to say that they are responsible for the First and Second World Wars and the Chicago fire, and I say that knowing that we have figures taken from the State of Washington's own fishery and game department which will prove that the Indians account for 5 percent or less of the fishery and that actually the testimony presented by the State of Washington is unsupported by any scientific data.

They have staffs of fish biologists, fish farms; they have a complete scientific organization to assess and evaluate each one of these rivers, and I would like to ask this committee just where are they? Why didn't they have a biologist come in here? They had two enforcement officers. They had the strong-arm section of the fish and game department come in and testify and, I believe that when Senator Magnuson questioned them, "What about the fish that got away?" I think he hit the nail on the head.

There was a complete lack of scientific data to back up their testimony.

Now, I would like to briefly state that these special privileges that these Indians are supposedly exercising have been purchased very dearly through giving up two-thirds of the State of Washington, and that if any of these fisheries, if they are going to be deprived of them they should be compensated for them.

Now, apparently the implication of the testimony of the State of Washington is that the United States somehow compensates these Indians for taking this fishery. That hasn't been said by any of these witnesses. They just want this committee and the Congress of the United States to take these fishing rights away. They don't want to talk about this business of compensating them, but the Indian fishery is an aboriginal right that they've possessed since time immemorial, and it is just as compensable as any real property, any real timber, or any other interest in real property that we own, and it should be compensated for under the fifth amendment.

I have mentioned the fact that in order to enforce or enjoy their fishing rights, many of these Indians had to give up their civil rights; that is, they were arrested. I also am familiar with the case where an Indian was put in jail because of a fishing violation and that he spent Christmas in jail right here in this city as a result of an arrest when he was exercising a treaty right; that is, a fishery right guaranteed to him by the treaty of the United States.

I would also like to mention that in testimony that will be submitted to this committee at a later time by the Tulalip Tribe, that the fishery's own figures will be presented in a comparison with graphs, will be presented in evidence showing that the Indian fishery accounts actually for a very small percentage of the total fishery. I think the commercial fishermen and the sports fishermen take the great bulk of the fishery in the Puget Sound in the Washington State area, and actually for these witnesses to come before this committee and say that the reason for the loss of fishery is the Indian is patently ridiculous; it is about 95 percent hogwash. Now, that is a strong statement to make but we can back it up with their own figures, and I might say this, that it is embarrassing to me to come here and I have to defend such testimony or to reply to it, when actually the State of Washington, through their fisheries department and through their game department, they do have the scientific figures to give you, and I think they should be made a part of this record.

Mr. TOLLEFSON. We have asked for additional figures, both here and in Seattle, but I think in all fairness to the witness from the State, he did not read his entire statement and I think the implication and the figures there and those cited, indicate that without a question the white fishermen, whether they be commercial or sport, take most of the salmon, but what the percentage is it doesn't set out, of course.

Mr. MCLEOD. Yes. Well, where I take issue with the State of Washington is attributing the loss of fishery to the Indians. Actually, pollution, dams, and other industrial effects like logging, the lumber industry, the pulp industry, dumping pulp liquor into the streams, and other harmful substances account for the great bulk of the loss of the fishery and it is not the Indians. If you are uninformed——

Mr. MAGNUSON (interrupting). Aren't we talking, though, about the State—I am just reading it here—about these certain, definite, specific streams and areas?

Mr. MCLEOD. Well, I believe they took one stream, which is the Puyallup River, which they are using as their——

Mr. MAGNUSON (interposing). They only have the Puyallup and the Hoko and the—well, they are talking about the various streams, but they would be only a small part of the overall salmon—when he mentioned——

Mr. MCLEOD (interposing). Yes.

Mr. MAGNUSON (continuing). A certain percentage, if they take a certain percentage of the salmon he was talking about in this one particular stream, but I would think the percentage to the total percentage, that we ought to have the figure in the record as to the number of fish the Indians take as compared to the total overall——

Mr. MCLEOD (interposing). Yes, and I think that that——

Mr. MAGNUSON (continuing). Of the whole sound, yes.

Mr. MCLEOD. But I might say that the way this testimony is presented it is very misleading. It gives this committee the impression that this is happening all over the State. I'd like to mention one river——

Mr. MAGNUSON (interposing). It is not misleading to us.

Mr. MCLEOD. I should say it is misleading to me. Take the Lummi River. Now, there is a river where the Nooksack and the Lummi have fished since time immemorial and in that river the runs are increasing and they have a reservation that is on the Lummi River, and if what the State says is true about the Indians destroying the fishery, why isn't it true on that river?

I would just like to say that the position of the Indians is that we should have all the facts, we should have the surveys that they have on each river, not a generalization, and guiding all Indian fisheries based on a couple of rivers that they have picked out, that gives this committee an unfair picture. It is not the proper one, and I might say that I was disturbed to find that they didn't have their scientific personnel who had personally made these surveys here to testify. I think that that is the Fish and Wildlife Service. Here we have all of these experts, dozens of them.

Mr. MAGNUSON. The Fish and Wildlife are here; they will be here.

Mr. MCLEOD. Well, but where is their testimony?

Mr. MAGNUSON. We haven't got around to it yet.

Mr. MCLEOD. As I understood, they were not going to be called.

Mr. MAGNUSON. They are here and we can call them for any questions. They were here when I left at noon and I hope they came back.

Mr. TOLLEFSON. They are still here. These are figures that we can get even outside of this hearing.

Mr. MCLEOD. Yes.

Mr. TOLLEFSON. And I am sure we will make it a point to get them.

Mr. MCLEOD. And in support of this business of violation of treaty rights, I have taken the liberty of appending to my statement a copy of the case of *State* v. *Satiacum*. It is a Supreme Court case in the State of Washington where the treaty rights of the Indians were sustained, and I believe that it is the law of the land, although there are some subsequent cases that have been brought, that is, there are arrests from time to time of Indians where the same treaty provision will be in point before the Supreme Court.

However, there is one other point that I would like to make and that is that under the U.S. Constitution the Indians are the wards of the Federal Government. It is the duty of the Attorney General of the United States and the U.S. district attorney to defend these Indians, but it has become a tradition—in fact,

almost a law—that they do not defend the Indians. They leave them to their own devices and about 90 percent of the time that is no counsel at all.

Actually to take Indian's lands, give them nothing for it and promise them all of these benefits and then not give them these benefits is, in effect, stealing the land; it is taking it without any consideration, and the Attorney General and the U.S. district attorney should be instructed to defend these Indians when they are arrested by the State in violation of these treaties.

Mr. MAGNUSON. Do we have any cases where the Indians have asked for counsel and have been refused?

Mr. MCLEOD. Oh, yes; constantly.

Mr. MAGNUSON. This committee would like to have some of those.

Mr. MCLEOD. In fact, I could cite a case in which I am cocounsel in which the United States did take the part of the Indians.

This case started in 1948 and the then U.S. district attorney, Charles Dennis, who was from the city of Tacoma, undertook the prosecution of a case on the behalf of some Indians. Well, it dawdled along all during——

Mr. MAGNUSON (interposing). What about defending the case? What about defending it? Has there been any instances where the, say, let's take a simple case like an arrest for a game violation or a fish?

Mr. MCLEOD. No.

Mr. MAGNUSON. Where an Indian was arrested and in a case where he has asked the district attorney's office to act as his counsel and the attorney's office has refused, the district attorney?

Mr. MCLEOD. Yes; we have such cases.

Mr. MAGNUSON. I imagine we could ask them. They either have a policy of doing it or not doing it. I know Mr. Dennis used to do it occasionally.

Mr. MCLEOD. Yes, yes; he did.

Mr. MAGNUSON. I was one of his deputies many years ago.

Mr. MCLEOD. Yes. Well, actually that case was just concluded here on appeal and the Federal court was reversed and the Indians won the case. The defense, in *John's* case, where the State of Washington had claimed certain tidelands that had accreted to an Indian allotment or an Indian donation claim.

Now, this decision was won for the Indians and it was won through the efforts of the U.S. district attorney and I was the cocounsel for the Indians, and that case added between 80 and 100 acres to this Indian donation claim, but that case is an exception rather than the rule.

Mr. MAGNUSON. Let the record show that this committee, both committees will ask the Attorney General what their policy is in this matter and we will get an answer forthwith, the Attorney General of the United States.

Mr. MCLEOD. I would appreciate that very much.

Mr. MAGNUSON. What their policy is.

Mr. MCLEOD. I might say that I have, for the committees' information, I would like to leave some briefs on these cases that have appeared and have actually occurred. One of them on the *Cowlitz* case versus the city of Tacoma before the U.S. Court of Appeals for the Ninth Circuit. This is the *Cowlitz Tribe of Indians* v. *the City of Tacoma*, and that brief will point up some of the problems that we have realized from the taking of Indian aboriginal lands by third parties other than the United States.

I have another case, the brief in *State of Washington* v. *Robert Satiacum and James Young*. That is No. 33545 in the Supreme Court of the State of Washington.

I also have a brief in the case of the *State of Washington* v. *Frank Quigley*, No. 34415, before the Supreme Court of the State of Washington. That is a hunting violation.

Mr. TOLLEFSON. These are all the Indian briefs?

Mr. MCLEOD. Yes; they are.

Mr. TOLLEFSON. And the briefs are for the Indian case?

Mr. MCLEOD. Yes; that is correct.

Mr. TOLLEFSON. I assume that somewhere along the line we will get the decision in the record; you probably have it?

MAN IN AUDIENCE. I have as to two of the cases cited but I do not have the third one.

Mr. MAGNUSON. Let's get down to the meat of this thing.

All of this problem in the fisheries, let's take fisheries, whatever it may be or what the facts are in any particular case, they are always different, but you heard testimony this morning that the better way to do this would be for a

voluntary effort on the part of the Indians and the game and fish and wildlife people and fisheries to get together and work out some regulations or whatever it may be on conservation, and the statement was made, that the great majority of Indians involved in all of these reservations and all of these where they have the allotments wanted to do that.

Mr. McLeod. Yes; they are, in fact, doing it.

Mr. Magnuson. Yes; in some cases they are doing it?

Mr. McLeod. Yes.

Mr. Magnuson. The testimony is in some cases apparently not?

Mr. McLeod. That is true.

Mr. Magnuson. Do you think that that can be achieved where they can all get together and voluntarily do this?

Mr. McLeod. Yes; I think so. I would like to say, however, that where the Indian is asked to give up the only right that they have left to subsistence, we have taken their timber, we have taken their land——

Mr. Magnuson (interposing). I understand that.

Mr. McLeod (continuing). And there is nothing left.

Mr. Magnuson. I understand all that.

Mr. McLeod. Excuse me, Senator.

Mr. Magnuson. It has to be a mutual agreement. It would have to be that both sides would agree to do this.

Mr. McLeod. On one condition, that they would be compensated for their rights taken from them proportionately.

Mr. Magnuson. I think Congressman Tollefson suggested that and, as you know, if the Federal Government takes a hand in this, whether it be voluntarily or at least given the tools or the framework in which there can be voluntary agreements, if Indian rights are violated that we have always compensated. I agree there have been some disputes as to the amount of compensation, but I have gone through all of this Celilo Falls business, which is somewhat similar.

Mr. McLeod. Yes; it is.

Mr. Magnuson. And in this case I think we ought to have, and you can get that from the fisheries, you can tell them we ought to have the percentage of total catch and the percentage or the number of the Indian catch on a mean average over the years.

From the testimony here this morning of the State fisheries department, I just took a quick calculation here and we are dealing with about 35,000 fish, and at $1 a fish that would not be too much, but we may be dealing with hundreds of millions of dollars worth of the resource in the future; this is the whole problem, and I am sure that the Federal Government would never enter into any activity in this thing unless they would have that as a guide rule, we never have. Now, there has been a lot of dispute. You mentioned the Seneca dispute.

Mr. McLeod. Yes.

Mr. Magnuson. I know that well. I sit here year after year and listen to that Seneca dispute on public works, Appropriations Committee. Now, that has been resolved this year but there is compensation involved and to the Indians.

Mr. McLeod. Yes. Senator, there is one thing I would like to call to the Senator's attention.

Mr. Magnuson. As I understand it, otherwise we wouldn't have appropriated the money.

Mr. McLeod. Yes. There is the *Cowlitz* case, however, and there is the Nez Perce Dam and also the High Mountain Sheep Dam.

Mr. Magnuson. Well, the Nez Perce hasn't been built yet, it hasn't even been licensed and the High Mountain Sheep hasn't even been authorized yet, let alone planning money, and the Cowlitz thing is Thor's department, I don't understand it. [Laughter.]

Mr. Tollefson. I have been around here for some time.

Mr. Magnuson. Yes, and I have been around for some time too [laughter] but I think that you can be very helpful, you people that are close to these people and these people have confidence in you and we should get this thing up to a voluntary effort as much as we can, and where there is actually a case where, in order to achieve this conservation and regulation or whatever it may be, if there are some valuable rights that must be sacrificed to do this, work out some method or yardstick of compensation, because we are not dealing here today with just 35,000 fish; we are dealing with a day in the future where the 35,000 fish may mean the difference with somebody fishing on the Puyallup River 25 years from now, Indians or anybody.

This is the real problem and the Indian problem is only one small segment of our whole fisheries problem, to preserve it for the future, and we have gone even beyond that. We are way off into the international field and everyplace else.

I am sure that something could be worked out because people are reasonable, we are dealing with reasonable people, at least all of us, and it would be a rare Indian or non-Indian or white or anybody else, or American or Swede or Jew or anyone else that wouldn't say that "I am not for conservation."

Mr. McLEOD. That is correct.

Mr. MAGNUSON. And I want to do what I can do to see that the fisheries in this area, this great resource is preserved the best within reason.

Mr. McLEOD. Yes.

Mr. MAGNUSON. I don't think anyone would say here that there are—there have been some Indians that haven't used reason.

Mr. McLEOD. That is correct.

Mr. MAGNUSON. Just like there are some other fishermen who do not use reason.

Mr. McLEOD. Yes. I would like to make this statement——

Mr. TOLLEFSON (interposing). Just leave it with us as a part of the record. How about those briefs, do you want those in the record?

Mr. MAGNUSON. Yes. You may put those in the record.

Mr. McLEOD. You may have them.

Mr. MAGNUSON. We won't put them in the record but we will put them in the file.

Mr. McLEOD. Yes.

Mr. MAGNUSON. Do you have anything further you would like to present?

Mr. McLEOD. No, sir. I just appreciate the committee's courtesy.

Mr. MAGNUSON. We appreciate your coming.

(Documents left by Mr. McLeod for incorporation into the committee file were the briefs relating to the following cases: *State of Washington, Respondent*, v. *Frank Quigley, Appellant* (No. 34415) ; *State of Washington, Appellant*, v. *Robert Satiacum and James Young, Respondents* (No. 33545) ; U.S. Court of Appeals for the Ninth Circuit; *Cowlitz Tribe of Indians, Appellant* v. *The City of Tacoma, a Municipal Corporation, Appellee.*)

(The following is taken from the prepared statement of Mr. Malcolm S. McLeod, to be incorporated in and made a part of this hearing:)

STATEMENT OF MALCOLM S. McLEOD, ATTORNEY AT LAW, SEATTLE, WASH.

This is a statement on behalf of the American Indians of western Washington concerning their rights to fish in the waters of Puget Sound and in the watersheds of rivers flowing into Pudget Sound.

This statement is made on behalf of the following tribes:

Samish
Nooksack
Lummi
Skagit
Snohomish
Duwamish
Snoqualmie
Suquamish
Skokomish
Nisqually
Clatsop Chinook
Puyallup
Squaxin
Steilacoom
Cowlitz
Taitnapam
Shoalwater Chinook
Lower Chinook
Willapa Chinook
Wahliakum Chinook
Cathlamet Chinook
Quillayute

These remarks are addressed to this committee on behalf of the nontreaty Indian tribes of the State of Washington, inasmuch as the land of these nontreaty Indians were taken from them without compensation and without even a treaty. Therefore, they should be much more entitled to the protection of the Congress of the United States than tribes who have written treaties. In my previous statement before this committee I dwelt with the difficulties encountered by tribes who have treaties and they are not honored by the United States or the State of Washington or the sportsmen or the other fishing interests.

Many tribes in the State of Washington had the experience of having their lands taken from them and they were stripped of all of their assets and all of their natural means of making a living and obtaining subsistence and now they are deprived of their rights as American Indians to fish on the rivers that they and their ancestors fished on from time immemorial.

One of the principal tribes to which this great wrong has been done is the Cowlitz Tribe of Indians and the Tainapam Band of Cowlitz Indians. These Indians lived on the Cowlitz River and its watersheds including the Lewis River,

the Cowlitz River, and other rivers in that vicinity, including the Kalama and the watersheds of all rivers on the southwest slope of Mount Rainier and Mount Adams. This great section of country was taken from the Cowlitz Indians without giving them so much as 5 cents. Since this area was taken from these Indians in the early 1850's, these Indians have fished traditionally on these same river watersheds. However, since the formality of a treaty was not afforded them they do not have fishing rights; that is, they are frequently denied these rights by the State of Washington and by the United States and by other individuals.

Most recently the city of Tacoma is building a dam at Mayfield and plans to build another one at Mossy Rock. In the application for this dam the city of Tacoma indicates that they will net over $1 million a month in this project. Now it would seem that there should be some of this money should be ordered by Congress to be used to compensate the Indians so that their asset—that is, the fish runs in the Cowlitz River—will not be taken from these Indians without some compensation. If the ordinary citizen's property is taken from him he is compensated under the fifth amendment. However, it seems to be one of the tenets of free enterprise on the part of the power companies and the public utility districts to go and fleece the Indian of all of his assets including the fish, including the hydroelectric power in the river, and then give them nothing. As a matter of fact there are a number of reservations in the State of Washington where there are big dams on rivers belonging to the Indians right on the reservations but there is no power on the reservaiton; that is, there aren't any—they are nonexistent.

UNITED STATES GRANTS POWER PROJECTS WITHOUT COMPENSATION TO THE INDIANS

Another area where Indian rights have been grossly impaired is the fishery that the Indians have lost due to the building of dams for hydroelectric projects. Many of these dams are on rivers which flow through reservations which are bordering the usual and accustomed fishing grounds of the Indians. However, in many cases both for treaty and nontreaty Indians the Federal Government has authorized licenses for dams without making any provision for compensation to the Indians for lost fishing and for loss of the river.

The Federal Power Commission has frequently granted licenses to build power projects on rivers which western Washington tribes have ancient tribal fishing rights without giving any compensation whatsoever to the Indians for loss of fish. A case in point is the Columbia River dams, entitled the High Mountain Sheep project and the Nez Perce Dam. Both dams will seriously damage the Indian fishing rights on the lower Columbia. However, to date there is no provision whatsoever to compensate the Indians for the loss of fish for the building of these dams.

The Federal Government has been grossly negligent in failing to enforce the treaties which are made for the benefit of the Indians and in allowing power companies to build dams without compensating the Indians for the loss of their fishing rights on these rivers.

Political pressure groups such as the State of Washington, sportsmen, and the commercial fisherman constantly use the Indian fishery as a whipping boy and that reputed losses to their fishery resulting from dams, fishing, and pollution an other industrial causes to the Indians when in truth and in fact the real cause of loss of fishery is not the Indians fishery but is the failure of the Government to take action to conserve the fishery from industrial destruction.

The U.S. district attorney and the Attorney General of the United States are charged with the duties of furnishing legal protection for Indian rights on property, fishery, and civil rights. However, it has become the tradition of that office to do nothing for the Indians since there is no political liability to ignore them so that the power companies and other corporations and individuals can fleece the Indians of their assets and the Federal Government helps them in the process and the U.S. attorney sits on his hands or looks the other way. Although by law the United States is the guardian of the Indians they have utterly failed to protect the ward—that is, the Indians—against encroachment of civil rights and property rights. The *Satiacum* case which is attached hereto had 38 arrests pending the appeal which was won for the Indians but at least 50 Indians had to endure the humilitation of being sent into jail (drunk tank) for exercising fishing rights.

VIOLATION OF INDIAN FISHING AND CIVIL RIGHTS IN WASHINGTON

The case of *State* v. *Satiacum* (found in 50 Wn. 2d, p. 513), before the Supreme Court of the State of Washington is a case where the Supreme Court of the State of Washington acknowledged the treaty rights of the Puyallup Indians on the Puyallup River. This case is an example of how over 50 Indians were arrested while exercising treaty rigths guaranteed by the Federal Government. This case is a shameful example of how the U.S. attorney and the Attorney of the United States sit on their hands while Indian fishing rights are ignored and the Indians thrown in jail because they dared to fish where their treaties and the Federal Government guaranteed their fishing rights. This case and dozens of other like it are examples of the gross miscarriage of justice which is prevalent in the State of Washington.

With a guardian as ineffective and as impossible as the United States has been the Indians would be much better off without a guardian or at least without one that cooperates in destroying their fishing and property rights.

TESTIMONY OF FRANK WRIGHT, MEMBER OF THE TRIBAL COUNCIL, PUYALLUP TRIBE

Mr. WRIGHT. I will not be very long. My name is Frank Wright. I am a member of the tribal council of the Puyallup Tribe.

Mr. MAGNUSON. We are getting right close to home here now.

Mr. WRIGHT. We have been much talked about today. I am not a biologist or a lawyer or anything, I don't know how to prepare a statement before you folks by words or—not very well worded, but I have some statements here that I would like to say and some facts to give about our river here.

Mr. MAGNUSON. You just go right ahead in your own way.

Mr. WRIGHT. According to our treaty which we have, Medicine Creek Treaty so-called, we have——

Mr. MAGNUSON (interposing). Do you know where Medicine Creek is?

Mr. WRIGHT. I understand it is in Nisqually somewhere, near Nisqually.

Mr. MAGNUSON. You understand; all right. We had better get the county engineers here.

Mr. WRIGHT. If my father was here he could tell you. He told me but I didn't——

Mr. MAGNUSON (interposing). He told you?

Mr. WRIGHT. As far as I can understand it, when this treaty was made up that not one Puyallup could talk English, speak English, nor could he read or write, so when it was written up I believe that it was very much in favor of the people of this territory, that they put in there what they wanted to put in there and the Indian, they explained to the Indian whatever they felt like explaining.

Now, I am not sure of this or any of the facts.

Under article II it is granted that our tribe ceded a large amount of property going up to Mount Rainier, toward Seattle and on past Nisqually. We ceded this land to the U.S. Government, giving them, giving up all of these lands and rights to it and that in turn we reserved a certain amount of land.

Now, in article II it says, in our treaty it says:

"There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land."

Now, this land would be the tribal reservation as shown on your maps there, the present reservation boundaries.

Mr. MAGNUSON. How large is the reservation?

Mr. WRIGHT. The reservation was, it says right here, "containing about two sections of land by estimation. A square tract contains two sections of 1,280 acres on Puget Sound near the mouth of the Shinnan Creek and 1 mile west of the meridian line of the U.S. land survey and a square tract containing two sections of 1,280 acres lying on the south side of Commencement Bay."

Now, the point I want to make on this is still in article II:

"All of which tracts shall be set apart and so far as necessary surveyed and marked out for their exclusive use."

And what I understand the word "exclusive" means without any bind or any hindrance or nothing binding. In other words, it's all their own; what they do with it is their business and like you say, what they do with the fish is their funeral. Well, that is my understanding.

Mr. MAGNUSON. Well, it need not be a funeral. [Laughter.]

We hope not.

Mr. WRIGHT. I imagine there's sportsmen here who would very much like to see a funeral. [Laughter.]

I have a statistical report of 1959 of the fisheries department of fish in this State. Now, this is their report showing the number of fish taken in all of the commercial fisheries all the way through the sound, but this particular part that I am referring to is that of the Indian fisheries department.

Now, the Puyallup Tribe had just started their recent fisheries in 1953, and this report includes from 1953 through 1959. They have these numbers of fish taken on the Puyallup River, the total of which is 55,172 salmon taken.

Now, the point I would like to make on this is that on page 227, two pages over, we find the Quinault Indians' catch of salmon, and this is taken on the Quinault River which is very much similar to the Puyallup River in size and tributaries. I am not a biologist as I told you, and I cannot make actual statements as to what these two rivers can compare in production of salmon, but it does state here they have records from 1935 on to 1959 in this book here, that these people have been taking salmon with their nets which is their right. And I have proof of it. But from 1953 to 1959 on their river in comparison they have taken 555,314 salmon, which is 500,000 more salmon taken than we have taken. We have the same size river.

Mr. MAGNUSON. Do you have the same hours?

Mr. WRIGHT. We fish in this river and we get 500,000 less fish than they have and yet our river should produce as much as theirs does. Who is getting those salmon?

Now, they point to us and they say, "All right, you Puyallup Indians, you are depleting our salmon." Everybody looks at us, the sportsmen, fishermen, anybody, but why can this tribe over there with the same size river get 500,000 more salmon than we can and still produce year after year since 1935? We have been in business on this book here, up to 1949 was a 7-year period and right now they are claiming that we have killed off the run and each year we catch 71,000 less than the Quinault River catches. Now, something is wrong someplace. I believe it is pollution. I believe that from the Straits of Juan de Fuca I know that at night there's gill netters and purse seiners work out in the ocean. At night it looks like a floating city out there; these commercial men, they have nets 1,800 feet long and they go row after row down the straits hereby Whidbey Island and whatnot and they take all of these salmon before they come to us, and when the salmon reaches the Puyallup River they come to us and they say, "Well, the runs of the Puyallup River is depleted and you will have to let them go by. Let them go by," they said, "in order that we might have more." If we are catching 71,000 fish less than another tribe on a comparable river and they want us to cut down more yet, someone is getting those fish and it certainly isn't us, and these records are records, a statistical report from the State fisheries department.

Mr. MAGNUSON. Maybe the fish aren't there? Maybe there aren't any fish.

Mr. WRIGHT. What I say is it could be pollution that is killing those fish, and besides all the sportsmen in the sound all the way on out and the commercial men that hit these fish constantly until they are down to us can all be factors in there, but this a very good comparison in the likes of my eyes that we are not depleting the salmon.

Mr. MAGNUSON. We will put in the record the total catch of the Puyallup and its tributaries, total catch of fish, everybody. We will get those figures and then the percentage of what the others take.

Mr. WRIGHT. How can you get the number of fish that are taken up in the sound? How do you know they are coming to us?

Mr. MAGNUSON. We are talking about river fishing.

Mr. WRIGHT. Well, when they say we are taking——

Mr. MAGNUSON (interposing). The same as the Quinaults. We don't get the number of fish that is pulled out of the ocean, just the number in the river.

Mr. WRIGHT. They made a statement that we take 80 percent of the fish in the Puyallup. They are not counting those fish that they have taken out in the sound and on up to Juan de Fuca and whatnot.

Mr. TOLLEFSON. I think you have to bear in mind that what they were talking about was the salmon in the river, and I think we can all concede that a number of Puyallup River spawn salmon have been caught out in the sound before they ever got into the river. I think that goes without saying, but how many, I wouldn't know and neither do you.

Mr. WRIGHT. Well, you——

Mr. TOLLEFSON (interposing). I will guess that the reason for the difference between you and the Quinaults is that in the sound there are a number of commerical fisherman and sports fisherman that take salmon whereas when the Quinault salmon gets out in the ocean there is nobody there to take them.

Mr. WRIGHT. Yes, the salmon has a free shot.

Mr. TOLLEFSON. Yes.

Mr. WRIGHT. But then they point to us and that gets me hot under the collar, I get worked up when they talk about it.

Mr. MAGNUSON. But you've got to get them in the river though to get them back, don't you?

Mr. WRIGHT. Well, they say, "Why don't you conserve the fish?" We conserve it and who gets them? They do. So——

Mr. MAGNUSON (interposing). Well——

[Laughter.]

Mr. WRIGHT. Yes. "Well, I'll be friends with you if you give me all of your money," or something like that.

Mr. MAGNUSON. But you don't want it to be that there won't be any fish at all for anybody, do you?

Mr. WRIGHT. I am for conservation if equal shares are given.

Mr. TOLLEFSON. Well, you concede that there is an area for trying to work out some understanding or settlement concerning this problem, don't you?

Mr. WRIGHT. Yes. There are——

Mr. TOLLEFSON (interposing). It is not all the giving on one side either?

Mr. WRIGHT. Well, they presented their views and told how we are just coming off with all the salmon and I am bringing these views saying that we can point to other things.

Mr. TOLLEFSON. We are glad you are. That is why we asked you to come here.

Mr. WRIGHT. Our peak year in this 7-year period, the highest take of salmon was 17,004 salmon. Now, that's all of the Indians that have fished in this river. Now, another book put out by the State, we see that one boat operated by Nick Baronovich on an Emancipator, took 13,000 salmon in 1 day, 1 catch.

Mr. TOLLEFSON. Where?

Mr. WRIGHT. That doesn't concern our salmon but it proves that they are very effective and they can and are capable and are taking——

Mr. MAGNUSON (interposing). You mean in Puget Sound?

Mr. WRIGHT. Yes. Much more salmon than we are taking, taken. That is a different run of salmon.

Mr. MAGNUSON. That is on the sockeye run in the Fraser.

Mr. WRIGHT. I know that they are capable of taking any salmon.

Mr. MAGNUSON. Oh, certainly, on the Fraser River run up there.

Mr. WRIGHT. Well, even they fish all the way down in the sound.

These sportsmen, they come around in the winter and they scowl at us and give us abusive names, and I read in this treaty that the Indians have the exclusive right on this land. These 600 fishermen, sportsmen that the director of game fish spoke of, were fishing on our exclusive fishing property rights; they are on the Indians' property and yet they are coming around and saying, "You leeches, you are taking our fish." I don't know, we are not able to make things public in the papers and what not because we are just a minority and we would have to pay money to have statements made in the paper, so the whole minds of the public——

Mr. MAGNUSON (interposing). You have to what, pay money to have statements made in the paper?

Mr. WRIGHT. We would, yes. The minds of the public is swayed by the press, so that the Indian is a leech——

Mr. MAGNUSON (interposing). I am sure that the Tacoma News-Tribune, any time you have a statement, a reasonable statement, that they would be glad to publish it.

Mr. WRIGHT. My brother tried to make a statement in the paper and they refused it so he had to send back to the American Society of Newspapers or something back East and then he finally got it in our newspaper.

Mr. MAGNUSON. I am sure that would be an exception to the rule.

Mr. WRIGHT. Exception to the rule? You just try—it's quite a——

Mr. MAGNUSON (interposing). There is a reporter right here that will take your statement. [Laughter.]

Now, sometimes I have that trouble with newspapers but that is because of the business I am in.

Mr. WRIGHT. Well, I just made that statement because it shows that the Indian has very little chance of making himself known and his side of the picture is not given.

Mr. MAGNUSON. Well, that is why we are all here. We are trying to find out as much as we can about this and to see where the equities lie and the facts and, as reasonable people I am sure we can work it all out.

Mr. WRIGHT. We have asked for assistance in controlling our river like a statement was made that we do not back up our conservation measures wholly and fully, and we have met with this department of fisheries asking assistance. The only offer that we have had is they want complete control; they don't want to give assistance, they want control.

Now, the Indian, as far as I can see, needs assistance but he knows what happens when control is given. So, about this meeting, one of the high points——

Mr. MAGNUSON (interposing). In other words you say that the fisheries department, they wanted to give you assistance but they wanted to handle their own assistance inside, is that right?

Mr. WRIGHT. Yes. "We will assist you if you let us take over."

Mr. MAGNUSON. What conservation control do you have now down in the Puyallup?

Mr. WRIGHT. Well, according to——

Mr. MAGNUSON (interposing). I don't know, I am merely asking.

Mr. WRIGHT. Two years ago we, they asked for a 10-day closure. We closed down for a while. We don't know when the salmon are coming; they do, see. They know just about when they are coming all the time. We are not mobile, we can't follow our salmon anywhere like the commercial men do. If the salmon are up by Seattle they can run over in a boat but our fishing is only on the tribal property.

Well, when we close down, if there is a big rain or something and we happen to be closed, the bulk or 90 percent of the salmon can go by in 2 days and the Indian is sitting there with nothing, and the only way that the State will know when they have enough up there is when the fish go up to the hatchery and they have gone by already and the Indian is left holding the bag. So on our conservation measures that is the trouble that we have had, and if we conserve—try to conserve—and someone else is getting the bulk of the run it is pretty hard to say, "All right. You guys quit fishing now because we've got to have enough fish go by——"

Mr. MAGNUSON (interposing). Who is getting the bulk of the run in the Puyallup? I don't quite follow you there.

Mr. WRIGHT. Well, I feel that——

Mr. MAGNUSON (interposing). Other than what you are fishing, leaving out the fish that are caught in the sound. They go in all kinds of rivers and they are caught by everybody. Who is getting the bulk of the Puyallup salmon?

Mr. WRIGHT. Well, look at it this way: The Quinault Tribe is able to produce a catch—I haven't got it figured out here on paper—but they get 71,000 more fish per year than we do. If they can catch that many more and still produce since 1935, maintain a run continually, why we are getting less than a third of that.

Mr. MAGNUSON. They practice closure, at least some semblance of regulation voluntarily, and you say that here you don't practice that. Maybe that is the reason they get more. I think they have a better river than the Puyallup for salmon; I think everybody will agree to that because of the location, as you say.

Mr. WRIGHT. That is what I am getting at again. Well, they fish——

Mr. MAGNUSON (interposing). They have control of the whole river.

Mr. WRIGHT. I don't know if you got my point on that, but——

Mr. TOLLEFSON (interposing). We get the point.

Mr. MAGNUSON. I get the point but I think there is a little difference. I don't think the comparison is quite the same.

Mr. WRIGHT. Well, the comparison is rivers of equal size. One is located where the fish can be preyed upon continually by commercial and sportsmen; the other is where the fish have an open entrance to the river. So it shows that——

Mr. MAGNUSON (interposing). The point that I am trying to make is that we get together. If we don't get together there won't be any fish for the Indians, the sportsmen, the commercial people or anybody.

Mr. WRIGHT. OK. Now, if we got together and our take——

Mr. MAGNUSON (interposing). Now, when I say getting together, somebody has to give a little here and give a little there because if you continue to fish the Puyallup, my best information, even if you had the absolute right to do it, which I think you have an inherent right, but if you continue to do it the way you are doing it, everybody that is supposed to know says that the run will finally quit and that the Puyallup River will be of no consequence any more as a producer of salmon at all for anybody, the people over here, the sportsmen or you people or anybody.

Mr. WRIGHT. Well, they have control of these men that fish these fish before they get down here. Now, if you can, you say you catch the desirable number of fish, allow for escapement, they caught all the excess of that and they just have the desirable amount, left by the time they reach us, OK, now, they say, "Well, there ain't enough fish. OK. You quit. We have had our share but now there isn't enough; you quit." You see my point?

Mr. MAGNUSON. I see your point.

Mr. TOLLEFSON. What if the fisheries department should say to the commercial and sports fishing men out in the sound, "You refrain from fishing 1 extra day more than you have been," or whatever the regulations provide, that would permit more salmon to reach the Puyallup River, then would you be willing to refrain from fishing 1 extra day so that there would be more escapement? Theoretically then eventually there would be more salmon for everybody if they refrained from fishing an additional day. I think what you are getting at is if there is going to be any giving up, the commercial fishermen or the sports fishermen ought to let more of them get up to the river? Then you would be willing to refrain from catching or fishing it so heavily as you have been doing?

Mr. WRIGHT. Well, according to this, this River Quinault can produce 71,000 fish a year and still not deplete their salmon run. Now, the river is of comparable size. Our highest catch is 17,000 salmon.

Mr. MAGNUSON. The rivers are entirely different. If you go up to the Quinault break and up to the head of the Quinault, it is an entirely different type of spawning grounds than you have here.

Mr. WRIGHT. Our spawning grounds have been ruined and they want us——

Mr. MAGNUSON (interposing). That is because they have a reservation and it is all within it practically and can be controlled. There has been a lot of work done up here on the tributaries of the Puyallup, all kinds of different things.

Mr. WRIGHT. There's dams and everything.

Mr. MAGNUSON. Spawning grounds but they have been pretty well, not thrown out altogether, but it isn't as easy——

Mr. WRIGHT (interposing). Another point I'd like to make is that when it came to selling out our lands, that was fine, just let the Indians go. So the Indians in our tribe were ignorant and sold all their land and they own nothing, just the fishing rights and a few acres of land. But when it comes to their fish, now they are not going to—that's a different concern. "You can't fish all your fish out and kill them off." Well, that is fine, this is different, you see; someone else is concerned. There is a point there, that it shows that the white man is not concerned with the Indians and in that status, it is just when it hurts him he is concerned to listen.

Mr. MAGNUSON. You are not suggesting that all white men are not concerned with the Indians, are you?

Mr. WRIGHT. Well, I would never make a statement like that.

Mr. MAGNUSON. Why, of course not.

Mr. TOLLEFSON. How big is the tribe?

Mr. WRIGHT. The tribe roll hasn't been completed. We have a proposed roll and we sent it to the area office and it hasn't been ratified yet.

Mr. MAGNUSON. How many names are on it?

Mr. WRIGHT. 340, around. And another thing, that——

Mr. MAGNUSON (interposing). How many of those live on the reservation proper?

Mr. WRIGHT. Oh——

Mr. MAGNUSON (interposing). Just as a matter of curiosity.

Mr. WRIGHT. I would say—I wouldn't even be able to make a statement; I wouldn't know.

Mr. MAGNUSON. About half of them, a quarter of them? Just generally speaking.

Mr. WRIGHT. I wouldn't know. It wouldn't be over half.

Mr. MAGNUSON. Not over half. But the most, the rest of them live in the area here, don't they, around in the area?

Mr. WRIGHT. Yes. Another thing I have in mind is after the cases have been won in the courts the State still picks the Indians up and throws them in the drunk tank and treats them like a criminal and the Government just sits by and allows the abuse of the Indians and of the treaty too.

Mr. MAGNUSON. You say they throw them in the drunk tank. How many of those cases have been for illegal fishing or hunting?

Mr. WRIGHT. Three cases that I know of.

Mr. MAGNUSON. Three in how many years?

Mr. WRIGHT. Oh, four, five. I say it, but I don't have all the figures. I am not prepared.

Mr. MAGNUSON. I know, but a lot of people get thrown in the drunk tank and it has nothing to do with what we are talking about, Indians, white people, and everybody else.

Mr. WRIGHT. Do you approve of throwing an Indian in a drunk tank——

Mr. MAGNUSON (interposing). No, no, not unless he is drunk when he is arrested.

Mr. WRIGHT. When he has a right as provided by the Government?

Mr. MAGNUSON. No, no. I was wondering how many cases there were to that effect.

Mr. WRIGHT. Five people that I know of.

Mr. MAGNUSON. Five people?

Mr. WRIGHT. Yes. And might be more possibly.

Mr. MAGNUSON. What I am trying to do is differentiate between somebody being arrested and somebody being arrested for this particular violation.

Mr. WRIGHT. The attorney here made a statement about the Indian doesn't have jurisdiction—I mean the tribe doesn't have jurisdiction over the Indian in his usual and accustomed fishing grounds.

Mr. TOLLEFSON. Off the reservation.

Mr. WRIGHT. Off the reservation. Now, provided for our tribe, the constitution and bylaws of the Puyallup Tribe of the Puyallup Indian Reservation, the Wheeler-Howard Act, it says:

"Approved May 13, 1936, under section VI.

"Section VI, powers of the tribal council in article K, the Indians of the tribe have the power to do so, to promulgate and enforce ordinances which shall be subject to review by the Secretary of the Interior governing the conduct of the members of the tribe."

That doesn't say whether he is on or off the reservation. So I feel, not being a lawyer, but I feel that it says you can govern the conduct of an Indian; you can do so wherever the Indian may be.

Mr. MAGNUSON. Yes.

Mr. WRIGHT. Yes.

Mr. MAGNUSON. Any further questions?

(All agreed to no further questioning of this witness.)

Senator CHURCH. If there is nothing further I want to thank you.

Mr. McLEOD. There is just one other thing. On this independent agency to examine this matter, I believe that Stanford University or Stanford Research Institute or the Brookings Institute or an organization of that caliber should look into it. The State is an interested party. The United States is an interested party.

Now Mr. Pautzke was before this committee. I believe Senator Church, the chairman of this committee, has asked him eight questions. He didn't have the answer to any of them. Mr. Neubrech was before this committee. He was asked a series of questions, to which he didn't have the answers.

I believe there is no question but what this committee does not have sufficient information to legislate on this problem, and that neither the State or Federal agencies represented here have made any attempt to bring out evidence—just conclusions of law.

And I believe that there is one other matter. On the Puyallup River we can give you a list of at least 30 industrial commercial firms that are polluting that river, pouring pollution into it every day.

In my prepared statement here, I have on the last page an article from the Tacoma News Tribune showing where the city of Tacoma had admitted polluting one of the rivers with copper sulfate and killing a lot of fish.

There is another case, the Heath Plating & Plastic firm which the State of Washington has enjoined from dumping cyanide into an adjacent river or into an adjoining river and polluting the waters.

Now, this pollution is going on constantly, but there is no mention of that by these experts. There is no mention of that by the State of Washington or by the United States. These firms are people that are represented by powerful interests. Nobody is going to attack them for killing the salmon.

Senator CHURCH. I think your recommendation with respect to surveys by a disinterested, independent, and competent agency is worthy of very careful consideration.

Senator SIMPSON. Does the witness have any agency in mind?

Senator CHURCH. He mentioned the Stanford Research or the Brookings Institution.

Mr. McLEOD. The Stanford Research Department could do this job very well, and I believe they could pick their own experts to work on it. Or the Brookings Institution.

Senator CHURCH. It is a question of finding financing to contract for that kind of investigation.

Mr. McLEOD. Yes.

Senator CHURCH. But there is much merit in your suggestion, and it is certainly one of the things that the committee will take under consideration.

Mr. McLEOD. The matter of pollution is something that is—the city of Tacoma pours into that river every day the bulk of their sewage. Now it is treated, but I don't care what it is, if you dump that much foreign deleterious material into any stream you are going to cut off the oxygen, you are going to kill the downstream migrants, and you are going to help kill that fish run.

Why isn't something done about that? In this article that I have included here, the city of Tacoma admitted that they poisoned and killed a lot of fish. In the Heath Plating Co. case they killed about 2,000 fish. Those were mature salmon that were spawning in that Mill Creek area which eventually gets into the Puyallup River.

These are other factors which are not before this committee. The fact that the city of Tacoma admitted that they are poisoning a lot of fish through copper sulfate, the fact they are dumping their sewage into that river, no other witness has brought that out. Why? Because it would be damaging. So the case isn't being properly presented to you. You are not getting the facts.

Senator SIMPSON. I wonder if it would make too much difference, but I don't find the admission there so much inasmuch as the fact they used the copper sulfate or whatever they put into the stream was stated in the positive statement made by Karl Krauss, assistant director of the game department, about the killing.

Mr. McLEOD. I believe a subsequent examination of the fish revealed that it was copper sulfate that killed them.

Senator SIMPSON. I don't see the admission you talk about here but by the same token I believe it.

Mr. McLeod. It may be in a later article.

Mr. Wright. It is in a later article they have submitted to the State of Washington admitting using the chemicals.

Mr. McLeod. Mr. Neubrech probably has the answer to that question.

Senator Church. Mr. Neubrech, do you have the answer to that question?

Mr. Neubrech. I didn't hear the question.

Senator Church. Whether the copper sulfate killed the fish in what creek?

Mr. McLeod. Mill Creek, which is a tributary of the—that was in the watershed of the Tacoma.

Mr. Neubrech. In the Green River.

Mr. McLeod. The use of copper sulfate. Do you have the information on that?

Mr. Neubrech. None other than that there was a dumping of copper sulfate in the river and it did destroy some fish; yes.

Mr. McLeod. That it was done by the city of Tacoma?

Mr. Neubrech. This is correct.

Senator Church. Any further questions, Senator?

Thank you very much for your testimony today.

Senator Church. The next witness is Mr. Ted Bugas, executive secretary for the Columbia River Salmon & Tuna Packers Association. Astoria, Oreg.

Mr. Bugas, we are happy to have you at the committee hearings this afternoon.

STATEMENT OF THEODORE T. BUGAS, EXECUTIVE SECRETARY, COLUMBIA RIVER SALMON & TUNA PACKERS ASSOCIATION, ASTORIA, OREG.

Mr. Bugas. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, I would like to thank you for the opportunity to present the statement of my organization.

I am Theodore T. Bugas, executive secretary of the Columbia River Salmon & Tuna Packers Association, a packers organization which processes about 95 percent of all salmon taken commercially in the lower Columbia River.

Members of this association are: Barbey Packing Co., Bioproducts, Inc., Bumble Bee Seafoods, Chinook Packing Co., Point Adams Packing Co., Portland Fish Co., and Union Fishermen's Cooperative Packing Co.

I am appearing before this committee to express the vital concern of my organization for the perpetuation of our world-famous Columbia River salmon and steelhead fishery resource. My statement also reflects the view of the Columbia River Fishermen's Protective Union, an independent association of self-employed commercial fishermen which supplies nearly all of the Columbia River salmon processed and marketed by members of my association.

I have a letter to the chairman of the committee, Senator, and I would like to submit it at this time, which validates our testimony as that of the union also.

Senator SIMPSON. It will be made a part of the files.

Mr. BUGAS. Thank you, sir.

The Columbia River salmon resources today support not one, but four separate and distinct user groups. The first—and we believe the most important—of these is the industry I represent, Oregon's 100-year-old commercial foodfish industry. This industry, which has generated well over $1 billion in revenues for the State of Oregon, today supports nearly 2,000 Oregonians directly involved in the harvesting and processing of Columbia River salmon and steelhead.

A second and, in recent years, quite substantial user group is composed of the recreational fishermen of Oregon, Washington, and Idaho, and I might add parenthetically visitors to those States who come in for recreational purposes of harvesting these fish. A sizable proportion of today's annual harvest of Columbia River salmon and steelhead is taken by these sports fishermen.

A third user group also exerts a considerable influence on our fishery. I refer to the combined sports and commercial ocean-troll fishery which operates off the coast of Oregon, Washington, Alaska, and British Columbia. A high percentage of the fish taken by these offshore trollers are anadromous species originating in the Columbia River system.

The fourth user group—and the one with which these hearings are directly concerned—is the Indian fishery on the Columbia River.

Like other wildlife resources in the 20th century, our Columbia River fishery has declined as our population and industrial economy have expanded. Despite fish passage facilities incorporated in the network of dams constructed on the Columbia, these huge obstacles have adversely affected the fish runs. Timber operations, which damage watersheds and spawning areas, have also contributed to our fishery decline, as does the water pollution that accompanies industrial expansion in the Northwest. Even agricultural irrigation and associated projects have a detrimental effect on our resources. In short, gentlemen, we in Oregon face a variety of conditions—all of which we might classify under "encroachment of civilization"—that today imperil our fishery——

Senator SIMPSON. Mr. Bugas, do you have figures to show the percentages that you are talking about, what the take is by the sportsmen?

The record today is full of statistics to the effect that the Indians take a comparatively small percentage, and the big percentage, three times as much is taken by the sportsmen as the Indians, 87 or 87½ percent taken by commercial fisheries.

Do you have any figures or percentages to support your statements here?

Mr. BUGAS. I do not have them as a part of the record or intend to submit them, Senator, but we do have this information available. It is difficult of compilation in the manner in which I have referred to it because we are referring to the statistics of about five or six different agencies engaged in collecting this information; namely, the fish commissions or the commercial fish regulatory bodies of Oregon and Washington, and the sports regulatory bodies of Oregon, Washington, and Idaho.

Senator SIMPSON. Do you keep any statistics?

37-688—64——9

Mr. BUGAS. We do not keep them in cataloged mass as such, sir. However, these agencies can provide these figures. They can be compiled.

Continuing—whether used for recreation, or as we use it or as most of the Indians use it, for our livelihood.

In light of these factors, we believe the public interest requires that the regulatory agencies of the States involved must be empowered to regulate all groups which are taking Columbia River salmon in such a way as to provide that an optimum number of fish reach the spawning grounds for perpetuation of the resource.

Senator SIMPSON. Right there, Mr. Bugas, let me go into this with you a little more carefully.

The Indians certainly have thrown a challenge here to any of the witnesses for this resolution because they have made an out-and-out assertion they can back or at least, which they have made, that they take this very small percentage of fish. They base their rights to take them, as they do have a right to take them, under the treaty of 1885 and subsequent treaties.

Now, they want the right to regulate their own, and with such a small taking isn't it patent to you and to others that probably the problem cure lies in taking care of the sports fishermen and the commercial fishermen and not paying so much attention to the Indians

Mr. BUGAS. This, of course, is part of the problem with which my industry is concerned, Senator. We have seen the charts, and as my statement and as, of course, my industry believes, both the harvesters, the fishermen and the processors, there is no attempt on our part to take away from the Indians such rights as they have.

We would like them to be subject to the same conservation agencies. We think, and again——

Senator SIMPSON. Let's stop there. Suppose they don't want to be, Mr. Bugas, and they laid a claim through the treaty which is supposedly a good treaty. You just can't break it with impunity and if you do break it in the national interest as was done in the *Seneca Indian* case in New York and Pennsylvania, there has to be adequate compensation, and there is a great turmoil over that.

Now, let's just suppose that they don't want to be regulated and they claim their legal right not to be regulated but to regulate themselves. In the light of the small take, isn't it obvious that that is not the seat of the problem. That the greater take by the commercial industry and the others cause the depletion and you actually wouldn't need State regulation of the Indian fishing. Do you think it is more of a take than they have testified to?

Mr. BUGAS. It isn't. I don't believe their figures have been inaccurate up to this point. They have used the figures of the agencies whom we are regulated by, and we believe these figures.

I would like to point out, however, some figures have been omitted by the gentlemen who have testified before me.

Senator SIMPSON. Will you supply them?

Mr. BUGAS. Yes, sir. We will at—I do not have them in my testimony but we will supply them.

Senator SIMPSON. We will hold the record open and you can supply those.

Mr. BUGAS. Yes, sir.

(See p. 130 for the information requested.)

Mr. BUGAS. And these are the figures which are not yet complete of collection regarding the last current fishery that was conducted on the Columbia River; namely, the June–July season.

During this season, which has just ended, the commercial gillnet fishery which I am speaking for harvested fish a total of 5 days.

The Yakima Indians and the other Indians harvesting, I think it is fundamentally the Yakimas on the Columbia, harvested this fish in excess of 20 days.

We don't figure even one season makes an entire story, of course, and this is an extremely complicated fishery. There are five species, there are a number of different so-called runs within each different specie, coming at certain well defined times during the year.

There has been a tendency, in my opinion, before this committee to oversimplify the entire matter. We don't argue that it is true that the Indians as of now are taking a less percentage than the commercial fishery. We do argue that the treaty, using the ceded concept where the Yakimas have, for instance, ceded a large portion of their old domain to the Federal Government and in return retained certain rights, we do maintain that this treaty has not been entirely and properly elucidated or illuminated because we think that the rights of the Indians within this ceded area are within the terms of the treaty itself. They are, for instance, the very phrases we have heard so much, "in common with the other citizens of the area."

This doesn't mean in our opinion superior to, less than, with other gear than, and superior in many cases, and without any regard to conservation.

It means, we think, fairly simply in common with.

Now bear in mind also, I think a mistaken concept, in the opinion of my people, has also been protected here.

Senator SIMPSON. I agree with you on your interpretation of that one provision of the treaty, and I don't think even the Indians have successfully got around it or really hit it head on in hard fashion here.

We have had different interpretations, but it is subject to more than one interpretation.

Mr. BUGAS. Yes, sir. But we can't fish in this area adjacent to their ceded treaty. We are kept out by our agencies which have ruled us out in the interests of conserving the fish.

Now, if we can't fish in this area, but there is nothing incidentally, I might say, there is no corollary to that precluding or prohibiting the Indians from fishing adjacent to and alongside us in the lower river outside of the treaty area or anywhere else and truly in common with us as other citizens.

Senator SIMPSON. Your contention is if they fish in other areas outside the reservation, and this provision of the treaty, they should subject themselves to the same regulation you do.

Mr. BUGAS. Precisely.

Senator SIMPSON. Do you believe that in light of the fact that the treaty calls for the utilization of the usual and accessible fishing grounds that were recognized by the U.S. Government at the time of the treaty?

Mr. BUGAS. This must be interpreted not in 1855, Senator, when the treaty was written and engaged, and I don't argue that it is

completely in derogation of the treaty, to somewhat curtail the efforts of the Indians in this, as reserved in this treaty.

The thing I say is that there were no dams. There was not agricultural development. True, the Indians didn't put them there, but they are there.

Furthermore, the Indians have chosen not to go elsewhere.

Senator SIMPSON. By the way, these dams and all the rest of these things were put there subject to the treaty of 1855 as far as the fishing rights of the Indians go.

Mr. BUGAS. Except where they have been extinguished as a portion of the so-called progress.

Senator SIMPSON. That is true.

Mr. BUGAS. Of the project; yes, sir.

Senator SIMPSON. OK, go ahead.

Mr. BUGAS. One point I wish to make at this point, Senator, if I may, is that I have the greatest respect for the rights of the Indians as reserved by our treaties, and I think they should be interpreted intelligently, but I don't think it is in the long-range best interests of the Indians to run back to the treaty and ignore progress, and ignore the inclusion of time and the manner in which the river is developed by other users.

Senator SIMPSON. You can get a lot of argument on that philosophy.

Mr. BUGAS. This is true. But we are expressing our view, of course.

Senator SIMPSON. Yes.

Mr. BUGAS. If, for example, the Yakimas—to continue my remarks—the Yakimas chose to fish above Bonneville Dam where conservation regulations prevent us from fishing, if they continue to do this, we are prepared to request of our regulatory agency that we be permitted to fish in common with them, because we are ruled out of there strictly in the interests of conservation.

Bonneville Dam has become somewhat of a sacrosanct measuring post beyond which there cannot be commercial effort, and we are not allowed up there in these pools to harvest the fish.

Senator SIMPSON. Is that on or off the reservation?

Mr. BUGAS. Well, this is off the reservation but adjacent to the old ceded area.

Additionally, I might point out that there is no attempt, or I have heard none here, with regard to the commercial interests, at least, and I don't recall it otherwise, to prevent the Indians from fishing except to actually save the run on their own reservation, and certainly we have no right to anything about this, except where it actually jeopardizes a run.

This does happen to be the case in the Yakima River adjacent to and actually a part of the Yakima Reservation in central Washington.

Some biologists have estimated that the Yakima properly seeded, would produce small fish and permit spawning to include fish in the whole river, in the whole river below that in excess of the great Salmon River of Idaho.

This is conjecture admittedly, and other factors would have to be brought into play, but as of now, the entire return run is quite well harvested by the Yakimas who have this unquestionable right on their reservation.

Now, I am not attempting in my testimony to shoot directly at the Yakimas but our areas of conflict are mainly with the Yakimas on the Columbia and this is the reason I have mentioned them several times.

To continue with my prepared statement, Senator, if I may, what we are concerned with is the unquestionable demand for conservation of the run, for the conservation of the fish in the rivers. To protect the public interest and to perpetuate the resource, our industry has, over the past 25 years, relinquished its fishing rights on all Oregon inland waters except the lower 140 miles of the Columbia River. During this same period, we have accepted an annual reduction in the number of fishing days from 272 in 1938 to only 98 days in 1963. It appears that this figure will be cut to less than 81 days this year. These are chopped up seasons, I might say parenthetically again, to coincide with the times during the year when the fish enter the river and pass through it and run back to their spawning areas.

I submit that this is solid evidence that our Columbia River salmon industry has made stringent and in many cases self-imposed sacrifices to conserve our fishery resource.

Senator SIMPSON. Has that curtailment come about, Mr. Bugas, by virtue of the more modernized methods in the ability to process as much fish in a shorter time than was the case formerly in 1938, or is it due to the preservation and conservation?

Mr. BUGAS. It is fundamentally due to the lack of fish, Senator, and the necessity to conserve the diminishing numbers that are present.

While we have accepted these severe restrictions there has been little commensurate regulation of the other user groups which benefit from the resource. Not only have the numbers of both offshore trollers and Columbia River sports fishermen multiplied in recent years, but ocean fishing is still permitted 6 months a year and recreational angling on the Columbia River on a year-round basis.

As for the commercial Indian fishery on the Columbia, the continuous efforts of our State management agencies to obtain the voluntary adherence of the Indians to our own regulations have been to little avail. We believe it is contrary to human nature—Indian or otherwise—to expect individuals to exercise adequate self-restraint in matters of this nature.

Here again I certainly admit that the Yakimas, in the last year or so, have adhered fairly closely to their regulations that they have prescribed, but even our own regulatory agency finds that its predicted regulation is not quite going to do the job. This is precisely what happened to us last month, Senator. We had a 1-month fishery prescribed ahead of time by the regulatory people. When the study was complete and all the factors of the river runs, the size and velocity of the river, and odd conditions of the river and the escapements were taken into account the regulatory agencies said, "You are going to take too much if we allow this period of time and will not allow the escape if they are going to the spawning areas and this will have to be done," and this was done immediately by our agency and although we didn't like it we had to take the restriction.

The Indians, in reacting to exactly the same situation because they are fishing the same fish, were unable to restrict their people to the degree that we were restricted.

Admittedly, they do not harvest again, year after year, the percentage of the runs that we do, but they are not able to control their people with the expeditiousness and the objectivity that an outside agency, studying all the factors involved, are able to control and this is one of the problems that has raised such a sore point.

Senator SIMPSON. Well, do you believe control is the best method or outright sale as contemplated in Senate Resolution 171?

Mr. BUGAS. We have taken the position, Senator, at the termination of my statement, you will see, where we feel it is perfectly conceivable that both these measures exercised possibly in different areas, could be of value in correcting the problem.

Senator SIMPSON. Well, in other words, you think there should be an unequal application?

Mr. BUGAS. No, sir, but in some cases it might be necessary to buy out and extinguish the rights, whereas in other places we think it would be helpful to support and strengthen the State laws on conservation.

Senator SIMPSON. You are advocating a change in the resolution?

Mr. BUGAS. No; we are advocating passage of both resolutions and inferential change in 170 to strengthen it.

Senator SIMPSON. All right.

Mr. BUGAS. The Indian fishery on the Columbia—incidentally, in all these feelings, Senator, with regard to control of the harvesting, our industry feels that all users should be considered in this at the same time.

We do not feel that there should be a pointed and only effort concerning the Indians. However, the two bills before us at this time refer only to the Indian fishery and those are the ones we are concerned with.

Senator SIMPSON. Do you think the problem could be resolved with a real sincere cooperative effort with the Federal Government, with the States involved, and the Indians themselves?

Mr. BUGAS. Yes. I think any problem could be solved.

Senator SIMPSON. It would necessitate a lot of study, would it not?

Mr. BUGAS. I don't think it would necessitate so much study, Senator, as it would changes in attitude.

Senator SIMPSON. That is obvious from the testimony here.

Mr. BUGAS. I think that the studies, the data, are sufficient to show the cause, except for the purchase where there must be an evaluation made as to the worth of any fisheries which might be extinguished.

The Indian fishery on the Columbia is conducted above the Bonneville Dam and is thus above the boundary of the established commercial fishery. Prior to construction of the Dalles Dam, the Indians historically fished with dip nets at Celilo Falls. Seven years ago when these fishing sites were inundated by the backwater of the Dalles Dam, the Indians received from the Federal Government some $27 million as compensation for their lost fishing sites. For a short period thereafter the Indian fishery on the main stem of the Columbia River was negligible. During the past 2 or 3 years, however, there has been a rapid acceleration in the Indian fishing activity above Bonneville Dam until they are now carrying on round-the-clock netting operations over considerably longer seasons than we are permitted.

Because of conflicting court interpretations of Indian treaty rights, this Indian fishery is not subject to the regulations of the conservation agencies of the State of Oregon and Washington and is restrained only mildly by tribal regulations.

Senator SIMPSON. Wait a minute. I want that in there, because you have injected that.

Mr. BUGAS. After the word "regulations," I said, "or by loose and questionably valid agreements between some tribes and some regulatory agencies."

The Indian fishery takes little cognizance of such conservation factors as length of nets, number of nets per fisherman, mesh size, and closed periods to provide escapement of seed fish to the spawning grounds. There is no question but that the Indian's commercial fishing operations on the Columbia could be made so efficient that they could harvest all of the annual salmon-steelhead runs, leaving none for other user groups or for perpetuation of the resource.

Senator SIMPSON. Now why do you inject that statement in there, Mr. Bugas?

Mr. BUGAS. Because as of now, they are not taking a tremendous proportion of the runs, but——

Senator SIMPSON. That is why I say, why do you inject that?

Mr. BUGAS. But with a further curtailment on us and our ability to take them above the sanctuary area, and because it can be supported, we feel that it is not the best place to harvest fish.

Senator SIMPSON. But you say that there is no question but that the Indians' commercial fishing operations on the Columbia could be made so efficient that they could harvest all of the annual salmon-steelhead runs, leaving none for other user groups or for perpetuation of the resource. That would be true of sportsmen, it would be true of commercial fishermen, it would be true of anybody. If you conjecture what could be done without any thought or conscience or temperance, why, of course, they could ruin anything.

Mr. BUGAS. With no regulation, sir. This is our main point. One of the reasons we introduced this statement in here is because of the fact that the graphs that were shown to you earlier by the Yakima Indians, showing what a small proportion of the run they are taking now or have up until 1963, whereas in the current season, 1964, the take is much greater—we feel it will be even more great because there are more Indians entering into fishery, and we think more Indians of other tribes are becoming more interested, renewing their interest.

Senator SIMPSON. Does your association or any of your component parts take any Indian fish?

Mr. BUGAS. Yes, some do.

If our Columbia River salmon runs are to be maintained at productive levels, we believe that all segments of the fishery must be subject to the conservation regulations of the responsible State agencies. In other words, these conservation regulations should be equally applicable to Indians and all other citizens without distinction.

Accordingly, we support and urge enactment of Senate Joint Resolution 170 and Senate Joint Resolution 171.

We do not believe that these two resolutions are necessarily in conflict. We can visualize circumstances in which the public interest might best be served by extinguishment of treaty rights in return for just compensation in some areas, whereas in other areas it might be more advantageous to assure that conservation regulations apply equally to Indians and non-Indians.

Senator SIMPSON. Thank you, Mr. Bugas. That is a very good statement. I am sure if you have any other things, any of the witnesses have anything further that they wish to put in, even in the way of answer or rebuttal, the record will be held open to accommodate them.

Mr. BUGAS. Thank you, sir.

Senator SIMPSON. Did you have anybody else with you?

Mr. BUGAS. No, sir.

Senator SIMPSON. Mr. Hawkins?

Mr. BUGAS. Senator, if I may, Mr. Schoning, director of the Oregon Fish Commission, feels that he can answer a question you asked me earlier.

Senator SIMPSON. You can sit there and just tell me, Mr. Schoning.

Mr. SCHONING. Yes, sir.

STATEMENT OF ROBERT W. SCHONING, DIRECTOR, FISH COMMISSION OF THE STATE OF OREGON—Resumed

Mr. SCHONING. Mr. Chairman, I am Bob Schoning, director of the Oregon Fish Commission.

Senator SIMPSON. The same one who testified this morning?

Mr. SCHONING. Yes, sir. The reason I offer this comment is that our agency is charged with collecting statistics on the Columbia River as far as commercial fisheries are concerned. You have asked several questions about this, the conflict in statistics. One point, and I am offering this comment only for clarification, one point that I think should be made clear, that some of the earlier comments about statistics and the small percentage—3, 4, 5 percent of the total harvest was Indian—I think they are referring to the State of Washington statistics statewide, while Mr. Bugas' comments referred to the Columbia River. We do have some statistics on the Columbia River.

Senator SIMPSON. Have you submitted those?

Mr. SCHONING. No, sir. We have no statistics here, but I wanted to point out that they are available.

Senator SIMPSON. Do you have some with you?

Mr. SCHONING. Yes, sir.

Senator SIMPSON. Why not submit them for the record?

Mr. SCHONING. These were collected for another purpose and are not as complete as they should be. We shall submit as complete statistics as we have and make them available; yes, sir.

Senator SIMPSON. I think that is very important.

(The statistics referred to follow:)

FISH COMMISSION OF OREGON,
Portland, August 24, 1964.

Mr. JAMES H. GAMBLE,
Professional Staff Member, Senate Interim Committee,
North Senate Office Building,
Washington, D.C.

DEAR MR. GAMBLE: During the course of the testimony at the meeting of the Subcommittee on Indian Affairs, U.S. Senate Committee on Interior and Insular Affairs on August 5, 1964, I was requested by Senator Simpson to supply the committee with information on the relative proportion of the total catch havested by Indian and non-Indian fishermen.

We have prepared the enclosed table which is for the commerical landings in the Columbia River in both Oregon and Washington for the period 1951–63, inclusive. No estimate is made of the sport catch in the river or ocean, or the commerical catch in the ocean, of Columbia River stocks, so the table does not give a complete picture of the harvest. Any sport catch statistics should be obtained from the Washington Department of Fisheries and/or Department of Game, Oregon Game Commission, and Idaho Department of Fish and Game.

If you have any questions about this information or need for more that our department can supply, please let me know.

Sincerely,

ROBERT W. SCHONING,
State Fisheries Director.

Commercial landings in numbers of fish of spring, summer, and fall chinook and sockeye salmon and steelhead trout in zone 6, Columbia River, with Indian landings expressed as percent of zone 6 and total river for 1951–63 (combined Oregon and Washington)

Date	Chinook											
	Spring chinook						Summer chinook					
	Zone 6				Total river	Indian as percent of total	Zone 6				Total river	Indian as percent of total
	Non-Indian	Indian	Total	Indian as percent of total			Non-Indian	Indian	Total	Indian as percent of total		
1951	656	33, 732	34, 388	98. 0	124, 831	27. 0	150	4, 150	4, 300	96. 5	41, 481	10. 0
1952	396	35, 020	35, 410	98. 9	164, 729	21. 2	313	5, 428	5, 741	94. 5	35, 856	15. 1
1953	2, 032	29, 521	31, 553	93. 6	88, 032	33. 5	6	1, 515	1, 521	99. 6	38, 565	3. 9
1954	24, 656	15, 919	40, 575	39. 2	89, 758	17. 7	7	1, 391	1, 398	99. 5	35, 942	3. 9
1955	39, 475	77, 311	116, 786	66. 2	224, 061	34. 5	24	8, 553	8, 577	99. 7	72, 129	11. 9
1956	43	11, 592	11, 635	99. 6	163, 983	7. 1	191	9, 768	9, 959	98. 1	102, 994	9. 5
1957		1, 190	1, 190	100. 0	117, 740	1. 0		327	327	100. 0	72, 289	. 5
1958		3, 539	3, 539	100. 0	126, 876	2. 8		4, 668	4, 668	100. 0	90, 266	5. 9
1959		649	649	100. 0	77, 027	. 8		384	384	100. 0	81, 169	. 4
1960		455	455	100. 0	64, 767	. 7		255	255	100. 0	57, 691	. 4
1961		1, 617	1, 617	100. 0	64, 370	2. 5		158	158	100. 0	62, 861	. 3
1962		3, 814	3, 814	100. 0	111, 644	3. 4		1, 240	1, 240	100. 0	33, 236	3. 7
1963		9, 177	9, 177	100. 0	80, 692	11. 4		4, 108	4, 108	100. 0	36, 936	11. 1

Date	Fall chinook						All chinook					
	Zone 6				Total river	Indian as percent of total	Zone 6				Total river	Indian as percent of total
	Non-Indian	Indian	Total	Indian as percent of total			Non-Indian	Indian	Total	Indian as percent of total		
1951	8,836	48,281	57,117	84.5	305,008	15.8	9,642	86,143	95,785	88.7	471,320	18.3
1952	15,750	61,451	77,201	79.6	179,738	34.2	16,453	101,899	118,352	85.8	380,323	26.8
1953	7,741	41,562	49,303	84.3	202,132	20.6	9,779	72,598	82,377	87.5	328,729	22.1
1954	9,230	35,399	44,629	79.3	169,096	20.9	33,902	52,709	86,611	60.1	294,796	17.9
1955	5,859	24,270	30,129	80.5	205,946	11.8	45,358	110,134	155,492	70.4	502,136	21.9
1956	6,831	32,949	39,780	82.8	214,662	15.3	7,065	54,309	61,374	88.2	481,639	11.3
1957		2,232	2,232	100.0	147,062	1.5		3,749	3,749	100.0	337,091	1.1
1958		3,480	3,480	100.0	147,368	2.4		11,687	11,687	100.0	364,510	3.2
1959		1,220	1,220	100.0	102,301	1.2		2,253	2,253	100.0	260,497	.9
1960		1,589	1,589	100.0	138,419	1.1		2,299	2,299	100.0	260,877	.9
1961		5,703	5,703	100.0	121,304	4.7		7,478	7,478	100.0	248,535	3.0
1962		5,039	5,039	100.0	160,798	3.1		10,093	10,093	100.0	305,678	3.3
1963		22,336	22,336	100.0	123,112	18.1		35,621	35,621	100.0	240,740	14.8

Date	Sockeye						Steelhead					
	Zone 6				Total river	Indian as percent of total	Zone 6				Total river	Indian as percent of total
	Non-Indian	Indian	Total	Indian as percent of total			Non-Indian	Indian	Total	Indian as percent of total		
1951	1,379	10,610	11,989	88.5	46,272	19.0	1,320	26,135	27,455	95.1	141,902	21.2
1952	2,452	29,017	31,469	92.2	165,759	14.5	999	55,748	56,747	98.2	180,138	27.8
1953	208	16,996	17,204	98.7	40,983	33.1	2,448	62,592	65,040	96.2	205,514	26.3
1954	309	16,413	16,722	66.9	67,338	18.6	1,450	20,358	21,808	93.3	137,920	12.4
1955	417	52,021	52,438	99.2	59,728	84.0	2,522	56,773	59,295	95.1	150,394	25.7
1956	257	39,074	39,331	99.3	81,325	39.0	1,845	26,499	28,344	93.4	99,476	20.9
1957		159	159	100.0	65,098	.2		178	178	100.0	91,767	.2
1958		6,296	6,296	100.0	197,194	3.2		4,076	4,076	100.0	84,604	4.8
1959		854	854	100.0	184,910	.5		801	801	100.0	103,764	.8
1960		615	615	100.0	120,026	.5		1,258	1,258	100.0	87,971	1.4
1961		131	131	100.0	40,703	.3		1,519	1,519	100.0	90,718	1.7
1962		3,832	3,832	100.0	14,244	26.9		282	282	100.0	90,560	.3
1963		8,896	8,896	100.0	13,906	64.0		8,383	8,383	100.0	108,577	7.7

NOTE.—For management purposes, zoning of the lower Columbia River was initiated to better report areas of salmon harvest. During the period 1951 through 1956, Indian commercial fishing was done almost entirely by dip net at Celilo Falls, which was the upper limit of zone 6 or about 201 miles above the mouth of the Columbia River. The lower limit of zone 6 was then Hood River about 169 miles above the mouth. Commercial fishing with gill net by non-Indians was allowed in that zone up to Celilo Falls. In 1957 after the completion of The Dalles Dam and the subsequent flooding of Celilo Falls, zone 6 extended from Bonneville Dam to The Dalles Dam or from 145 miles to 191 miles above the mouth. Commercial fishing by non-Indians was not allowed in zone 6 after the rezoning. Commercial fishing by Indians since 1956 has taken place in almost all of the present zone 6. Both dip net and set gill net have been used since that time by the Indians. The Indian landings reported are for salmon and steelhead caught in zone 6 and sold commercially and exclude personal-use and tributary catches.

Source: Fish Commission, State of Oregon, Aug. 24, 1964.

Mr. SCHONING. One particular figure, in the case of Chinook salmon on the Columbia River, Indians took 15 percent this year. Out of the total harvest that was made commercial fishingwise, they took 15 percent.

Senator SIMPSON. Thank you very much, Mr. Schoning.

Mr. Hawkins?

STATEMENT OF HANK HAWKINS, SNOHOMISH TRIBE

Mr. HAWKINS. Yes, Mr. Chairman.

Senator SIMPSON. You are from the Snohomish Tribe?

Mr. HAWKINS. Yes, sir.

Senator SIMPSON. My Wyoming Indians are Shoshoni.

Mr. HAWKINS. Mine are Snohomish.

Mr. Chairman, my name is Hank Hawkins. I am chairman of the Snohomish Tribe of Indians. We are treaty Indians with no reservation. In other words, we have no reservation to fish on. If we are going to do any fishing, we shall have to do it in our usual and accustomed places.

Senator SIMPSON. Has your tribe been terminated?

Mr. HAWKINS. No, we never did have a reservation.

Senator SIMPSON. Never had?

Mr. HAWKINS. Never had a reservation. That is the point I am trying to get over. The Point Elliot Treaty of 1855—there were five treaties in the State. The particular one that I am interested in is the Point Elliot. There were 22 tribes and bands recognized by the U.S. Government at that time who signed this treaty. The Puyallup Reservation was established where these 22 tribes were supposed to move on. However, very few Indians all through the country that I have ever found even cared much about reservation, and did not want any part of it. Most of us did not.

By the way, these treaties were signed by the Indians in 1855, but the United States never recognized them until 1859, when Buchanan signed them. But that is another story.

Senator SIMPSON. It still antedates State law?

Mr. HAWKINS. Yes. However, I think that the record will show many other cases whereby the Indians kept their word, but even during that 4 years, you might say, of armistice.

Now, the thing that we are interested in more than anything else is that we are interested at this particular time in our rights. Now, with 170 and 171, it definitely is going to abolish off-reservation fishing.

Senator SIMPSON. Do you have a tribal roll?

Mr. HAWKINS. Yes. It is not closed. We have a roll whereby we have enrolled and, too, fighting our claims for our lands——

Senator SIMPSON. Where do they reside? Is your tribe scattered?

Mr. HAWKINS. Yes, because we never had any——

Senator SIMPSON. You never had a reservation?

Mr. HAWKINS. Yes. Therefore, we are scattered.

Senator SIMPSON. But you do have a tribal roll?

Mr. HAWKINS. Yes, but we are organized under the Howard-Wheeler Act, and are recognized by the BIA.

Senator SIMPSON. And you signed a treaty?

Mr. HAWKINS. Yes. It was part of our people who signed it.

Now, if this thing goes through, this is going to cancel any rights we have ever had. The only rights we have ever had have just been our hunting and fishing rights. Not having the reservation, it has to be at our usual and accustomed places.

Senator SIMPSON. Let me ask you this, Mr. Hawkins. If it goes through, you say it will cancel your rights. You will be compensated for the rights. You do not even want that? You want to keep the rights?

Mr. HAWKINS. Yes, sir.

Senator SIMPSON. Go ahead.

Mr. HAWKINS. Now, as far as I can find out—I have only been chairman 7 years, but I have been active in the council several years before that. But as far as I can find out, there has been no member of the Snohomish Tribe that exercises their rights as an Indian. What few fishermen we have have been working with the commercial fishermen—speaking of commercial fishermen now—as commercial fishermen, side by side with the other fishermen and working under their regulations and procedures and so forth. What I am interested in is this: if we lose this—we are not exercising it now. There is nothing in the future to prevent some of those who want to start it.

On the question of sport fishing, as far as I am concerned, being able to sport fish without being charged a fee is not going to be an infringement. But what proof do we have of that? We have seen these things twisted before.

Now, in 1855, when this treaty was signed, the non-Indian was very, very much in the minority in the State of Washington. Now, the non-Indian—they referred to them as the white man, but I like to use the word "non-Indian." He was asking for equal rights to fish, with that word again, "in common." He was a minority, but he wanted equal rights with the Indian.

Now, with the testimony that has been presented already here, we have a population in the State of Washington of somewhere between 1,800,000 and 2 million people. Testimony showed approximately 18,000 Indians. Now we are a minority of approximately 100 to 1. The treaties have served the purpose as far as non-Indians are concerned, so let us throw them out the window. They want to fish in common, okay.

In this statement right here by the Washington State Sportsmen's Council, may I quote:

> The importance of conservation of anadromous fish to the State of Washington is reflected in the fact that the sport salmon fishing industry alone has a capitalized value of $580 million.

Is that in common with the Indians?

(The full statement of the Washington State Sportsmen's Council appears on p. 212.)

Senator SIMPSON. Well, you have a very peculiar interpretation, because the treaty was signed by the Indians and they bound themselves under the treaty to fishing in common with the non-Indian.

Mr. HAWKINS. Right.

Senator SIMPSON. It was not the reverse which you have put in, it was the other way around. The Indians signed that, not the non-Indian.

Mr. HAWKINS. It was the non-Indian that asked that Indian to sign it.

Senator SIMPSON. But the non-Indian did not sign it.

Mr. HAWKINS. Well, in the name of the U.S. Government.

Senator SIMPSON. The U.S. Government, of necessity, had the supervision, of course. I do not think it does any good in the record to argue that point. But it is very interesting, the interpretation you have. That is an entirely new one to me.

Mr. HAWKINS. Well, that is one thing that I want to bring out.

Another thing I would like to bring out at this time is that I am definitely opposed to 170 and 171.

The Washington State Sportsmen's Council definitely admitted that they are the ones putting up this 170 and 171 for State supervision. I would like to put it in the record right here what my interpretation of the Washington State Sportsmen's Council is and what I have seen of it in the past 12 years that I have been interested in this.

In the State of Washington, the State that is being referred to, is this game commission that regulates the hunting and fishing of the sportsmen. That is a commission made up of people who are appointed by the Governor of the State. Every person serving on that commission has been endorsed by the Washington State Sportsmen's Council. Now, if there is anything as onesided as can be, it is that.

Now, what chance is the Indian or any other outside party going to have against a prejudiced organization like that? To me, that would be one of the worst things that ever came up if the State regulated the Indian fishing.

I feel that 174 is a lot closer to our problem than this.

Senator SIMPSON. 174 is the——

Mr. HAWKINS. This is the resolution in regard to forming a commission to study this problem.

Senator SIMPSON. Oh, yes.

Mr. HAWKINS. Which would be, and it was the testimony here this afternoon, the recommendation of a disinterested party to make this survey. Now I feel that 174 comes closer to that. I would very much like to see this——

Senator SIMPSON. You certainly want it prior to the enactment of 170 and 171?

Mr. HAWKINS. Right, before any action is taken on these two, I think 174 should be acted upon, or something in that nature, for an unbiased study of this question.

Now, as far as the loss of the salmon is concerned; yes. If I may take just a few more moments, in the early part of the depression, in the early 1930's, I had occasion to be with a group in the city of Renton, where we have a small river that runs right through the middle of the city, the Cedar River. It has never been mentioned in any of these cases before now. To my knowledge, no Indian has ever fished with a net, excepting way back, when there was nobody around, you might say. Now, in the early days of the depression, I was with a delegation of citizens who went up to the city council of Renton and protested to them about the stench that was rising up from the banks of the Cedar River from the dead salmon lying there in the hot sun. Today, if you see a salmon in the river, you see a dozen people standing and looking at it, alive, never mind dead. No Indians cleaned that

river out of fish, but there are no fish there. The whole thing boils down to pollution.

Senator SIMPSON. Do you attribute it to pollution?

Mr. HAWKINS. Yes; I attribute it to pollution and overfishing.

Senator SIMPSON. There was not any overfishing then?

Mr. HAWKINS. Not by Indians and not by your game commission. I have caught lots of steelheads in that river before the war, but since the war, there are no fish.

In Elliot Bay, which is the Seattle harbor, during the war and right after the war—I have no exact count, but I can faithfully say that there were hundreds and hundreds of people fishing in small boats out there in the harbor, catching salmon. There was a policy among the boathouses that rented these boats that no boat could come to shore that did not have salmon in it. If you did not have salmon and you came in, one of their personnel would take you out and show you how to catch salmon. Today, you have no trouble at all counting the boats on that bay. And if you catch a salmon, you get your picture in the paper.

Now, at the same time, Elliot Bay today is nothing but a cesspool. It actually stinks. Now, how a salmon that has been living in the ocean for from 2 to 3 years can go through that cesspool and get into the river to start to spawn—I cannot see how they can do it. Yet when they do get up there and the young start down, what happens? The young salmon, and I have never heard any of these specialists here mention this, your salmon spawns in the fall and winter. When they reach the stage of 3 to 4 to 5 inches long, they are living in that stream, and then they migrate down the stream and go out to salt water. Any biologist will verify that.

At this particular time of the year, you can walk up any of those streams and you can find trout, undersized, that have been thrown back in the water because they were undersized, but they were young salmon. That is done by what—I do not call them sportsmen, I call them sports.

Then, in the process of going downstream, you have all these industries dumping this pollution, plus the sewage, raw sewage. Now, today, they have a thing there in Seattle that will, I hope, clean up this sewage. It looks to me like it will. It is one of the finest things that has ever been done.

Senator SIMPSON. I take it you say one of the chief factors is pollution.

Mr. HAWKINS. I say today there are two chief factors. It was greed by overfishing commercially and not necessarily sports, but by the commercial fisheries, and pollution. You, yourself, have heard testimony here about what a small percentage of the catch is by the Indian. I cannot speak for the Columbia River. I am speaking of Puget Sound, because I am not familiar with fishing on the Columbia River. But I am concerned about this point today where, in 1855, when we, the red man, were in the majority and they wanted us to work with them. Now today, when we are a 100-percent minority, they want to forget it and shove us aside.

I make this final plea and that will be all. Mr. Senator, will you see that we get an impartial study of that situation before you go any further?

Senator SIMPSON. I am only one of a number on this committee. Unfortunately, we have not all been here to hear you and I wish we all could have been here. But we happen to be in the last days of a very busy session, and we have to get called from one committee meeting to another and we have to spell each other, and we have to get back to our offices. But you can rest assured that the entire subcommittee will get the benefit of reading all the evidence produced here, and subsequent to that, it will be presented to the full committee. You can rest assured that they will give it a very thorough going over, and they will come up with a solution that they hope and think will be acceptable to the Indians and non-Indians alike.

Mr. HAWKINS. I beg of you, do not turn it over to the State, because I have pointed out to you exactly what the State situation is.

Senator SIMPSON. I gave you a good chance to make that plea, and that is a good plea.

Mr. HAWKINS. It is, and I want to thank this committee for listening to me. You have heard all the figures and testimony that the legal people here can put out, and I just wanted to give you our viewpoint on it.

Senator SIMPSON. Our purpose is to make a thorough investigation, and you have been helpful, and thank you very much for your testimony.

Senator MECHEM (presiding). Mr. Charles Hobbs, Quinault Indian Tribe.

STATEMENT OF CHARLES HOBBS, GENERAL COUNSEL TO THE QUINAULT TRIBES; ACCOMPANIED BY JERRY C. STRAUS

Mr. HOBBS. Mr. Chairman, my name is Charles A. Hobbs, and I am a member of the law firm of Wilkinson, Cragun & Barker. We are general counsel to the Quinault Tribe of Indians. With me is Jerry C. Straus, an associate of our firm. We represent the Quinault Tribe of Indians, who live on the Pacific coast of Washington. None of the members of the tribe are here today, and I am their spokesman. In summary, we oppose the bills.

If the chairman will take a glace at the last page of this statement, he will see a map of the Quinault Reservation. It shows at a glance the fishing situation on the Quinault River. There are four major fishable streams, the Queets, the Raft, Quinault, and the Moclips, of which two of the rivers are closed to Indian fishing by their tribe as a measure of conservation; namely, the Raft and Moclips Rivers. The chief fishery is in the Quinault River, which, as you see, lies entirely within the reservation until it gets to Lake Quinault. Above that, it is just a small feeder stream.

Then, Mr. Chairman, if you would look at the pages just preceding that map, we have reproduced the fishing regulations of the Quinault Tribe here. As you see, there are five or six pages of printed regulations which have been in effect since 1925 and, in fact, they have been in effect since 1917 but they were not reduced to printed form until 1925.

A point I wanted to make here today is that the Quinault Tribe is sincere and careful in its efforts to promote conservation. They have these regulations and they are strictly enforced against their own

members. The tribe hires two persons to patrol the river. There is a full-time river patrolman and a part-time river patrolman. Each of them is deputized by both the State and the Federal Government to enable them to make arrests of people who violate State or Federal law, as the case may be.

Violations of tribal law would have two consequences. One, it might remove the immunity of the Indian to State law and thus make him subject to State penalties, and two, since we are dealing with tribal members, their privilege to fish can be removed or suspended if they fail to follow these regulations.

Quite likely, as a result of this careful enforcement of their conservation regulations, the Quinaults do not have a serious fish depletion problem.

Their streams are not subject to pollution, because there is no industrial development on the reservation. We do have trouble with the logging companies which take gravel from the stream and cutover land might silt up the gravel beds where the salmon spawn. But aside from that, we do not have a pollution or man-made problem. The problem could only be that of overfishing, which is not a problem because the regulations are enforced. Consequently, the Quinaults do not regard their reservation and their fishery as being within the problem which has been described by the State as serious elsewhere.

Just a word about the Quinault Tribe. There are about 800 Quinault Indian men, women and children on or near the reservation. The tribe has a roll. It is not as up to date or as reliable as the Yakima roll, but it could be made so and the Quinaults know who are their members.

Each member is issued a card, a so-called green card, which identifies him as a member of the Quinault Tribe. I noticed testimony earlier that the State was concerned about identification of who is an Indian entitled to exercise treaty rights. In the case of the Quinaults, the card system would seem to be an adequate means of identification.

Mr. Bugas testified earlier for the Columbia River Salmon & Tuna Packers Association. On behalf of this organization, he stated that he supported both 170 and 171. He thought that they are not inconsistent and that on some occasions, 171 might be appropriate in order to purchase Indian fishing rights, and on other occasions, Indian rights should be under State regulation.

Well, what occurred to me was this: If the Indians have treaty rights, then they have some advantage over ordinary non-Indians. Yet Mr. Bugas says that he believes that the Indian should be treated equally with the other citizens of the State and should have no privileges or advantages. Well, if 171 is enacted, then they will have no advantages. Therefore, what would there be left to purchase? If the fishing rights of the Indians are the same as those of any other citizen of the States, what is there to purchase?

So it occurs to me that the two bills are inconsistent. As I say, the Quinault Tribe opposes both.

Senator MECHEM. You say you are opposed to both?

Mr. HOBBS. The tribe is opposed to both.

The Quinault Tribe wants to make it clear that they have no sympathy with those Indians who overfish a river and kill all the fish in it. That is not true of the Quinaults, nor are they sympathetic with that position if anyone should be advocating it.

37-688—64——10

I have a statement here which is not long. I would like to have it made a part of the record at this point if the chairman permits.

Senator MECHEM. That will be done.

Mr. HOBBS. Then there is no need to read it into the record and that concludes my testimony.

(The prepared statement referred to follows:)

PREPARED STATEMENT OF CHARLES A. HOBBS, REPRESENTING THE QUINAULT TRIBE OF INDIANS

My name is Charles A. Hobbs and I am a member of the law firm of Wilkinson, Cragun & Barker. We are general counsel to the Quinault Tribe of Indians. Senate Joint Resolution 170 would broaden the power of the States to regulate off-reservation fishing rights. Senate Joint Resolution 171 would authorize the Secretary of Interior to purchase certain Indian treaty fishing rights. The tribe opposes Senate Joint Resolution 170 because it removes what small advantage the Supreme Court left to off-reservation Indian treaty fishing rights. The tribe opposes Senate Joint Resolution 171 because the fishing right is worth more than money to the tribe.

BACKGROUND OF QUINAULT TRIBE

The Quinault Tribe of Indians resides on the Quinault Reservation on the Pacific coast of Washington. The reservation contains two villages, Taholah and Queets, wherein dwell approximately 600 Quinault Indian men, women, and children. Perhaps another 200 Quinault Indians live nearby outside the reservation. These figures are very approximate. Practically all of the reservation has been allotted out to individual Indians, and one of the few remaining assets of the Quinault Tribe is its fisheries in the Quinault, Queets, Raft, and Moclips Rivers. At present, the Indians are only fishing the Quinault and Queets Rivers; the other two are closed. At the proper times of the year, the rivers abound with various species of salmon. So far, in 1964, the Quinault River has been stocked with 200,000 silver salmon fingerlings, and the Moclips River with 250,000 fingerlings, all at no expense to the State.

The fisheries are owned by the tribe, and are utilized by various members of the tribe who have ancestral fishing stations on the rivers. The Quinaults are very poor, and many of them rely on fish to supplement their diet. The Indians take only a portion of the total fish run. State and Federal authorities agree that more salmon will be taken by (non-Indian) sports and commercial fishing in the ocean than will return to the Indian rivers.

The tribe has had comprehensive fishing regulations since 1917. A copy of the regulations of 1925, which, with amendments, are still in effect, is attached. These regulations are strictly enforced, to prevent the depletion of the fishery. The tribe employs one full-time and one part-time river policemen who are empowered by the Federal and State authorities to make arrests.

SENATE JOINT RESOLUTION 170

The Quinault Tribe opposes Senate Joint Resolution 170, which broadens the power of the State to regulate off-reservation treaty fishing rights. The tribe believes that the State presently has all the authority it needs to prevent the kind of fish depletions by Indians which have been cited as the basis for enacting these resolutions.

In *Tulee* v. *Washington*, 315 U.S. 681 (1942), it was made clear that the States have the power to "impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside of the reservation as are *necessary for the conservation of fish* * * *." [Emphasis added.] The courts have held that this means the State cannot enforce its restrictions against Indians exercising treaty fishing rights unless it can show that conservation cannot be achieved by restriction of non-Indian fishing. *Makah Tribe* v. *Schoettler*, 192 F. 2d 224 (9th Cir. 1951) and *Maison* v. *Confederated Tribes*, 314 F. 2d 169 (9th Cir. 1963), cert. den. 375 U.S. 829 (1964). The rule of these cases is the very minimum a court could hold without abolishing the Indian treaty rights altogether.

The proposed resolution would change this rule by authorizing States to enact regulatory legislation restricting Indian fishing rights, which is merely "* * * *for the purpose of conservaton of fish*." Stated otherwise, the State would no

longer have to show that the regulations it had enacted were "necessary" for fish conservation but only that they were for the "purpose" of fish conservation.

The tribe sees no justification for such a broad expansion of State authority to regulate Indian fishing rights. The tribe does not believe the State will face any serious difficulty under the present rule, certainly no unwarranted difficulty, when it has to deal with a case of substantial Indian depletion of a common fishery. Certainly Indian treaty fishing rights should not be abolished merely for the sake of non-Indian commercial and sports fishermen.

SENATE JOINT RESOLUTION 171

Senate Joint Resolution 171 gives blanket authorization to the Secretary of the Interior to purchase Indian treaty fishing rights. The Quinaults would vigorously oppose any effort to take away their fishing rights, whether they were paid for them or not. The fish, to put it simply, are more important to them than money. As this committee may know, economic conditions on the Quinault Reservation are very bad. Unemployment is chronic. There is no industrial development, and income from timber sales, heretofore the major source of income on the reservation, has greatly fallen off in recent years, and is likely to fall off still further. But no matter how bad economic conditions become, the members of the tribe know they can always turn to the fish in their streams to supplement their diet.

As a practical matter, even if a large sum of money were appropriated to pay the tribe for the loss of their fishing rights, the money would be paid to the tribe, and not to the individuals. The individual members would feel that they had lost their birthright, when they found they could no longer take salmon from the rivers except in accordance with State regulations, which might be much stricter than the regulations which the tribe now imposes.

Even worse would be payment of money to the individual members of the tribe. The amount per individual would be small (the Yakimas received $3,270 apiece for the loss of their fishing rights occasioned by the Dalles Dam. *Whitefoot* v. *United States*, 293 F. 2d 658, 661 (Ct. Cls. 1961), and it would not be long before these members had neither money nor fishing rights. Fish may have a market value to white men, but this has little relation to the subsistence value to an Indian. How does one value fishing rights "which were not much less necessary to the existence of the Indians than the atmosphere they breathed?" *United States* v. *Winans*, 198 U.S. 371 (1905).

If, however, in spite of the above considerations the resolution is to receive further consideration, the tribe strongly recommends that it be made clear that the resolution does not authorize the Secretary to acquire on-reservation fishing rights. The resolution was probably not intended to authorize the Secretary to purchase on-reservation fishing rights, since the problem which is the genesis of the legislation is unrestrained off-reservation fishing by Indians. The clarification could be accomplished by inserting the words "outside a reservation" after the words "entitled to exercise a right secured under any treaty * * *." In so doing, the scope of coverage would be made parallel to that provided for in Senate Joint Resolution 170.

RULES AND REGULATIONS TO GOVERN FISHING IN AND UPON THE QUINAULT INDIAN RESERVATION, WASHINGTON

At tribal meetings of the different tribes and bands of the Quinault and Quilieute Indians held at Taholah, Washington, on the 28th day of April 1925, confirmed on the 16th day of June 1925, by a tribal meeting, the said Indians voted to adopt the following rules and regulations to govern fishing upon the Quinault Indian Reservation, and particularly in the Quinault River and Quinault Lake upon said reservation.

(1) Fishing locations shall be on both sides of the Quinault River, 255 feet apart, and the locations on one side shall be directly opposite the locations on the other side, as shown in a drawing made by Special Agent Dorrington in connection with his report dated December 20, 1915, a photostatic copy of which is on file at the Taholah Indian Agency, Hoquiam, Washington.

(2) The maximum amount of gear (cross nets, leads, and pockets) that may be used on any location shall not be increased in any manner over that provided heretofore per the aforesaid drawing of Special Agent Dorrington except by the action of the Tribal Council called to consider such changes and except as here-

inafter provided. Provided, however, that in locations 1 to 5 the entire net shall not exceed 18 fathoms in length.

(3) An open channel shall be established and maintained as follows:

"Beginning with locations 1 and 2, and including locations 5 and 6, the open channel shall be 75 feet in width; between 7 and 8, to and including locations 39 and 40, the open channel shall be not less than 125 feet in width, for the remaining locations the open channel shall be not less than 100 feet. No fishing is to be permitted in channel, and the said open channel be kept free from stakes, nets, leads, or other obstructions of any kind whatsoever at all times. Owners of location will be held responsible for the enforcement of this rule along the front of their respective locations."

(4) A hook not exceeding 50 feet in length shall be permissible to those fishermen who have no pocket on their web; Provided, however, that in no case shall the hook extend into the open channel provided for in Section 3.

(5) No nets shall be placed in front of the mouth of the river channel.

(6) No splash rope or other device that will frighten the fish will be allowed in the river.

(7) No person shall acquire, operate, or control more than one fishing location upon the Quinault River, and the present fishermen now operating fishing locations upon said River shall continue to have the exclusive right to fish said location without the molestation or interference of any person. Any change in any person fishing said location must receive the consent and approval of the proper authorities, and when two or more persons jointly operate or control a fishing location in said River, only one of them shall be allowed to operate same at a time.

(8) Fishing locations shall not be acquired, operated, or controlled by any nonresident Indian, nor acquired, operated, or controlled by any person than a bona fide resident of the Quinault Indian Reservation, nor shall any fishing location be acquired, operated, or controlled by any Indian or other person not having full rights upon the said Quinault Indian Reservation.

(9) If any fishing location is abandoned, or forfeited for a violation of these rules and regulations, or if the operator of said location dies, a majority vote of the Quinault Business Committee shall designate the successor, subject to the approval of the Tribe. Provided, however, that in case of death, preference will be given to the member of the deceased's family, if they be bona fide residents of the Quinault Indian Reservation.

(10) All nets shall be lifted and removed entirely from the River by 8 p.m. on Saturday from April 15th to June 30th, at all other times at 6 p.m. and shall not be returned to the River until 6 a.m. of the following Monday. No net shall remain on or in the locations during the hereinafter mentioned closed season under any circumstances. This rule shall apply throughout the entire year.

(11) All nets shall be lifted and the fish removed therefrom at least once in every 24 hours. Under no circumstances shall nets be allowed to remain in position without having been lifted and the fish removed therefrom for a greater length of time than aforesaid.

(12) No person shall be allowed to fish in the Quinault Lake except with a hook and line, and no fishing tackle shall be used by any person fishing in said Lake, which tackle will cause the snagging of the blue back or other salmon fish, it being our desire and intention that the snagging of blue-back salmon, particularly by White people from Lake Quinault shall stop, and that irrespective of what fishing tackle may be used and when it shall appear to the Tribe upon competent proof that any person is intentionally snagging blue-back salmon in said Lake even though that person be using but hook and line, all fishing privileges both in the Quinault Lake and the Quinault River heretofore granted such person shall be withdrawn and he or she will not be allowed to again fish in said Lake or River within the boundaries of the Quinault Indian Reservation.

(13) No person, Indian or otherwise, shall be allowed to fish in any other manner, except with a hook, and line, in or upon the Quinault River at a point above what is called Chow Chow Bluff, said Chow Chow Bluff being approximately 6 miles from the mouth of said Quinault River, and under no circumstances or conditions will any set net fishing be allowed above and beyond such Chow Chow Bluff. It being the intention and the purpose of the Quinault Indian Tribe to

establish this point as a deadline in said Quinault River, beyond which no person will be allowed to fish accept as herein provided. Provided, however, that this shall not apply to the present fishing location of Bob Pope during his lifetime.

(14) If any person shall fish illegally or shall violate the foregoing rules and regulations, and upon competent proof of such violation, such person will be suspended from all fishing rights on said Quinault River or Quinault Lake for one year. One violation of said rule or regulation shall be deemed sufficient to invoke this penalty.

(15) The Quinault River shall be closed to all kinds of net fishing beginning January 31st up to April 15th. Provided, that a net not less than 8-inch mesh shall be used for the period July 1st to September 15th. After September 15th nets or gear of 6½ inches may be used for silver and steelhead.

For home consumption of the party fishing, net fishing will be also permitted during the closed season on Thursday of each week from 6 a.m. to 6 p.m. under the same limitations as above set forth.

(16) All new applicants for fishing locations in the Quinault River shall present their applications to a committee of seven, now known as the Quinault Business Committee, the said Committee having been selected by the Tribe. This Committee of seven is authorized to consider all applications for new fishing locations and assign same when in their judgment it is proper to do so. In the event an applicant feels aggrieved or displeased with the ruling of the Committee, it is provided that the applicant shall have the right to appeal to a council meeting of all Indians of the Tribe for the purpose of finally deciding the matter, and then be guided by the action of the Tribe in the premises.

(17) Violations of any of the foregoing rules except as hereinbefore provided, shall upon conviction therefore, be punished by withdrawal of fishing privileges as follows:

(A) For the first such offense, the fishing privileges of the violator may be withdrawn for a period of not less than one week and not more than one month.

(B) For the second offense, or for conviction of three or more violations at the same trial, all fishing privileges of the violator shall be withdrawn for not less than one month, nor for more than one fishing season.

(C) For the third offense or for numerous flagrant or willful violations, all fishing privileges of the violator shall be withdrawn for the remainder of the season, and the fishing privileges of such holder at said location may be permanently forfeited.

(18) The Court of Indian Offenses shall have cognizance of the aforesaid offenses, but the Superintendent shall have the right, upon the appeal of the defendant or upon his own motion, to review the case and to make such modifications of the sentence imposed by the Court as may to him seem advisable. The Superintendent shall also have the authority to commute the sentence of the Court of Indian Offenses or to direct a lesser sentence than herein provided when, in his opinion, good and sufficient reason exists therefor. The defendant shall have the right of an appeal to the Superintendent and the Commissioner of Indian Affairs in all cases.

(19) In the interest of propagation, the Bureau of Fisheries will have sole jurisdiction over the streams entering Quinault Lake which are known as spawning grounds, and joint responsibility in enforcing the laws and policing the Lake, and the outlet of the Quinault River, however the Quinault Indian Tribe wishes at this time to go on record as opposing the fish weir now in use by the United States Bureau of Fisheries, it is our wish that this fish weir be abandoned, we see no useful purpose in maintaining same, we think it is destructive to the salmon and the propagation of same, as their weir destroys many salmon, and has been in operation for over 4 years. We grant the Bureau of Fisheries certain rights upon our reservation, and in return for these we ask that this weir be removed and take this opportunity of going on record against this weir.

(20) That all of the foregoing rules and regulations be enforced by such officer or officers as the Secretary of the Interior or the Commissioner of Indian Affairs may designate.

We the following named Indians, do hereby certify that we, and each of us are duly enrolled Indians and actual residents of the Quinault Indian Reservation, Washington, and that at a duly authorized tribal council held at Taholah, Washington, upon June 16, 1925, we and each of us were appointed, designated and elected by the entire vote of the Quinault and Quilieute Tribe and bands of Indians, to act as the Business Committee to represent the above named Tribes and Bands in any and all dealings which said Tribes and Bands may or might have with any person or persons, and that we, the following named committee have been especially authorized to sign the following rules and regulations upon the behalf of said Tribes and Bands, said Tribes and Bands having previously voted in favor of each and every one of the foregoing rules and regulations, and we the following named Committee are further authorized to submit same to the Secretary of the Interior, and the Commissioner of Indian Affairs for approval.

HARRY SHALE, *President.*
WILLIAM MASON,
CHAS. STROM,
OSCAR MCLEOD,
ROBERT SAMPSON,
FRED POPE,
JOHNSON WAUKEENAS,
W. J. GARFIELD,
Quinault Business Committee.

Amended Section (10) to read from April 1st to June 30th instead of April 15th, etc.

Amended Section (16) to read 5 members of the Business Committee instead of 7 members.

Fishermen's meeting and continuation of annual meeting March 30, 1961, that 17 years of age and over are entitled to fish during the commercial fishing season.

Resolution, October 22, 1956: "Dipnetting: * * * *and only* those other individuals that are considered and approved by the Quinault Tribal Council * * *" "* * * any individuals * * * non-allottees, also non-residents * * * do not in any way qualify for dipnetting privileges."

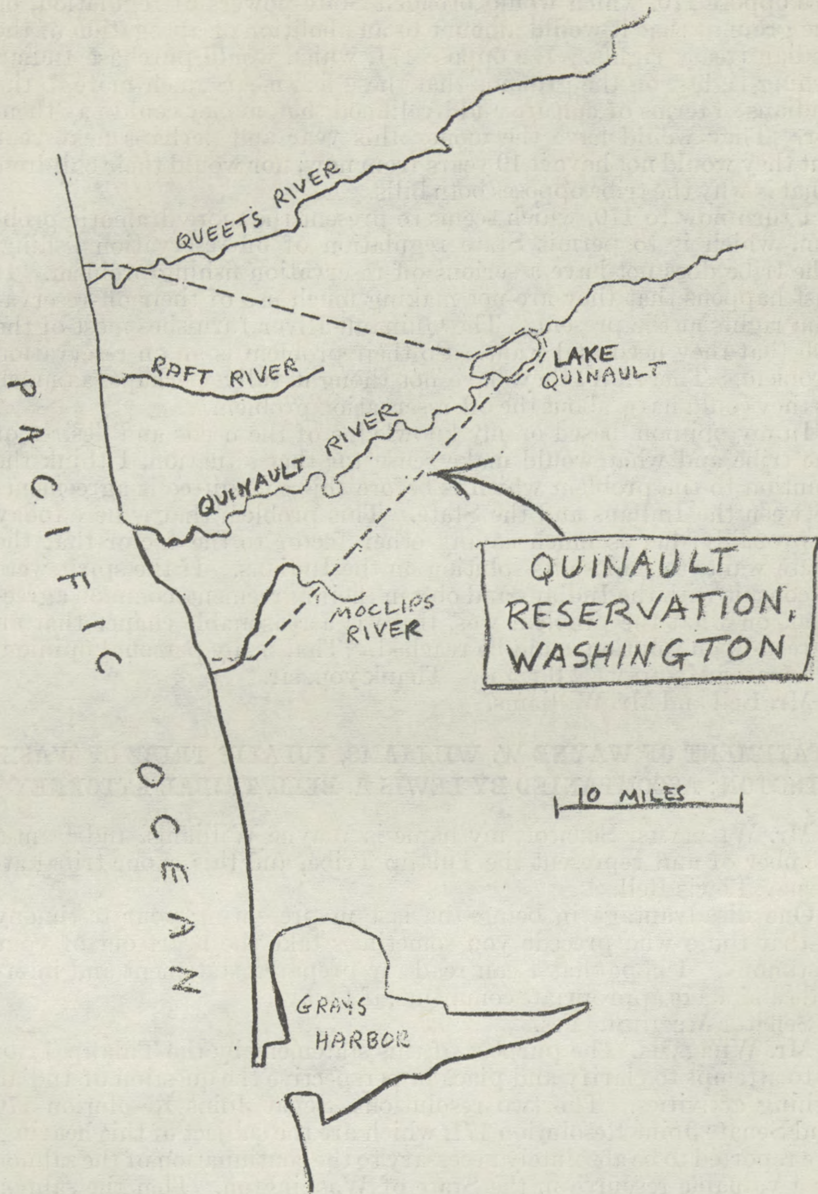
Dipnetting: Old Tribal ruling that no dipnetting during the commercial season when nets are set at the mouth of the river. Permissible only during high water when the nets at the mouth of the river are out.

Home consumption fishing from July 1st to September 14th that no blue back or small web net is to be used.

Home consumption: Annual meeting March 30, 1957, that fishing for home use prior to the blue back commercial fishing season amended to fish only on Fridays from 6 a.m. to 6 p.m.

Resolution, June 14, 1961: In the settlement of fishing ground estates before the Business Committee, that all parties are required to be present.

QUINAULT FISHING STREAMS



Senator MECHEM. Do you have any suggestions or recommendations other than appear in your statement? We have had recommendations for a study and we have had recommendations to leave the situation as it is and recommendations otherwise, and I just would like to find out if you have any or if the tribe has any.

Mr. HOBBS. Let me answer you circuitously, if I may, in this fashion. We oppose 170, which would broaden State powers of regulation, on the grounds that it would amount to an abolition or abrogation of the Indian treaty rights. We oppose 171, which would purchase Indian fishing rights, on the grounds that these fish mean much more to the Indians in terms of culture and livelihood than money could pay them for. They would have the money this year and perhaps next year but they would not have it 10 years from now, nor would their children. That is why the tribe opposes both bills.

I turn now to 170, which seems to present the more dramatic problem, which is to permit State regulation of off-reservation fishing. The tribe does not have a serious off-reservation fishing problem. It just happens that they are not making much use of their off-reservation rights at the present. The Quinault River furnishes most of the fish that they need and want. So their problem is an on-reservation problem. Therefore, they have not thought fully, perhaps, as much as they could have, about the off-reservation problem.

In my opinion, based on my knowledge of the needs and desires of the tribe and what would make sense for that situation, I think the solution to the problem which is before this committee is agreements between the Indians and the State. This problem that is here today is probably due as much as any other factor to the factor that the State wants to impose its solution on the Indians. If the spirit were to consult with the Indians and obtain their agreement, common agreement on what the problem was, there is a reasonable chance that an agreed-upon solution could be reached. That is my personal opinion.

Senator MECHEM. All right. Thank you, sir.

Mr. Bell and Mr. Williams.

STATEMENT OF WAYNE W. WILLIAMS, TULALIP TRIBE OF WASHINGTON; ACCOMPANIED BY LEWIS A. BELL, TRIBAL ATTORNEY

Mr. WILLIAMS. Senator, my name is Wayne Williams, and I am a member of and represent the Tulalip Tribe, and this is our tribal attorney, Lewis Bell.

One disadvantage in being the last in presenting your testimony is that those who precede you sometimes take the heart out of your testimony. I hope that I can read my prepared statement and intercede and make appropriate comments, if I may.

Senator MECHEM. Yes.

Mr. WILLIAMS. The purpose of this statement by the Tulalip Tribe is to attempt to clarify and place in perspective the question of Indian fishing activities. The two resolutions, Senat Joint Resolution 170 and Senate Joint Resolution 171, which are the subject of this hearing, are reported to be absolutely necessary to the continuation of the salmon as a valuable resource in the State of Washington. That the salmon is an asset worth saving is without question. However, we vigorously take issue with the proposition that the way to accomplish this is through the enactment of these resolutions.

I might mention that there are three camps, so to speak, in the State of Washington, relative to Indian fishing. One, you have the State department of fisheries and game, the sportsmen's organizations on one side, who are very violent in their opposition to Indian fishing,

and on the other hand our Indians who deny this and the vast majority of the people are uninformed as to what has happened. So I would say that the wealth of correspondence that Congress has received has been the result of a very definite compaign among the minority in the State of Washington.

I mention this to make an attempt to clarify, as I have said, the position that because of the emotionalism involved, we are inclined to overlook many other aspects of the fishing problem.

I would like to briefly run through some of the factors that exist. The preceding gentleman from Oregon cited a number of them, and I was very much pleased that he did so.

The future of the salmon in the Pacific Northwest is in serious jeopardy, but not from the Indian as has been often charged. We will admit to being a factor in influencing the salmon runs but deny that wild accusation that we are the sole cause.

I believe that Mr. Pautzke, a man for whom I have great respect for his ability and knowledge of fishery matters, in reply to a direct question of, I believe, Senator Simpson—he asked him are the Indians the direct and sole cause of the depletion of the salmon. Mr. Pautzke somewhat squirmed but very truthfully said we are a factor.

This we do not deny. Anyone who takes a salmon is obviously a factor.

The cold, hard fact of the matter is simply that there are not enough salmon to go around.

In the directors foreword of the 1962 Annual Report of the Washington State Department of Fisheries the following statement may be found:

> One of the most urgent problems within the industry is the great number of commercial salmon fishermen who share the commercial catch. More fishermen are licensed and there are more fishermen than are needed to fully harvest the available runs.

The following sentences from a recent publication by the University of Washington (Publications in Fisheries, New Series, vol. II, No. 1, dated February 1963) add to this contention:

> The excess fishing gear used to harvest the salmon resource of the northern Puget Sound and the Strait of Juan de Fuca has endangered the conservation of the salmon runs and greatly reduced the earnings of the men and vessels engaged.

If there were enough salmon—an impossible condition, man is never satisfied—there would be no problem. Unfortunately, however, this is not the case. At almost every turn obstacles have been placed before the salmon. It is a remarkable fact that they have survived thus far.

Mr. Clarence Pautzke, presently head of the U.S. Fish and Wildlife Service, when he was with the Washington State Department of Fisheries, wrote that the decline in salmon runs was caused by "the loss of environment to the fish. Environment consists principally of suitable spawning and rearing areas." This statement may be found on page 100 of volume III of "Fisheries," a book compiled by the Washington State Department of Fisheries in 1960.

What are some of the things that have taken place that have harmed the salmon's spawning and rearing areas? As the Northwest contintues to grow so will the need for electric power and fresh water. This will bring about the construction of dams across spawning

streams. Deforestation of watersheds by overextensive logging activities allows the rain and melting snows to run off much too rapidly carrying with it silt that will kill the eggs and destroy the minute plantlife that provide the food for the young salmon.

I might add that in a recent meeting with the Department of Fisheries in Seattle on another matter, the effect of overlogging was described by one of the biologists. There is a river close to the Tulalip Reservation, which I am from, that is called the Stillaguamish, a very fine producer. He cited that at one time the Stillaguamish produced chinook salmon in great numbers. Due to overlogging, however, chinook had diminished. Not being a biologist and not schooled in these matters, I admitted my ignorance and asked why. He said that the chinook likes a nice quantity of water to spawn in, and cool water. The reduction of trees allows, as I have mentioned, the runoff of the snow and rain far too rapidly, so that the water is gone in one great bulk, and then throughout the time when the chinook will be in the stream, the rate of flow is diminished. As a result, the water temperature rises and thus makes it unattractive to the chinook, so as a result he does not go back.

Predators, both bird and fish, take their toll of young salmon. An examination of 12 mergansers shot in the Puget Sound area revealed that they had each eaten an average of 474 young pink salmon. The active Canadian fishery just inside the Bonilla-Tatoosh line constitutes a major threat to the salmon runs destined for Washington waters. By the whim of nature the bulk of the salmon travel on the north, or Canadian side of the Strait of Juan de Fuca as they return to the streams of their birth. This fact has caused the Canadian fleet to grow in an area that they never fished before. Thus far the Canadians have turned a deaf ear to this country's request to relocate the line to reduce the effect of this large fishery.

The aforementioned University of Washington publication had this to say on this problem:

> Other factors concern area of operations and efficiency of gear. Within the past 10 years the Canadian side of Juan de Fuca Strait has become a major fishing area. The power block—

this is a type of power gear that salmon fishermen use, white commercial fishermen. It was referred to by previous witnesses.

> The power block has doubled or tripled the number of sets a seiner can make in a day. Drum seine gear permits a boat to make as many as 15 sets a day. Synthetic fiber gill nets are universally used, and they have about twice the fish-catching ability of linen nets. Mobility of the fleet, increasing with speed and power, permits high-speed craft to shift between areas, defeating efforts at effective administration.

This has been a major source of concern to the Washington State Department of Fisheries. They, along with Canada, are members of the North Pacific Salmon Commission. They have attempted to reason with the Canadians in an attempt to give Canadian fishing regulations more recognition of salmon who are traveling in Canadian waters that are destined for American streams. But thus far you are dealing with a sovereign foreign country, and their fishermen are enjoying a tremendous advantage and they are not about to change.

Pollution by agricultural pesticides must not be overlooked. Industrial pollution, principally by the pulp industry, is one of major concern.

The 1962 Annual Report of the Washington State Department of Fisheries recites in detail the results of a test of placing chinook fry in an area where pulp wastes are discharged. A 100-percent kill was observed near the mill, called station II in the tests.

> The live-box study demonstrated that the acutely polluted waters at station II could not support fish life for more than a few minutes. Dispersion of these waters through tidal and wind action could be expected to extend the toxic conditions throughout a greater area of the bay. Also, the fact that dying juvenile salmon had a tendency to sound and remain on the bottom after death could preclude the perception of a kill of young salmon.

The sports fishery also constitutes a major factor in the salmon picture. In 1962 over 1,100,000 "angler trips" took place that resulted in the taking of almost 600,000 salmon. This represents approximately 20 percent of the total salmon catch for the year in the State. Any group that can account for that amount of salmon cannot be ignored. By way of comparison the "white" commercial fishermen took 2,241,000 salmon while the Indian was engaged in taking the grand total of 247,000 salmon. Please note that the sports catch was almost 2½ times greater than the Indian catch.

If I may, Senator, I would like to refer to the testimony of the Tulalip Tribes in October of 1961 in Tacoma when Senator Magnuson and Congressman Tollefson conducted a hearing into the same thing. The 10-year catch was compiled from the State of Washington figures put out in their annual report and the 10-year State catch computed from 1951 to 1960 in numbers of fish showed the Indian catching 3,700,000, or 5¼ percent of all salmon caught in the State of Washington; this is commercial, Indian, and sports. The sports fishermen took 5,227,000, or 7¼ percent, and the commercial fishermen, 62 million salmon, 87 percent.

Senator MECHEM. Does that include both reservation and off-reservation catches?

Mr. WILLIAMS. All-Indian catch. The 10-year chinook catch from 1951 to 1960 show the Indian taking—I consider the chinook an important reference here in that it has a worldwide reputation of being a very tasty fish, a very good game fish, much prized by anglers and trollers. The Indian took in that 10-year period 478,000 fish or 6.5 percent of all chinooks caught during that 10-year period. The sportsmen took 2,154,000 or 28.5 percent; commercial fishermen 4,488,000 or 65 percent.

This trend has continued. I shall not belabor you now with them, but I would like to insert them for the record.

Senator MECHEM. Why do you not just refer to it?

Mr. WILLIAMS. Yes; these figures are not dreamed up by me or anyone else. They are readily available to anyone who wants to see them in the annual reports put out by the Washington State Department of Fisheries.

With the salmon being subjected to such an overwhelming set of circumstances why have the Indians been singled out for such attention? At various times in the past the pulp industry, the commercial fishing industry, and the sportsmen's organizations have all accused each other of being responsible for the decline of the salmon but each finds the other a tough, well-organized, and well-financed adversary. The Indians by way of contrast are the poorest, least-organized group

left to blame. In short, the Indians are low man on the totem pole.

In conclusion we maintain that the State of Washington is not powerless to protect itself but is fully capable of doing so. The attached document that the tribal attorney will refer to, the Washington State Supreme Court decision in the case of the *State* v. *McCoy*, is documentary proof of this fact. If the State is powerless then it is their own choice to be such.

There is a fishing problem in the State of Washington but it is not caused by the Indians as can be seen by the foregoing. The problem is a serious and difficult one—one that will require the most careful study and thought and not be the subject of special interest pressure groups.

We further believe that insofar as Indian fishing is a factor, a small factor at that, this is a matter for the judicial branch of our Government, not for the legislative. Lastly, these resolutions strike at the treaty. This treaty is more than a scrap of paper, it represents the solemn word of the United States of America. We earnestly request that this committee do nothing that will impugn that word.

I would like to add just very briefly that the Tulalip Tribes, far from being unregulated, are a regulated fishery. I would like to leave for the record and for your examination a fishing audit enacted by our tribe and reviewed and approved by the Solicitor's Department of the Bureau of Indian Affairs. This document has received the praise not only of the Bureau but also from the State department of fisheries. We have letters that we did not bring, but we can send for and add to the record, in which the State game department and the State fisheries department recognize our efforts at conservation and have thanked us for our cooperation in maintainnig a court system and a paid patrolman to apprehend violators.

We limit gear, we limit the size of the net, we do not allow power on our beach seining, in contrast to some of these large purse seiners that whites fish with.

In short, I think that Indians are suffering from being branded as a group. One group does something that incurs the wrath of the general population and right away all Indians are such. We would like a reverse discrimination. We are not all as bad as some may say and probably not as good as we maintain.

But I would like to call upon our attorney to go into some brief detail on the statement that we feel that the State of Washington can help itself and has chosen deliberately not to.

Mr. Bell.

Senator MECHEM. Before he starts, do you have a tribal roll?

Mr. WILLIAMS. Yes; we do.

Senator MECHEM. All the members of the tribe are identified?

Mr. WILLIAMS. Yes.

Senator MECHEM. How many are there, all told?

Mr. WILLIAMS. 750 roughly. This changes because of deaths and births.

Senator MECHEM. Do you keep that roll current?

Mr. WILLIAMS. Yes.

Senator MECHEM. Go ahead, Mr. Bell.

Mr. BELL. Mr. Chairman, my name is Lewis A. Bell and I am an attorney for the Tulalip Tribes.

I first would like to make a part of the record the statement which I have handed to the Senator and leave all this here for the record, as well as several other copies for the committee. I am not going to read it, but I would like to point out that attached thereto is a verbatim copy of the Supreme Court decision in the *McCoy* case. It has been much talked about, and I think the best thing is to have the Senator read it and come to his own conclusions.

(The documents referred to follow:)

STATEMENT OF LEWIS A. BELL, REPRESENTING THE TULALIP TRIBES OF WASHINGTON

Before proceeding on discussion of the resolutions a knowledge of the history of these Indian people clearly discloses how the "usual and accustomed" places doctrine was put in the treaty.

In 1855 Washington territory was a wild land 60 days horseback removed from St. Louis, Mo., and inhabited by more Indian people than whites.

The white people occupied it by force of arms and the Indians were a subjugated people overpowered by a military force.

In order to secure title to the lands involved and to assure order in a wild land peopled by a strong and savage race, the United States made a purchase of the lands for cash and other considerations. The treaty clearly discloses it to have been a transaction of bargain and sale.

In order to induce the Indian to so deal he was given exclusive occupancy and possession of certain lands called reservations. But this did not fully assure him for he fished for sustenance and without fish he starved.

No food was available from the United States as a substitute.

So the Indian asked that he, though not a citizen but a subjugated person being removed to a reservation upon which he must live in the future, be given as to fishing at least the right to go off the reservation to secure his sustenance. He naturally wanted to go to fish to his usual and accustomed places and he wanted to be protected and unmolested thereat from the soldiers and citizens of his conquerors.

He realized he had just sold his place to others and they certainly would want to utilize it, too. The Indian did not ask for occupancy of these places to the exclusion of those to whom he had just sold it, all he sought at such places was equality so he could fish as an equal as if he were a citizen of the conqueror instead of a member of a conquered race.

The record attached hereto shows that he was so assured and told he could go off the reservation to the usual and accustomed places for the purpose of fishing, hunting, and berry gathering (and for no other purpose) and thereat while so engaged he would be protected from discrimination and treated with equality by the white man who having bought the place could be expected to be also there similarly engaged.

Today the Indian is a citizen and thus no longer needs a treaty to give and assure equality before the law when he exercises his treaty right to get to and thereafter fish at his usual and accustomed places "off the reservation."

It is the position of the Tulalip Tribes as an Indian people signatory to the treaty of Point Elliott that both Senate Joint Resolutions 170 and 171 be rejected by the committee.

They understand Senate Joint Resolution 170 to declare that by reason of decisions of the U.S. Supreme Court "off-reservation" fishing rights are subject to State regulation. This they have always believed to be the fact and have conducted themselves accordingly.

The power of the State to regulate the time and manner of fishing has nothing to do with the treaty nor has it any relation thereto. It is simply the State's exercise of its police power to protect the general welfare and conserve the fishing resource.[1]

By law of the State of Washington all wild animals and game fish of the State are its property [2] and the taking thereof and of food fish which includes salmon are controlled by regulation of the director of fisheries and of game.[3]

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[1] *Greer* v. *Connecticutt,* 161 U.S. 519.
[2] Revised Code of Washington, R.C.W. 77.12.010.
[3] R.C.W. 75.08.010 et seq. R.C.W. 77.12.030.

The Tulalip people claim no treaty right to fish off the reservation at usual and accustomed places which gives to them a status greater than other citizens.

They merely claim the right to fish at such places "in common" with other citizens on a basis of equality subject as are all others to the police power of the sovereign State of Washington.

Their right is solely to fish, thus they need not be licensed in order to be permitted to do so and they cannot be deprived of the right to fish by denial of access to the water but once there the treaty is clear as interpreted by the *Tulee* and *Kake* cases[4] that they are on a basis of equality with other citizens.

The other citizens have no right to fish and thus are merely permitted to do so by the State which licenses them. Nor can such others claim a treaty privilege to go over the lands of others to get an ancient fishing ground. But once fishing in waters under the State's jurisdiction the State's power to reasonably regulate all people, including Indians, in the time and manner of fishing outside the reservation is unquestioned.

This State's regulatory power does not arise in treaty, is not dependent upon such, nor further any treaty provision, nor derogate therefrom.

To so resolve that it does is an idle, useless, and erroneous act and statement of the law. It will not affect, add to, change, or vary existing powers, jurisdictions, or rights, now or in the future of any State.

Besides being a fruitless exercise in passing legislation the Resolution 170 will cause confusion because it will erroneously infer and lend credence to the belief that the State's powers to regulate an off-reservation Indian fishery are in some mysterious and unknown manner deemed to arise from the treaty.

A treaty with the Federal Government is not dependent for efficacy and implementation upon subsequent supplementary State legislation nor can the right in such treaty vested be in any way affected by such State legislation.

The treaty is the supreme law; rights granted by it are paramount.

Nor can a subsequent State legislative act interpret it. Interpretation is a judicial function and such functions cannot be physically performed or accomplished by a legislature. In the nature of things a legislature cannot interpret law; by law and constitution it is forbidden to so do even if it could.

Resolve as in Resolution 170 is therefore an idle, useless exercise of legislative function stating only the already obvious, to wit: that State legislation on the subject must be in furtherance of and not in derogation of treaties.

To so resolve is also erroneous because State legislation on the subject of regulation of its fish and game doesn't derive for fundamental power to do so from Federal authority, but, rather, springs from the attributes of the State's own sovereignty.

Senate Joint Resolution 171 is equally lacking of purpose and based upon misconception.

In the first place it rests as to the need for its enactment firmly upon the precept that judicial decision of *Tulee* v. *Washington*, *Maison* v. *Confederated Tribes* and *Washington* v. *McCoy* have not resolved the issues.[5]

This is erroneous as they have done so and with clarity and firmness. In their essence these cases say that the Indian people gave no off-reservation treaty right to fish except in common with citizens.

Resolution 171 then proposes to purchase the Indian's equality with other citizens.

This impoverishes the United States because regardless of the amount of money paid to the Indian people for their so-called off-reservation rights they will still have them as American citizens. No Congress can purchase a citizen's equality with other citizens and Indians are citizens of the United States.

Today, Indians can get access to usual and accustomed places by public highway or navigable streams, or both, and they will do so even after selling their right to trespass to get to such places. In fact, though possibly they could trespass as a matter of treaty right, they don't do so and today go to fish just as do other citizens.

Off-reservation fishing rights granted by treaty consist basically of (1) a property right in the nature of an easement on the lands of others to get to the usual and accustomed fishing places without trespassing, and (2) the right not to be excluded therefrom by other citizens or by the State after arrival at the fishing site.

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[4] *Tulee* v. *Washington*, 315 U.S. 681; *Stater Wallahee*, 143 Wash. 117; *State* v. *Meninock*, 115 Wash. 528; *State* v. *Towessnute*, 89 Wash. 478; *Kake* v. *Egan*, 369 U.S. 60.

[5] For *McCoy* case see attached exhibits 64 (2d) Wash., Dec. 423; 314 Fed. 2, 169.

This concept leads to allowance of fishing by Indians at such places without need of the State's permission through licensing and the payment of money to Indian people by Government when such places are destroyed and lose their existence, such as was paid to the Yakimas when The Dalles Dam flooded their usual place called Cellilo Falls.

Resolution 171 will not compensate for the destruction of the fishing place as such is not contemplated and as citizens the Indians cannot be deprived of fishing there with equality with other citizens where originally as a noncitizen in 1855 he could have been so excluded except for the treaty.

The State of Washington in regulating the fishery by Indians as citizens without treaty right off the reservation at such places would still have to exercise its police power in a reasonable manner equally applicable to all citizens, not arbitrarily and capriciously, and with regulations germane to the subject to be regulated, i.e., reasonably necessary to the conservation of the fishery resource.

So about all the purchase would do would be to possibly change the burden of proving the regulation of a proper use of State police power by shifting such burdens from the State to the Indian citizen. This would not change substantive right, and is solely procedural. Thus it is open to question whether the United States will under Resolution 171 purchase anything of consequence though the price may be high because Indians have always been foremost among those of our citizens who followed fishing as an occupation.

But the Resolution 171 contains a moral. If possible, it is a clear expression of congressional intent that the United States is willing to break the faith of 100 years with the Indian people and to unilaterally and without their consent destroy the treaty.

If the United States, today, will not keep its promises and treaties even though they be with Indians this attitude of mind and standard of morals will not fail to be impressed upon the conscience of other native minorities, including Negroes, as well as upon foreign nations.

Today, of all times, is no time for the United States to break its most solemnly given promises.

Indians do fish off the reservation. Some have by their excesses caused great public outcry which has been well founded.

But these excesses have not been in pursuit of treaty right but rather in derogations thereof. Such excesses continued and increased because the State of Washington's enforcement officers sat idly by and allowed them to continue and multiply for lack of the normal procedure of arrest and trial.

The State's law enforcement officials took movies of State fishery law violations by Indians and showed them to audiences throughout the State of Washington and did not arrest the violators.

The result was and is predictable. Great public outcry occurred against the Indian people as a whole because of the excesses of the few. Enflamed by such propaganda, sports organizations and conservationists demanded corrections. Such demands directly resulted in these hearings.

The calculated lack of law enforcement, well publicized, has done its evil work.

If the State would aggressively enforce the law, the off-reservation Indian fishing problem would be over.

Only law enforcement by the State will protect the fishery resource and the *Tulee* and *McCoy* cases clearly point the way and allow such enforcement.

Because the *McCoy* case is so clear, concise, and definitive on this subject it is attached verbatim as an exhibit to this statement with both majority and minority opinions for the committee to read and itself determine if it does not do as is contended, that is: decide once and for all that Indian people have no off-reservation fishing rights except in common and on equality with other citizens at the Indians' usual and accustomed fishing places.

In conclusion it is submitted that both resolutions be rejected. Attached hereto is a true copy of the entire treaty and excerpts from the 1854–55 conferences concerning the signing of the treaty in order that the committee can be fully oriented on its background and meaning. Please note that no mention is made of fishing on the reservation. Such is done outside State jurisdiction as an incident of the Indians exclusive occupancy of the land of which fishing is a usufruct as would be mining, oil production, farming, or other land uses. This right of fishing as an incident to occupancy and use of reservation lands is not affected by the resolutions except as their adoption might create a moral climate for subsequent demand to do away with the entire treaty.

Such subsequent demand is not at all unlikely as the present resolutions though fully implemented and enacted would do nothing to accomplish their intended result of limiting Indian fisheries conducted without regard to State jurisdiction rule and regulation.

To do so the treaty would have to be abolished.

Is the Senate ready to establish such a precedent?

Ordinance No. 27

An Ordinance for the regulation and control of fishing of the Indians of the Tulalip Reservation

Be it enacted by the Board of Directors of the Tulalip Tribes of Washington, an Indian tribe organized and existing pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended and acting in accordance with Article VI, Section 1(f), (h), (k) and (l) and Article VIII, Section 2, of the Tribal Constitution and Section 5(b)(3) of the Tribal Charter the following:

ARTICLE 1. GENERAL PROVISIONS

Section 1. No one shall be allowed to fish commercially within the jurisdiction of the Tulalip Tribes of Washington, hereinafter called the Tribe, as the owner of any type of boat, net, gear, equipment, or apparatus of any kind or description used to catch fish commercially, hereinafter called gear, or as a crewman or operator of such gear until a Commercial Fishing Permit has first been secured for such type of fishing from the Tulalip Board of Directors, hereinafter called the Board.

Section 2. Only members of the Tribe, as defined by the Constitution and Bylaws of said Tribe, shall be granted a Commercial Fishing Permit, hereinafter called Permit, except that an American Indian not a member of the Tribe but descended from a tribe signatory to the treaty of Point Elliott, upon application to and the approval of the Board, may be granted a Temporary Permit to fish as a crewman or operator only and not as the owner of gear. Such Temporary Permit shall be issued subject to any requirements, limitations, or restrictions deemed appropriate by the Board and promulgated by the resolution of said Board no later than the 15th day of May of each and every year.

Section 3. Commencing on or about the 15th day of April of each and every year applications for Permits will be received at the Tribal office. If the applicant is a gear owner he shall produce a Coast Guard Registration card and other documentary evidence that he is the legal owner of the gear for which said Permit is applied for and in no case shall a Permit be issued to any gear owner or crewman or operator until the required fee, together with any and all fees and/or fines of any prior year or years, have first been paid. A schedule setting forth the fee for each type of Permit shall be promulgated by appropriate resolution of the Board no later than the 15th day of May of each and every year.

Section 4. Any Indian, other than a gear owner, who is subject to and fishes commercially within the jurisdiction of the Tribe without a valid Permit shall be deemed guilty of violating this Ordinance and upon conviction shall be fined not less than $25 nor more than $50.

Section 5. Any member of the Tribe who fishes commercially within the jurisdiction of the Tribe as the owner of any gear without a valid Permit or Permits for himself or for one or more crewmen or operators of his said gear shall be deemed guilty of violating this Ordinance and upon conviction shall be fined not less than $25 nor more than $100, and the confiscation of all fish caught by said gear while in violation of this section. Upon the second conviction during any Commercial Fishing Season of the Tribe, hereinafter called Season, for violation of this section, in addition to the aforementioned fine and confiscation of fish, the violator's gear shall be impounded and held until a valid Permit or Permits are obtained, or until the end of the said Season, whichever occurs first.

Section 6. Any gear owner who permits or allows a non-Indian to fish commercially as a crewmen or operator of said owner's gear within the jurisdiction of the Tribe shall be deemed guilty of violating this Ordinance and upon conviction shall be fined not less than $250 nor more than $500, and the confiscation of all fish caught by said gear while in violation of this section, and the gear owner's Permit shall be revoked and gear shall be impounded until the end of the Season.

Section 7. No gear owner who has a valid Permit to beach seine or to gill net shall be granted a Permit to fish with a set net.

Section 8. Any Indian subject to the jurisdiction of the Tribe who maintains, causes, aids, or abets in maintaining a public or private nuisance upon any Fishing Location, Set Net location, or any other fishing areas within the jurisdiction of the Tribe shall be deemed guilty of violating this Ordinance and upon conviction shall be fined not less than $25.00 nor more than $100.00 or his Permit shall be revoked for the balance of the Season, or both.

Section 9. A Catch Tax on the gross sale price of all fish caught within the jurisdiction of the Tribe and sold by each gear owner or his agent is hereby levied and imposed on said person or persons. The amount of the aforementioned Catch Tax shall be determined by the Board and promulgated by appropriate resolution of the said Board no later than 15th day of May of each and every year. The said Catch Tax shall be paid before the fish are removed from the jurisdiction of the Tribe: Provided, that the said Catch Tax shall be considered paid if the said fish are purchased for resale by any person or firm, or agent thereof, who agrees in writing to withhold the required tax and remit the same to the Tribe no later than the 15th day of December of each and every year. Failure to pay the Catch tax before the fish are removed from the jurisdiction of the Tribe deem the gear owner guilty of violating this ordinance and upon conviction shall be fined not less than $50.00 nor more than $150.00, in addition to the payment of the required Tax on all fish sold by said owner not previously collected. This section shall not apply to individual fish sold on the beaches or fishing grounds for purposes other than resale or to nonprofit organizations on the Tulalip Reservation.

Section 10. The Season shall commence on the 15th day of June of each and every year and shall extend to and close on the 30th day of November of each and every year: Provided, however, that all commercial fishing shall cease and be suspended completely from 6:00 P.M. Friday to 6:00 P.M. of the following Sunday each and every week of said Season and further provided, that an emergency closure may be ordered by the Hunting & Fishing Committee of the Tribe, such closure not to exceed five (5) fishing days for the period between regular Board meetings. The Board may fix and promulgate by appropriate resolution other times, periods, and areas of opening or closing. Any gear that is used in violation of this section shall deem the owner thereof guilty of violating this Ordinance and said owner shall, upon conviction, be fined not less than $250.00 nor more than $500.00, and the confiscation of all fish caught while in violation of this section. Each crewman or operator who operated such gear while in violation of this section shall, upon conviction, be fined not less than $100.00 or more than $250.00.

Section 11. Any and all fish confiscated by the Court as a penalty for violation of this Ordinance shall be sold and the proceeds thereof shall be placed in the Tribal treasury and forfeited by the convicted violator.

Section 12. The number and type of gear owner may operate during any Season may be regulated by appropriate resolution of the Board.

Section 13. The Board may appoint a Fisheries Patrolman whose duties shall be to enforce the terms and provisions of this Ordinance, the orders of the Tribal Court, and any other Ordinances thereafter enacted relating to fishing or the regulation thereof. The time and place of patrol and the rate of compensation shall be determined by the Board: Provided, that the rate of compensation shall be promulgated by appropriate resolution of the said Board.

Section 14. Any power or powers herein reserved to the Board, except those which are required to be exercised by the passage of a resolution, may be delegated, by appropriate resolution, to a representative or representatives of said Board; Provided, that any person aggrieved by the exercise of any such power shall have the right to request a review of the action by the Board at a subsequent meeting thereof. Unless otherwise provided in the resolution delegating the power, such right to request a review shall not stay the effectiveness of the action taken by the representative pending such review.

Section 15. The use of a gaff hook, spear, or any other method fishing not specifically allowed in this Ordinance is prohibited. Any Indian subject to the jurisdiction of the Tribe who violates this section shall, upon conviction, be fined not less than $50.00 nor more than $100.00, and the confiscation of all fish caught while in violation of this section.

Section 16. Fishing for personal consumption and not for resale with not more than one line and one lure held in hand while landing a fish shall be per-

mitted at any time in waters under the jurisdiction of the Tribe not specifically closed to fishing. Any one subject to the jurisdiction of the Tribe who violates this section shall, upon conviction, be fined not less than $25.00 nor more than $75.00. The Board may further regulate the practice of fishing for one's own use, such regulations to be promulgated by appropriate resolution.

ARTICLE II. BEACH SEINE FISHING

Section 1. The Board shall cause those tidelands of the Tulalip Indian Reservation fronting upon Port Susan to be marked by appropriate monuments above the line of maximum high tide placed as near as is practicable 600 feet apart, more or less, and a map thereof prepared showing the location of said monuments and designating the space and tidelands between said monuments commencing with Number 1, at the north boundary of the said Reservation and proceeding in sequence southerly along the shore of Port Susan to Hermosa Point, and such monuments and numbered areas be and the same are hereby designated a Fishing Location Number 1, 2, etc.

Section 2. Should the Board deem it necessary the tidelands fronting Port Gardner from Snoqualmie Jim's Point to Priest Point may be marked into Fishing Locations in the manner set forth in the preceding section as far as it is practicable or said tide lands may other wise be regulated by appropriate resolution of the said Board.

Section 3. The Permit grants the Permittee the right to use and occupy for the Season one (1) Fishing Location, regardless of the number of fishing boats owned by said Permittee, and any other tribal tidelands not marked out as heretofore provided and any other Fishing Location not in use. Any gear owner who violates this section shall, upon conviction, be subject to the same penalty as imposed by Section 5, Article I.

Section 4. The Permittee shall have the right of renewing the privilege to fish at a specific Fishing Location provided said Permittee applies prior to the start of the Season. Failure to renew prior to the 1st day of the Season shall deem said Fishing Location vacant. The right to use a specific Fishing Location as provided by Ordinance #25 shall continue until the start of the 1962 Season when this section shall apply and continue thereafter.

Section 5. A Fishing Location shall not be loaned, given, transferred, or assigned by the Permittee without the prior consent of the Board and subject to any terms and conditions that the said Board may deem appropriate.

Section 6. Any motor-powered apparatus of any kind shall not be used to haul, or drag in, purse, move, or place any beach seine or beach net for the purpose of fishing as provided by this Ordinance when said powered apparatus or any part thereof is located upon the land or tidelands of the Tulalip Indian Reservation. Any fishing gear owner who violates this section shall, upon conviction, be fined not less than $50.00 nor more than $150.00, and the confiscation of all fish caught while in violation of this section. Upon the second conviction in any one Season for violation of this section the violator shall have all of his fishing gear confiscated for the balance of the Season, in addition to the penalty heretofore provided.

Section 7. The Board may, by appropriate Resolution, regulate the size and length of gear used and the manner and method of operation of such gear while beach seine fishing.

ARTICLE III. GILL NET FISHING

Section 1. A gill net boat, while in operation, shall have safety equipment and navigation lights required by Coast Guard regulations, and a jack light attached to the end of the net while such net is in the water.

Section 2. The Board may, by appropriate Resolution, regulate the size and length of gear used and the manner and method of operation of such gear while said gear is gill net fishing.

Section 3. Motor-powered apparatus of any kind or description may be used to haul, drag, or reel in a gill net while such gill net gear is operating until such time as the Board of Directors, by appropriate resolution, prohibit the same. Any gear owner who violates any section of Article III, or resolution passed pursuant thereto shall, upon conviction, be fined not less than $50.00 nor more than $150.00, and the confiscation of all fish caught while in violation of this Article. Upon the second conviction in any one Season for violation of this Article in addition to the aforementioned fine and confiscation of fish, the violator's Permit shall be revoked and his fishing gear impounded for the balance of the Season.

ARTICLE IV SET NET FISHING

Section 1. The Board shall cause the banks of the Quil Ceda Creek to be marked by appropriate markers commencing at a point not less than 300 feet, more or less, from the mouth of said creek and proceeding in a northeasterly direction designating such markers as Set Net Location Number 1, 2, etc. The aforementioned markers shall be placed as near as is practicable 150 feet apart, more or less, and a map prepared showing the location of such markers.

Section 2. The Permit grants the Permittee the right to use and occupy for the Season one (1) Set Net Location: Provided, that the Board may, by appropriate Resolution, increase the total number of Set Net Locations that a single gear owner may use.

Section 3. The Permittee shall have the right of renewing the privilege to fish at a specific Set Net Location: provided, that said applicant applies prior to the start of the Season. Failure to renew by the 1st day of the Season shall deem the said Location vacant.

Section 4. A Set Net Location shall not be loaned, given, transferred, or assigned by the Permittee without the prior consent of the Board, and subject to any terms and conditions that the said Board may deem appropriate.

Section 5. The number of set nets at each Set Net Location shall not exceed one (1) and the maximum length of a set net shall not exceed or extend from the bank more than one-half (½) of the width of the Quil Ceda Creek, such width to be determined by measuring from the water's edge one one bank to the water's edge on the opposite bank at mean tide level, more or less. The Board shall cause such measurements to be determined and recorded for each Set Net Location. Any gear owner or operator who violates this section shall, upon conviction, be fined not less than $50.00 nor more than $75.00, and the confiscation of all fish caught while in violation of this section.

Section 6. During the days that are allowed for fishing each set net shall be removed from the waters of the Quil Ceda Creek during the hours from 8:00 A.M. to 6:00 P.M. and at such other times as may be set and promulgated by appropriate Resolution of the Board. Any fishing gear owner or operator who violates this section shall, upon conviction, be fined not less than $25.00 nor more than $75.00, and the confiscation of all fish caught while in violation of this section.

Section 7. Each set net shall have attached thereto the name of the owner thereof, or such other identification as the Board may deem necessary. Any gear owner or operator who violates this section shall, upon conviction, be fined not less than $10.00 nor more than $25.00.

Section 8. Any gear owner or operator who places, or allows to be placed, his set net in waters other than that set fourth in his Permit shall be deemed guilty of violating this Ordinance and upon conviction shall be fined not less than $50.00 nor more than $125.00, and the confiscation of all fish caught while in violation of this section.

Section 9. The Board may, by appropriate Resolution, further regulate the size of gear used and the manner and method of operation of such gear while set net fishing.

Section 10. Ordinance #22 and #25 and any other Ordinances or Resolutions pertaining to fishing, commercial or otherwise, or the regulation thereof, are hereby declared to be repealed and of no further force and effect.

Passed this 3d day of May, 1962, by a vote of 5 For and 0 Against, with a quorum being present.

GEORGE S. WILLIAMS, *Chairman.*

Attest:

CHARLES SHELDON, *Secretary.*

Approval:

M. L. SCHWARTZ,
Superintendent, Western Washington Indian Agency.

MAY 11, 1962.

RESOLUTION NO. 181–16

Be it resolved by the Board of Directors of the Tulalip Tribes of Washington, an Indian tribe organized and existing pursuant to the act of June 18, 1934 (48 Stat. 984), as amended, and acting pursuant to sections 2, 3, 9, 10, 12, 13, 14 and 16, article I; section 7, article II; and sections 2 and 3, article III, all being in ordinance No. 27 that the following shall be in full force and effect during the 1964 commercial fishing season on the Tulalip Indian Reservation:

I. 1. Applicable to tribal members:

(*a*) A fee of $15 for one boat fishing as a beach seiner and one fishing location.

(*b*) A fee of $12 for each boat fishing as a gill netter.

(*c*) A fee of $15 for each additional boat fishing as a beach seiner after fee in (*a*) is paid.

(*d*) A fee of $5 for each set net location.

(*e*) The fee for each type of gear not listed herein shall be determined by the board.

(*f*) There is no charge for a tribal member to fish commercially other than as a gear owner.

II. Applicable to nontribal members: A fee of $15 for the season to a nontribal member otherwise qualified, with preference granted to a spouse of a tribal member.

III. The catch tax shall be 1 percent of the gross sale price of fish sold.

IV. The season shall commence at 6 p.m. on the 10th day of May, 1964, provided that the privilege of renewing a specific fishing location shall be extended until 4 p.m., June 12, 1964.

V. The board may, by appropriate motion, authorize the business manager to:

(1) Issue nontribal member fishing permits, upon the recommendation of the hunting and fishing committee, and

(2) Hire a fisheries patrolman at a rate of pay of $15 per day.

VI. (*a*) Beach seine nets shall not exceed a length of 700 feet, as measured along the cork line.

(*b*) Gill nets shall not exceed a length of 1,500 feet, as measured along the cork line, and the depth shall be as follows:

(1) Nets with a stretched mesh measurement of 7 inches, or over, shall not exceed a depth of 45 meshes.

(2) Nets with a stretched mesh measurement of less than 7 inches shall not exceed a depth of 60 meshes.

(*c*) The penalty for violation of the net limitations set forth in this resolution shall be the same as that set forth in section 3 article III, ordinance No. 27.

VII. No more than four permits for fishing gear shall be granted to one gear owner for the season.

Passed this 5th day of May 1964, by a vote of 6 for and 0 against, with a quorum being present.

CHARLES SHELDON, *Chairman.*

Attest:

MARTIN WILLIAMS, *Secretary.*

TREATY WITH THE DWAMISH, SUQUAMISH, ETC., 1855

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian Affairs for the said Territory, on the part of the United States, and the undersigned chiefs, head-men, and delegates of the Dwamish, Suquamish, Sk-tahl-mish, Sam-ahmish, Smalh-kamish, Skope-ahmish, St-kahmish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluckwa-mish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sahku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-quilch, Cho-bah-ahbish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

ARTICLE 1. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing

the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE 2. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-sohk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island, called Shais-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

ARTICLE 3. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Sno-homish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. *Provided, however*, That the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE 4. The said tribes and bands agree to remove to and settle upon the said first above-mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE 5. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE 6. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousands two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may, from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 7. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on renumerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion

of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE 8. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE. 9. The said tribes and bands acknowledge their dependence on th Government of the United States, and promise to be friendly with all citizens thereof, and they pladge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the same tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 10. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE 13. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fense, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manners as he shall approve.

ARTICLE 14. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE 15. This treaty shall be obligatory on the contracting patries as soon as the same shall be ratified by the President and Senate of the United States.

Signed January 22, 1855.
Ratified March 8, 1859.
Proclaimed April 11, 1859.

Executive Order

Tulalip or Snohomish Reserve

Executive Mansion, *December 23, 1873.*

It is hereby ordered that the boundaries of the Snohomish or Tulalip Indian Reservation, in the Territory of Washington, provided for in the third article of the treaty with the Duwamish and of her allied tribes of Indians, concluded at Point Elliot, January 22, 1855. (Stats. At Large, vol. 12, p. 928), Shall be as follows, to wit; beginning at low-water mark on the north shore of Steamboat Slough at a point where the section line between sections 32 and 33 of township 30 north range 5 east, intersects the same; thence north on the line between sections 32 and 33, 28 and 29, 20 and 21, 16 and 17, 8 and 9, and 4 and 5, to the township line between townships 30 and 31; thence west on said township line to low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark on the shore of Port Susan; thence southeasterly with the line of low-water mark along said shore and the shores of Tualaip Bay and Port Gardener, with all the meanders thereof, and across the mouth of Ebey Slough to the place of beginning.

U. S. Grant.

Excerpts From Minutes and Reports of Indian Treaties Made With the Indian Tribes West of the Cascade Mountains by Gov. Isaac I. Stevens as Disclosed by the National Archivist Certificate No. 1391 Issued on the 15th Day of April 1939

The following are excerpts of the above-entitled proceedings which have bearing upon the question of Indian hunting and fishing on and off the reservation. The above-entitled proceedings were kept by George Gibbs as the duly authorized and acting secretary of the commission for the purpose of making treaties and were in notes in his handwriting which purported to set forth actual occurrences and statements made by the commission in its own meetings and with the various Indian tribes.

The commission was appointed in Olympia of Washington Territory on the 7th of December 1854 by Gov. Isaac I. Stevens and was constituted of a James Doty, the secretary, George Gibbs, the surveyor, H. A. Goldsboro, and Frank Shaw, an interpreter.

The following excerpts are verbatim and quoted with exactness although taken out of a much longer document, the length of which makes it impractical to attach herewith as an exhibit.

The purpose of the quotes is to disclose the actual words used by the various parties at the time of the making of the treaty in order that the Senate committee may have some understanding of what the Indian people must have understood and what the white people must have meant at the time the treaty was made and the bargain therein set forth sealed.

A reference to the full document might better explain the content and the interpretations of these words and meanings thereof by this writer is, of course, solely this writer's opinion and is submitted for whatever value such opinion may have in the deliberations of the committee.

On the question of Indian fisheries at a meeting of the commission on the 10th day of December 1854 the commission considered a draft of treaties which after discussion and light modification was adapted as the basis of the treaties to be held with the tribes upon Puget Sound. This draft to be signed by the tribes was later subsequently in the main followed and included as article 1 with the name of the tribe and band involved and its ceding to the United States all of their land whatsoever reserving, however, to the use of said tribes the following tracts; viz (description thereof), and the rights of fishing at common and accustomed places is further secured to them.

Such a treaty was presented to the Indian people at this hearing assembled now in this year 1964 and at the time of signing of the same in the year 1854 and 1855 was read to them section by section.

At an evening session of the commission on the treaty ground in December 26, 1854, with the entire treaty commission being present the treaty with the Puyallups and other Indians who were signatory to the Medicine Creek Treaty was fully discussed and the necessary provisions to be incorporated therein were gone over.

Then followed the following exact statements as reported by Mr. Gibbs, to wit:

"Messrs. Simmons and Gibbs thought that several Reserves would be necessary for remaining tribes on the Sound, on account of their differences in language and dispositions and because they needed a number of fishing stations.

"The question of a central agency, farm and agricultural school was fully discussed and unanimously voted as necessary for the civilization of the Indians and as no more than justice to them considering that they cede to the United States so large an amount of valuable land.

"It was also thought necessary to allow them to fish at all accustomed places, since this could not interfere in any manner with the rights of citizens and was necessary for the Indians to obtain a subsistence."

Later on, on the 21st of January 1855, Governor Stevens held a meeting and treated with the Indians at the mouth of the Snohomish River in what was later called the Treaty of Point Elliott with the Duwamish and other allied tribes. The minutes of those meetings of Monday, January 22, 1855, disclose that among other things Governor Stevens addressed the various Indians in attendance for the signing of the treaty and its explanation prior to signing as follows, to wit:

"You understand well my purpose, and you want now to know the special things we propose to do for you. We want to place you in homes where you can cultivate the soil, raising potatoes and other articles of food, and where you may be able to pass in canoes over the waters of the Sound and catch fish, and back to the mountains to get roots and berries.

"The Great Father wishes you to send him back a paper showing your desires and wishes. The Great Father thinks you ought to have homes as I before told you. The Great Father knows that you are Christians, looking to a future state, and that you have wives and children and he wants you to have a school where your children can learn to read and can be made farmers and be taught trades. He is willing that you should catch fish in these waters and get roots and berries back in the mountains. He wishes you all to be virtuous and industrious and to become a happy and prosperous community."

At a later date near Point No Point another group of Indians were assembled on January 25, 1855, and there were again addressed by Governor Stevens and members of the commission and his party. At this meeting some objections were taken to the treaty by the Indians and the following conversations were had, to wit:

"An Indian Chief: 'I wish to speak my mind as to selling the land. What shall we eat, if we do so? Our only food is berries, deer, and salmon—where shall we find these? I don't want to sign away all my land, take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food. I don't like the place you have shown for us to live on. I am not ready to sign the paper.'

"Another Indian Chief: 'I do not want to leave the mouth of the river, I do not want to leave my old home, and my berrying grounds. I am afraid I shall die if I do.'

"Mr. F. Shaw, the Interpreter, then explained to them that they were not called upon to give up their old modes of living and places of seeking food, but only to confine their homes to one spot.

"Another Indian explained that he did not want to go onto the reservation with Indians of another tribe and Mr. Simmons then explained that if the Indians kept half of their country they would have to live on it and would not be allowed to go anywhere else they pleased. That when a small tract alone was left the privilege was given of going wherever else they pleased to fish and work for the whites. If you could cultivate more land than this the Indians were told they could have it.

"At this time one of the Indians known as 'The Duke of York' said as follows: 'I hope the Governor will tell the Whites not to abuse the Indians as many are in the habit of doing, or ordering them to go away and knocking them down. We are willing to go up the canals since we know we can fish elsewhere. We shall only leave there to get salmon and when done fishing will return to our houses.'"

On the 26th of December 1854, Gov. Isaac I. Stevens addressed the Indians gathered to sign and discuss the Treaty of Medicine Creek and he there stated, among other things, to wit:

"The Great Father has many white children who come here, some to build mills, some to make farms, and some to fish and the Great Father wishes you to have homes, pastures for your horses, and fishing places. He wishes you to learn to farm and your children to go to school and he now wants me to make a bargain with you in which you will sell your lands and in return be provided with all of these things."

WASHINGTON DECISIONS

(Containing the decisions of the Supreme Court of the State of Washington, published weekly by Bancroft-Whitney Co., Olympia, Wash., Jan. 10, 1964)

[No. 36224. En Banc. December 19, 1963]

THE STATE OF WASHINGTON, *Appellant*, v. JOE MCCOY, *Respondent*

[1] States—Indians—Fishing Rights—Power of State. The provisions of the Treaty of Point Elliott which preserve the right of the affected Indians to fish at "usual and accustomed" fishing places, do not prevent the State of Washington from imposing, under the police power which it holds as a sovereign state, reasonable and necessary regulations on treaty Indians fishing off of their reservations at usual and accustomed grounds; and in an action wherein such regulations are under attack, it is error to reject evidence offered by the state tending to show that the regulations are reasonably necessary to the preservation of its natural resources.

[2] Same—Indians—Fishing Rights—Police Power. The fishing-privilege provisions of the Treaty of Point Elliott secured the Indians affected thereby a servitude or easement upon the land at their usual and accustomed fishing places, which prevents such Indians from being excluded from such places by non-Indians; however, the treaty did not impair the police power of the state.

[3] Same—Indians—Treaties—Effect. The Treaty of Point Elliott was not a transfer of governmental powers, but simply a purchase by the United States of real estate over which it already held political dominion.

[4] Same—Indians—Treaties—Sovereign Power of State. Under the United States Constitution, the Enabling Act for the State of Washington, and the decisions of the United States Supreme Court, the power of the State of Washington to preserve its fish, game, and other natural resources remains unimpaired and has not been preempted by the Treaty of Point Elliott or otherwise, since such power exists as part of the sovereign powers acquired when the State of Washington was admitted into the Union upon equal footing with the original states, and the treaties involved do not contain the express congressional intent necessary to impair such sovereign rights.

DONWORTH, J., dissents.

Appeal from a judgment of the Superior Court for Skagit County, No. 2187, Charles F. Stafford, J., entered August 31, 1961. *Reversed and remanded.*

Prosecution for fishing in closed waters. Plaintiff appeals from a judgment of dismissal.

Walter J. Deierlein, Jr., and *Paul N. Luvera, Jr.*, for appellant.

Harwood Bannister, for respondent.

The Attorney General, Stephen M. Reilly and *Joseph L. Coniff, Assistants,* amici curiae.

ROSELLINI, J.—This case involves the question of whether the state can enforce reasonably necessary regulations for the conservation of chinook salmon fisheries against an Indian whose tribe was a party to the Treaty of Point Elliott, 12 Stat. 927 (January 22, 1855).

Defendant, an American Indian of Swinomish descent, was charged with fishing in closed waters. The trial court acquitted him, holding that the Treaty of Point Elliott granted him immunity from state regulatory powers. The state appeals.

In the early morning hours of July 28, 1960, defendant was fishing from his boat in what is called the "jetty drift" located near the mouth of the north fork of the Skagit River. He was operating an 18-foot, 25-hp-outboard-motor boat, and was using a 600-foot modern nylon gill net. One end of the net was attached

to his boat; the other end extended horizontally 600 feet. The top of the net was equipped with floats and the bottom with a lead line. The net, thus, was held perpendicular in the water and the mesh was deep enough to drag the bottom of the river. The defendant would commence in the upper reaches, and drift with the tide to the end of the jetty. This procedure would be repeated. The effect was to sweep the jetty clean of fish. The defendant's catch of salmon was for sale to commercial buyers.

The jetty drift is a commercial fishery which has been enjoyed in common by the Indians and non-Indians for a period of many years. About 1959, the Swinomish Indians asserted that they could fish unregulated at the jetty drift.

The regulation in effect at the time of the defendant's arrest was not a permanent prohibition of fishing. It was a 10-day closure designed to protect the peak of the salmon runs passing through the Skagit River to the spawning grounds.

Salmon migrate through many fisheries. Time closures, therefore, are staggered to protect the fish as they make their way through each fishery situated on the path of migration. This 10-day closure on the Skagit River was closed to all fishing. Defendant asserts his immunity to the closure regulation because of Art. 5 of the Treaty of Point Elliott:

"The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens." (Treaty with the Dwamish, Suquamish, etc., 1855, 12 Stat. 927.)

The court found that the respondent was not fishing within the boundaries of the reservation, but was fishing at the usual and accustomed fishing grounds.

The 24 assignments of error raise two issues (1) whether the state can show that regulation is reasonably necessary to conserve a fishery resource, and (2) whether it has been preempted by the Treaty of Point Elliott from any state action in regard to Indian fishing rights.[1]

[1] It is contended by the respondent that the Treaty of Point Elliott reserves to Indians the unrestricted right to fish. Therefore the reasonableness of any regulation is an irrelevancy. The law is otherwise when applied to treaty Indians fishing off of the reservation at the usual and accustomed grounds.

In *Tulee* v. *Washington*, 315 U.S. 681, 86 L. Ed. 1115, 62 S. Ct. 862 (1942), the court ruled that the state might regulate the time and manner of off-reservation fishing by Indians where necessary for conservation.

"* * * The appellant [Tulee], on the other hand, claims that the treaty gives him an unrestricted right to fish in the 'usual and accustomed places,' free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

The United States Supreme Court reaffirmed this ruling in *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 75, L. Ed. (2d) 573, 82 S. Ct. 562:

"* * * Even where reserved by Federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward* v. *Race Horse*, 163 U.S. 504; *Tulee* v. *Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, [citing authorities].

"True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. * * *"

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[1] Basically, the same questions were before this court in *State* v. *Satiacum*, 50 Wn. (2d) 513, 314 P. (2d) 400, but no definitive answers were given. An addendum by Chief Justice Hill, at p. 538, states:

"The eight judges who heard the *En Banc* argument on this case on February 13, 1957 (Judge Weaver being incapacitated at that time), are agreed that the order of the trial court dismissing the charges against the two defendants should be affirmed, but they are in disagreement as to the reason for the affirmance.

"Three judges have signed Judge Donworth's opinion, and three judges have signed Judge Rosellini's opinion, and there is no majority opinion. It therefore follows that the cases which Judge Donworth's opinion states are overruled, are not in fact overruled, and nothing is decided except that the order dismissing the charges against the defendants is affirmed."

In *Makah Indian Tribe* v. *Schoettler*, 192 F. (2d) 224 (C. A. 9th, 1951), the court held that the state had not proved the necessity of a regulation limiting gear in the Hoko River to hook and line. In the course of the opinion, the court observed that the resource might be equally well conserved by permitting a fishery with periodic closures.

In the case of *Maison* v. *Confederated Tribes of Umatilla Indian Reservation*, 314 F. (2d) 169 (C. A. 9th, 1963), the court said:

"Thus, in both the Tulee and Makah cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."

Of interest is the Indian Claims Commission decision which is not published, but is on microfilm at the University of Washington Library, and has been transcribed and made available to this court. That is the case of *Makah Indian Tribe* v. *United States*, 7 Ind. Cl. Comm. 477 (1959) affirmed 151 Ct. Cl., docket No. 559, unpublished, cert. den. 365 U.S. 879, 6 L. Ed. (2d) 191, 81 S. Ct. 1028 (1961). There compensation was sought for the alleged impairment of the treaty-fishing right by regulation. The treaty provision was similar to that in the instant case. The commission ruled, p. 507:

"By entering into international agreements with Canada to conserve, protect and restore the depleted Pacific halibut ocean fishing, the United States did not deprive, abrogate, or deny to the Makah Tribe of Indians any right which they may have reserved under Article IV of the 1855 Makah Treaty to fish in common with all citizens of the United States at usual and accustomed grounds and stations because:

"(1) Such fishing rights as guaranteed under Art. IV of the 1855 Makah Treaty are not so absolute, unlimited, and exclusive in that they cannot be accommodated and adjusted to meet changing circumstances where the Government must impose reasonable regulations designed to conserve and protect our natural resources for the benefit of all. *Tulee* v. *State of Washington*, 315 U.S. 1081 (1942), *Makah Indian Tribe* v. *Schoettler*, 192 F. 2d 244 (1951); and

"(2) The defendant has shown by overwhelming evidence (for the most part undisputed) that the seasonal restrictions, imposed up the Pacific coast halibut fishery by regulations promulgated and adopted by the International Fisheries Commission, pursuant to the Convention between Canada and the United States, are fair, reasonable, and absolutely necessary to conserve, protect, and rehabilitate the halibut species. * * *

"(3) The reserving of Makah fishing rights at usual and accustomed places under the 1855 Treaty was founded upon the need of the petitioner tribe to maintain its then subsistence economy which was based primarily upon the immediate products of the sea, and in no sense was this treaty provision a guarantee of future commercial fishing rights.

"(4) Petitioner has failed to prove that in complying with the regulations of the halibut Commission, or by their enforcement, the individual members of petitioner tribe suffered a deprivation to the extent that they are unable to sustain their immediate wants or that of their families consistent with a subsistence economy."

To ascertain whether regulation is reasonably necessary conservation of Pacific salmon, one must understand the life cycle of these fish.

Pacific salmon are anadromous fish; that is, they are hatched in fresh water, descend to salt water, attain most of their growth there, and then return to the stream of their origin to spawn and perpetuate their kind. After spawning, they die. They have a well-developed homing instinct that enables them to return to spawn in the stream of their origin. Spawning occurs in the fall and winter in well-percolated gravel beds, where the fish bury their eggs to protect them from predators and the elements. The eggs hatch in the gravel and then first live there for a time, subsisting on the yoke material from the egg. After emerging from the gravel, the young fish begin to swim actively. Dependent on the species, some salmon spend a year or more in fresh water before migrating to sea, while others leave for ocean environment within a few weeks or months after emerging from the gravel of the nest. Three to five years later, the chinook salmon return from the sea to the river of their birth to spawn.

After the various species of salmon near maturity and are in prime condition, they leave the extensive pastures of the sea to begin the long journey to the

home stream of their origin. It is during this period of the salmon's life that the main effort toward harvest is concentrated. While still at sea the chinook, silver, and pink salmon are caught by the commercial and sports trollers off the coasts of Alaska, British Columbia, Washington, Oregon, and California. After these species enter the inside waters off the mouths of their spawning streams, their numbers are further reduced by net fisheries.

When the survivors escape the last net fishery in the rivers of their birth, they deposit their eggs in the gravel to perpetuate their kind, complete the life cycle and die.

The appellant proffered testimony to show the number of other Indians fishing, their manner of fishing, and the effect of such fishing. It offered proof of the effect on salmon runs of unrestricted fishing. It offered charts and testimony with regard to catch versus escapement of chinook and silver salmon in the Puyallup River, showing how an unregulated Indian fishery affects conservation, and the necessity for regulation to conserve salmon runs. This evidence disclosed that prior to 1953, there did not exist any Indian fishery on the Puyallup River. During the year 1953 there were three Indian nets, and by 1960, there were some 30 gill nets and numerous set nets on the Puyallup. Exhibit No. 14 illustrates graphically what occurs when unrestricted fishing is permitted. It shows the catch record of only a few fish in 1953 and more than 14,000 fish in 1960. While, the escapement record shows approximately 13,000 fish in 1953 and less than 1,800 fish in 1960. As the catch increased, the escapements decreased so that a point of extinction will be reached should the cycles of salmon all be subject to unrestricted fisheries.

The offered evidence was rejected. This was error.

One essential of a conservation program is the regulation of the harvest of salmon in salt- and fresh-water areas. It is regulation that provides the escapement necessary to maintain a perpetual supply of salmon for the harvest by all people. If a fishery, within a river or off its mouth, harvests too many of the adult salmon because of the shallow confined nature of the fishing area and the habits of the salmon which cause them to school up and delay in these areas prior to ascending the river, there will be little escapement to perpetuate the runs. An uncontrolled fishery in such areas may harvest almost the entire run of a fishery resource. Salmon are not inexhaustible and without their proper escapement for reproduction from year to year through controls in the harvest, the stocks will be reduced to a point where only a remnant run will exist.

Experience has shown that for runs of chinook salmon returning to a river, there are limits within which the harvest must be kept if sufficient seed stock is to reach the spawning grounds to maintain the runs. For chinook, a catch of 40 to 50 percent of the total run is estimated to be within the necessary limits.

The Skagit River is capable of handling approximately 60,000 to 75,000 chinook spawners. Surveys in 1952 showed escapement of only 20,000 adult fish, and these continued to drop until, in 1957, the escapement of chinook in the Skagit River was down to 10,000. To stop the decline, regulations were imposed restricting fishing time, until in 1960, approximately 30,000 escaped and spawned in the Skagit. It has been demonstrated that unrestricted gill net fishing on the Fraser River could take 98 percent of the runs. Similar results have been obtained on the Columbia River.

The State had a right to show that the number of fishermen fishing the jetty drift could take a major portion of the returning salmon. It is suggested that if greater regulation had been imposed upon the harvest of salmon in the ocean and in waters other than the Skagit River, that Indians could fish unmolested. This is contrary to the scientific proof. It has been demonstrated in places both on the Columbia and Fraser rivers that the regulation of one form of gear has not in reality saved any fish for spawning purposes, but instead has provided additional catch to the last fishery on the road of migration.

Edward M. Mains, supervisor of the Research Division of the State Department of Fisheries, established the relation between regulation and conservation, as follows:

"Q. You mentioned previously time, manner and place, so far as the regulation of fishing was concerned. Would you tell us the importance of regulating the time of fishing so far as the conservation of salmon as a resource is concerned?

"A. Yes. The control over time of fishing is one the best tools we have in the conservation work. During the time the salmon are migrating from the sea to their—this applies especially, I should say, to migrating fish, because over the years we have collected information and we have quite complete information on when these runs pass through certain areas and we know the time that they are in this area. So that by restricting the number of days of fishing it is fairly easy to actually conserve fish to spawn. We can actually do this by areas. We know the fish come through the outer straits areas at a certain time and in approximately a week later they are in another area, and a week further they are closer to the spawning grounds. We can stagger the closed seasons in this area to protect this entire group of fish. For instance, if you effect a ten-day closure out in the straits somewhere you would have to consider travel time——

"Q. Excuse me one moment. What is the traveltime of the average fish?

"A. It varies. From the time they cease feeding and start moving toward their home stream it varies from ten to twenty miles a day. This has been borne out by tagging studies. From the actual time when the tag was placed on the fish and released and time it was recovered we know the actual number of miles it covered in certain days.

"Q. Thank you. I did not mean to interrupt.

"A. Anyway, by following these certain groups of fish, by taking care of the fish in the peak of the run, by staggering the closures as it goes in you can protect this group of fish. This is the real prime principle you try to do. In other words, there is no use in trying to curtail fishing for ten days out in the Sound some place if you are going to let this same fishery catch these same fish you saved out there. In other words, you haven't accomplished your intention of getting this same fish up to the spawning grounds. You have saved this group of fish from this one fishery and you let them be caught by another. This has been demonstrated time and time again in the Columbia River fisheries and Fraser River fisheries where unlimited and unrestricted gill net fishery can take ninety-five to ninety-eight percent of the fish. Unless you effectuate staggered closures up the river you can't really save the salmon from one year to another year.

"Q. In other words, this time closure on fishing is necessary for the conservation of salmon throughout the State of Washington.

"A. Very definitely. If you don't actually design the closures correctly so that they are compatible with the time movement of the fish, and if you don't have everybody observing the closures that you set, why, then you effectively have no regulation or only partial regulation."

This same witness concluded that a few individual fishermen, unregulated by the department, could destroy the run:

"Q. What would your opinion be, sir, as the effect of conservation, if you have one or a few individuals unregulated so far as the Skagit River is concerned?

"A. Well, you could definitely destroy the run by the same illustration which I mentioned here. It has been demonstrated, for instance, that unrestricted fishing on the Fraser River by their gill net fishery could take ninety-eight percent of the run. It has been demonstrated by studies on the Columbia River that unregulated fishery there has the ability to take ninety-five percent of the run, and we also have the rather recent illustration in the case of the Puyallup River Indian fishery where they have virtually destroyed that run and are in the process of doing so with unregulated fishery."

This evidence if considered by the court would have proved that regulation was reasonably necessary to conserve chinook salmon runs in the Skagit River.

The reason for the great increase in the Indian fishery and its attendant conservation problems, is because of the skyrocket values of salmon. An adult chinook salmon will weigh from 15 to 45 pounds, and some have weighted as much as 82 pounds. The average weight in a catch is anywhere between 18 to 22 pounds. The average wholesale price for chinook salmon is $10 per fish. With such an economic bonanza, just for the taking, individual self-restraint is a poor substitute for proper state regulation. Without state action to permit enough seed stock to escape to spawn, salmon will face extinction.

The trial court held that the Treaty of Point Elliott granted the Indians an unrestricted right to fish. This decision was based upon the reasoning of Indian "water rights" cases.

The "water rights" cases are distinguished in that they involve the on reservation use of water, which was necessary for the agricultural development

of Indian lands. It was the policy of Congress to integrate the various Indian tribes eventually into the agrarian level of our economy. *Conrad Inv. Co.* v. *United States*, 161 Fed. 829, 831 (C.C.A. 9th, 1908); United States Department of Interior, Federal Indian Law, 225–230 (1958).

Pioneer Packing Co. v. *Winslow*, 159 Wash. 655, 294 Pac. 557 (1930), is not contrary to this view. That case involved the Indians' right to fish on the reservation, as is clearly shown by the statement of the court on page 662.

"In the case of *State* v. *Towessnute*, 89 Wash. 478, 154 Pac. 805, there was involved the right of the Yakima Indians to catch fish in violation of the state law outside of the reservation. The question of their right to catch fish within the reservation was not involved in that case, and it has no application here."

To say that, by analogy, the Indians have a right to go outside their reservation to their "usual and accustomed grounds" to fish free of any regulation, amounts to an unwarranted extension of the rationale of the "water rights" cases. *United States* v. *Fallbrook Public Util. Dist.*, 165 F. Supp. 806, 838 (1958), forcibly demonstrates that the "water rights" theory is not to be extended by analogy.

An examination of the Point Elliott treaty discloses that the Indians ceded the lands to the United States. The reserved lands for Indian reservation purposes, and reserved 36 sections of land for the purpose of establishing an agricultural and industrial school for the Indians. In consideration for the land, the United States was to pay $150,000; and an additional $15,000 was granted for expenses of removal and settlement of the Indians on the reservation, and to provide for the breaking and clearing of land for cultivation, and for fencing the same.

The United States was also to establish schools and to provide instructors, and to furnish mechanical shops.

By Art. 9 of the treaty, the tribes and bands acknowledge their dependence on the government of the United States, and promise to preserve friendly relationships with all citizens and with other Indian tribes.

The Indians of Puget Sound, unlike those of the upper Columbia (Yakima and Nez Perce) were remnants of former large tribes; their numbers were depleted by smallpox and other diseases. These tribes were docile and were subjected to raids by the Haida and Tlingit of British Columbia and Alaska and by the Yakima from Eastern Washington. In addition to these difficulties, the settlers were fencing the gathering places, and, when objection was made by the Indians, they were told that the Great Father would pay for the lands. Existing under these conditions, the Indians appeared to welcome the message from Governor Stevens which promised them protection and a way of bettering their lot by providing reservations for their use and even a means of imitating the white settlers. "The Life of Isaac Ingalls Stevens," by his son, Hazard Stevens" (1901) Vol. 1, 451–459. Under such circumstances, Art. 9 of the treaty of Point Elliott, by which the Indians acknowledge dependence upon the government, becomes more meaningful.

In the light of the governmental policy to set aside farming areas for the Indians and the condition of these tribes at the time of the treaty, the reason for Art. 5 is clarified. Governor Stevens was commissioned to carry out a governmental policy intended to protect and provide for their ultimate civilization and a place in the community. The Indians' condition was such that they welcomed the opportunity to have a place set aside for themselves.

But the project of instructing the Indians so that they would be self-sustaining would take years. The treaty itself had to be ratified. Unless the Indians were permitted to leave the reservation to pursue their gathering culture, they would starve.

In "The Life of Isaac Ingalls Stevens," supra, p. 454, the author states that while in Olympia, the Governor outlined the provisions to be included in the Puget Sound treaties. With reference to the reason for the fishing provisions, he says:

"7. As the change from savage to civilized habits must necessarily be gradual, they were to retain the right of fishing at their accustomed fishing places, and of hunting, gathering berries and roots, and pasturing stock on unoccupied land as long as it remained vacant."

A similar account is given in *The Northwest Coast; or, Three Years' Residence in Washington Territory* (1857), by James G. Swan, p. 344:

"* * * The Indians, however, were not to be restricted to the reservation, but were to be allowed to procure their food as they had always done, and were at liberty at any time to leave the reservation to trade with or work for the whites."

Article 5 does not relate to fishing alone. It obviously relates to the Indians' gathering culture at the time of the treaty; the right to gather roots and berries, pasture their horses, and to fish.

Article 5 is limited: The right to fish was limited to a right "in common" with other citizens and to the usual and accustomed places. Only temporary houses for curing were to be constructed at such places; the gathering of roots and berries, and hunting could be conducted only on open and unclaimed lands; and shellfish could not be taken from beds staked or cultivated by citizens.

Governor Stevens' representation was that a means would be afforded for the Indians to obtain food during the transition period to a civilized life as farmers. There was no intention to limit governmental powers and there was no need to discuss governmental powers. The United States had purchased the Indian lands but secured to them the limited right to go on those lands to obtain food consistent with their needs at that particular time.

[2] The decisional law arising from Indian claims leads to the conclusion that the treaty secured to the Indians a servitude, or easement, upon the land at their usual and accustomed places. This right in the soil protects the Indians from exclusion from such places by non-Indians. *United States* v. *Taylor*, 3 Wash. Terr. 88, 13 Pac. 333 (1887); *United States* v. *Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, 63 L. Ed. 555, 39 S. Ct. 203 (1919). But the treaties do not impair the police power of the state. *Ward* v. *Race Horse*, 163 U.S. 504, 41 L. Ed. 244, 16 S. Ct. 1076 (1896); *New York ex rel. Kennedy* v. *Becker*, 241 U.S. 556, 60 L. Ed. 1166, 36 S. Ct. 705 (1916); *Tulee* v. *Washington*, 315 U.S. 681, 86 L. Ed. 1115, 62 S. Ct. 862 (1942); *Makah Indian Tribe* v. *United States*, 7 Ind. Cl. Comm. 477 (1959).

Neither line of decisions is exclusive of the other. The interpretation of the right as one in the soil, subject to the sovereign power of the state (United States Department of the Interior, Federal Indian Law (1958) 716) is consistent with the nature of the Indians' aboriginal right in the soil, the policy of the United States in extinguishing this right by purchase, and the conditions surrounding the making of the treaty.

The relative rights of the United States and the aborigines to the soil was first established in *Johnson* v. *McIntosh*, 21 U.S. 543, 5 L. Ed. 681 (1823). Chief Justice Marshall distinguished between the powers of government and rights to property, stating at p. 584:

"* * * Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?

"By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'propriety and territorial rights of the United States,' whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it."

[3] The governmental powers of the United States were not derived from the Indians. The Indian right was one of use and occupancy in the soil to the extent that it is recognized by the United States. Cohen, Original Indian Title, 32 Minn. L. Rev. 28, 35 points out the distinction between a transfer of governmental power and a transfer of rights in land:

"It may help to appreciate the distinction between a sale of land and the transfer of governmental power if we note that after paying Napoleon 15 million dollars for the cession of political authority over the Louisiana Territory we proceeded to pay the Indian tribes of the ceded territory more than twenty times this sum for such lands in their possession as they were willing to sell. * * *"

The United States has consistently pursued the policy of acquiring the Indians' rights of use and occupancy by purchase rather than conquest, engaging in what was termed by President Truman as "the largest real estate transaction in

history," involving more than 90 percent of the public domain. While the United States paid 50 million dollars to Britain, Spain, France, Mexico, and Russia for claims of sovereignty based on discovery, 800 million dollars has already been paid to the Indians for their rights of use and occupancy, 32 Minn. L. Rev. 28, 34, 43, 58. Additional claims are now pending before the Indian Claims Commission.

The Treaty of Point Elliott was a part of this real estate transaction—a treaty for the purchase of real estate.

Spain had released its claim to lands north of the 42nd parallel by treaty in 1819. Russia relinquished its claims south of 54°40′ by treaty with the United States in 1824, and Great Britain in 1825. The United States and Great Britain settled their differences in 1846, thereby leaving what is now the state of Washington open for settlement. 5 Treaties and Other International Acts of the United States of America, 1846–1852, Miller, pages 3–5 and 11.

It is difficult to conceive that, after treating with these European nations for the governmental power and rights to the soil arising from discovery, the United States authorized Governor Stevens to bargain away its governmental powers to the Swinomish Indian tribe and a multitude of other small tribes and bands of Indians.

By Act of March 2, 1853 (10 Stat. 172), the Washington Territory was organized out of the Oregon Territory and by Act of July 17, 1854 (10 Stat. 305), the Oregon Donation Act (9 Stat. 496) was extended to the Territory of Washington. Thus, the Territory was opened for settlement prior to any of the Indian treaties. The United States was buying and the Indians were selling the aboriginal right of use and occupancy to the Washington Territory.

Prior to the treaties, the fee was in the United States subject to the aboriginal right of use and occupancy insofar as it is recognized. *Johnson* v. *McIntosh, supra;* Original Indian Title, 32 Minn. L. Rev. 28; *Tee-Hit-Tom Indians* v. *United States*, 348 U.S. 272, 99 L. Ed. 314, 75 S. Ct. 313 (1955), reh. den. 348 U.S. 965; *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 86 L. Ed. 260, 62 S. Ct. 248 (1941).

In *United States* v. *Winans*, supra, p. 381, the court held that by such treaty provisions, the Indians

"* * * were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned."

Such a right naturally follows from the recognition by the United States of the existence of aboriginal Indian title and the acquisition of that right by purchase. The court further stated at p. 384:

"The extinguishment of the Indian title, opening the land for settlement and preparing the way for future States, were appropriate to the objects for which the United States held the Territory. And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights as they possessed as "taking fish at all usual and accustomed places.' Nor does it restrain the State unreasonably, if at all, in the regulation of the right. *It only fixes in the land such easements as enables the right to be exercised.*" [Italic ours.]

[4] The United States may grant such rights in the soil while lands are held in territorial status without conflict with the subsequent admission of states upon equal footing. *United States* v. *Winans, supra; Shively* v. *Bowlby*, 152 U.S. 1, 48, 38 L. E. 331, 14 S. Ct. 548 (1894); *Stearns* v. *Minnesota*, 179 U.S. 223, 45 L. Ed. 162, 21 S. Ct. 73 (1900); and *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 7 L. Ed. (2d) 573, 82 S. Ct. 562 (1962).

The State of Washington was admitted into the Union upon equal footing with the original states. Enabling Act, § 8, chapter 180, 25 Stat. 676, 678. By such admission, it became entitled to exercise all of the powers of government enjoyed by the original states of the Union, *Coyle* v. *Smith*, 221 U.S. 559, 55 L. Ed. 853, 31 S. Ct. 688 (1911); Constitution of the United States of America, Sen. Doc. No. 170, 82nd Cong., 2d Sess., 1952, Corwin. The power to protect fish and game is an inherent attribute of the sovereign power of a state. *Geer* v. *Connecticut*, 161 U.S. 519, 40 L. Ed. 793, 16 S. Ct. 600 (1896); *Ward* v. *Race Horse*, supra.

While the United States had the power to impair a state's police power by treaty, *Missouri* v. *Holland*, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920), the language of a treaty wherever reasonably possible will be construed so as not to override state laws or impair rights arising under them. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 143, 82 L. Ed. 1224, 58 S. Ct. 785 (1938).

There must be a clear and unequivocal expression of congressional will by Congress if state powers are to be preempted. *Cohens* v. *Virginia*, 19 U.S. 264, 443, 5 L. Ed. 257 (1821); *Reid* v. *Colorado*, 187 U.S. 137, 47 L. Ed. 108, 23 S. Ct. 92 (1902). Here, there is no express limitation of governmental powers in the treaty and no expression of congressional will which in any way conflicts with state law. In the absence of a clear conflict, state law must prevail.

But it is argued that all doubts must be resolved in the Indians' favor and that the application of this rule requires that the treaty be construed as a limitation of the police power.

Of this rule the court said, in *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 353, 89 L. Ed. 985, 65 S. Ct. 690 (1945):

"* * * But the context [of the original statement] shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. * * *."

Further, the rule that such treaties should be construed so as to uphold the sanctity of the public faith will not permit a state to be stripped of an essential attribute of its governmental existence by implication and deduction and

"* * * should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States. * * *" *Ward* v. *Race Horse*, 163 U.S. 504, 516.

While the court endeavors to construe such provisions as the Indians understood them, it will not construe them so as "to divide the inherent power of preservation as to make its competent exercise impossible." *New York ex rel. Kennedy* v. *Becker*, *supra*.

The intention and understanding of the Indians must be established by clear and satisfactory proof sufficient to warrant the application of this rule. *Choctaw Nation* v. *United States*, 121 F. Supp. 206, 211 (Ct. Cl. 1954).

The treaty secured to the Indians an interest in land, consisting of an easement, which secured to them the right *not* to be excluded from their usual and accustomed fishing grounds by non-Indians. Those cases which recognize this right and protect the Indian from such exclusion do not hold that a state may not subject the Indians to reasonable and necessary regulations in the exercise of these rights, for the protection of the fishery resource.

Upon admission to the Union upon equal footing, this state acquired all of the sovereign powers of the original states, including the power to preserve its natural resources, and it cannot be stripped of this power by implication and deduction.

For the reasons herein stated, the judgment of the trial court is reversed and the state is granted a new trial.

FINLEY, WEAVER, HUNTER, and HAMILTON, JJ., concur.

HILL, J. (concurring in the result)—I concur in the result of the majority opinion.

I agree with the dissent in principle, but with an exception on which I will hereafter enlarge which, for me, takes the present case without the protection of the treaty.

I disagree with the majority's position that for certain specified periods of time the right of the treaty beneficiaries can be suspended under the state's regulatory powers.

The rights of the Indians to fish by the methods and with the gear in use at the time of the treaty cannot be suspended or abridged. Had the defendant, Joe McCoy, been so fishing the state would have had no right to interfere with his activities.

However, none of the signatories to the treaty contemplated fishing with a 600-foot nylon gill net, which could prevent the escapement of any fish up the river for spawning purposes. (See discussion in Judge Finley's concurring opinion in *State* v. *Satiacum* (1957), 50 Wn. (2d) 513, 535 *et seq.*, 314 P. (2d) 400, 412 *et seq.*

I would not limit the type of gear used by an Indian when he is exercising the right to fish that anyone else is entitled to exercise; but where his right to fish "at all accustomed grounds and stations" *rests solely on his treaty rights*, then he should be limited to the gear and implements with which the treaty signatories were accustomed.

I would grant the state a new trial.

OTT, C. J. concurs with HILL, J.

DONWORTH, J. (dissenting)—The scholarly discussion by the majority concerning the very important issue presented by this case makes no mention of our most recent decision dealing with the subject of the impact of the Indian treaties on the police power of the state to regulate fishing by tribal Indians "at all usual and accustomed grounds and stations."

In *State* v. *Satiacum*, 50 Wn. (2d) 513, 314 P. 2d) 400 (1957), there were two opinions, each of which had the concurrence of four judges. In the first opinion, many of the decisions of the United States Supreme Court (some of which are cited in the majority opinion in this case) were discussed at length. The result of the first opinion (which was concurred in only as to the result by the four judges who signed the second opinion) was to affirm the trial court's dismissal of certain charges against two Puyallup Indians based on alleged violations of the provisions of RCW 75.12 (and regulations promulgated pursuant thereto). The defendants in that case had been fishing with nets on the Puyallup River within the city limits of Tacoma. It was stipulated that one net was within the limits of the Puyallup Indian Reservation and that the other was at a usual and accustomed fishing ground of the Puyallup tribe as provided in the 1855 treaty of Medicine Creek.

The first opinion held that the statutes involved violated the treaty. The basis for this holding was the result of an extensive review of many decisions of the Supreme Court of the United States (including *Tulee* v. *Washington*, 315 U.S. 681, 86 L. Ed. 1115, 62 S. Ct. 862) and of other appellate courts construing Indian treaties and treaties with foreign nations, which have been held to be the supreme law of the land under Art. 6 of the United States Constitution. In the first opinion it was stated:

"The courts have generally recognized that the treaty right of fishing at 'usual and accustomed places' was given to the Indians to provide for their subsistence and as a means for them to earn a livelihood. *United States* v. *Winans*, *supra* [198 U.S. 371]; *Makah Indian Tribe* v. *Schoettler*, *supra* [192 F (2d) 224]; *State* v. *McClure*, *supra* [127 Mont. 534]. Applying a liberal—and not a strained—construction to the treaty of Medicine Creek as a whole, it is our opinion that the Puyallup Indians so understood Article III of the treaty, and that neither the Indians nor the United States intended that the states would or could enforce general regulations against the Indians 'equally with others' or 'in common with all citizens of the Territory' and thereby deprive them of their right to hunt and fish in accordance with the immemorial customs of their tribes. As we interpret the treaty, we believe that the phrase 'in common with all citizens of the Territory' merely granted the white settlers and their heirs and/or grantees a right to fish at these places with the Indians, but that the Indians thereby reserved their right to fish at these places irrespective of state regulation, so long as the right shall not have been abrogated by the United States.

"No other conclusion would give effect to the treaty, since to hold that their right was *equal* to that of the citizens of the territory would be to say that they were given no right at all, except that which any citizen subject to state statutes and regulations may enjoy to fish at the 'usual and accustomed grounds and stations.' This interpretation would permit the state to abrogate their treaty rights at will.

"We are convinced that, under the applicable decisions of the Supreme Court of the United States referred to herein, the statutes and regulations in the case at bar are in conflict with the treaty provisions, constitute an interference with matters that are within the exclusive scope of Federal power and, therefore, cannot be held valid as to the Puyallup Indians, in relation to their right to fish 'at all usual and accustomed fishing grounds and stations.'

"To summarize, the treaty of Medicine Creek of 1855 is the supreme law of the land and, as such, is binding upon this court, notwithstanding any statute of this state to the contrary, and its provisions will continue to be superior to the exercise of the state's police power respecting the regulating of fishing at the places where the treaty is applicable until:

"(1) the treaty is modified or abrogated by act of Congress, or

"(2) the treaty is voluntarily abandoned by the Puyallup tribe, or

"(3) the supreme court of the United States reverses or modifies our decision in this case."

I still adhere to the views expressed in the first opinion for the reasons hereinafter stated.

The basis for the concurrence in the result in the *Satiacum* case by the four judges who signed the second opinion is stated in the last paragraph thereof as follows:

"The trial court decided this case against the state on the ground that the state had failed to sustain the burden of proving that the regulation was reasonable and necessary or rather, that the enforcement of the regulation against the defendants was reasonable and necessary for the preservation of fish. In doing so, the court adopted the holding of *Makah* v. *Schoettler, supra.* It is the general rule that such a regulation is presumed to be valid and the burden of proving its invalidity is upon the party challenging the regulation. The court, however, felt that in such a case as this—where the enforcement of the regulation, if not reasonable and necessary, would infringe a treaty right of the Indian—the burden should be upon the state to show that the violation of the regulation by the Indian threatens the conservation program. I would uphold the trial court in its disposition of the cause, for it is true that the state made no attempt to show that the conservation program was seriously affected by he fishing activities of the defendants or of the Indians generally. But I would not go further, as the majority has, to say that the treaty intended that the state may never interfere with fishing by Indians in their usual and accustomed places, no matter how wasteful and destructive their fishing may be. Such a holding is unnecessary to a decision of the case. Furthermore, I think it is unwarranted under the facts and the law."

Thus, this court, in 1957, upon the concurrence of eight judges, upheld the dismissal by the trial court of similar charges against treaty Indians. I think that our two opinions in the *Satiacum* case should not be ignored in deciding the present case. At least, if the first opinion is to be wiped off the books, it should be made a matter of record and not done *sub silentio.*

The majority rely on two recent decisions of the United States Supreme Court which discuss the fishing rights of nontreaty Indians in Alaska. They are *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 7 L. Ed. (2d) 562, 82 S. Ct. 552 (1962), and *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 7 L. Ed. (2d) 573, 82 S. Ct. 562 (1962). These cases, being the only expression of the Supreme Court on the subject of Indian fishing rights since our decision in the *Satiacum* case (which was decided in 1957), should be reviewed in some detail.

The *Metlakatla* case was an appeal from the decision of the Alaska Supreme Court (Alaska, 362 P. (2d) 901) which affirmed the denial of an injunction which would have prevented the state of Alaska from interfering with the Metlakatlas' use of certain fishtraps near the Annette Islands. These fishtraps had been used by the Indians for many years to catch salmon pursuant to regulations promulgated by the Secretary of the Interior long prior to statehood. A statute enacted by the Alaskan legislature in 1959 prohibited the use of fishtraps of the type used by these Indians. It is to be noted that the Metlakatlans were not aboriginal natives of Alaska but had migrated there from Canada in 1887. They never had a treaty with the United States. The court's decision was based on its interpretation of the act of Congress of 1891 creating the Annette Islands Reserve.

The companion case (*Organized Village of Kake* v. *Egan*) likewise involved the interpretation of federal statutes. It involved the fishing rights of two Indian communities chartered under the Wheeler-Howard Act of 1934. No treaty rights were involved, although the decision discusses Indian treaties at some length. This discussion is too long to quote in full in this dissenting opinion. The following excerpts indicate the court's *rationale* regarding Indian rights:

"The relation between the Indians and the States has by no means remained constant since the days of John Marshall. In the early years, as the white man pressed against Indians in the eastern part of the continent, it was the policy of the United States to isolate the tribes on territories of their own beyond the Mississippi, where they were quite free to govern themselves. The 1828 treaty with the Cherokee Nation, 7 Stat. 311, guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory. Even the Federal Government itself asserted its power over these reservations only to punish crimes committed by or against non-Indians. 1 Stat. 469, 470; 2 Stat. 139. See 18 U.S.C. § 1152.

"As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country. In 1871 the power to make treaties with Indian tribes was

abolished, 16 Stat. 544, 566, 25 U.S.C. § 71. In 1887 Congress passed the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. §§ 331–358, authorizing the division of reservation land among individual Indians with a view toward their eventual assimilation into our society. In 1885, departing from the decision in *Ex parte Crow Dog*, 109 U.S. 556, Congress intruded upon reservation self-government to extend federal criminal law over several specified crimes committed by one Indian against another on Indian land, 23 Stat. 362, 385, as amended, 18 U.S.C. § 1153; *United States* v. *Kagama*, 118 U.S. 375. Other offenses remained matters for the tribe, *United States* v. *Quiver*, 241 U.S. 602.

"The general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia*, 6 Pet. 515, 561; *The Kansas Indians*, 5 Wall. 737, 755–757; and *The New York Indians*, 5 Wall. 761, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law, *Utah & Northern R. Co.* v. *Fisher*, 116 U.S. 28, 31. In *Langford* v. *Monteith*, 102 U.S. 145, the Court held that process might be served within a reservation for a suit in territorial court between two non-Indians. In *United States* v. *McBratney*, 104 U.S. 621, and *Draper* v. *United States*, 164 U.S. 240, the Court held that murder of one non-Indian by another on a reservation was a matter for state law.

"The policy of assimilation was reversed abruptly in 1934. A great many allottees of reservation lands had sold them and disposed of the proceeds. Further allotments were prohibited in order to safeguard remaining Indian properties. The Secretary of the Interior was authorized to create new reservations and to add lands to existing ones. Tribes were permitted to become chartered federal corporations with powers to manage their affairs, and to organize and adopt constitutions for their own self-government. 48 Stat. 984, 986, 987, 988. These provisions were soon extended to Alaska, 49 Stat. 1250.

"Concurrently the influence of state law increased rather than decreased. As the result of a report making unfavorable comparisons between Indian Service activities and those of the States, Congress in 1929 authorized the States to enforce sanitation and quarantine laws on Indian reservations, to make inspections for health and educational purposes, and to enforce compulsory school attendance. 45 Stat. 1185, as amended, 25 U.S.C. § 231. See Meriam, Problem of Indian Administration (1928); H.R. Rep. No. 2135, 70th Cong., 2d Sess. (1929); Cohen, Handbook of Federal Indian Law (1945), p. 83; United States Department of the Interior, Federal Indian Law (1958), pp. 126–127. In 1934 Congress authorized the Secretary of the Interior to enter into contracts with States for the extension of educational, medical, agricultural, and welfare assistance to reservations, 48 Stat. 596, 25 U.S.C. § 452. During the 1940's several States were permitted to assert criminal jurisdiction, and sometimes civil jurisdiction as well, over certain Indian reservations. *Eg.*, 62 Stat. 1161; 62 Stat. 1224; 64 Stat. 845; 63 Stat. 705. A new shift in policy toward termination of federal responsibility and assimilation of reservation Indians resulted in the abolition of several reservations during the 1950's. *E.g.*, 68 Stat. 250 (Monominees); 68 Stat. 718 (Klamaths).

"In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations, consenting to the assumption of such jurisdiction by any additional States making adequate provision for this in the future. 67 Stat. 588, 18 U.S.C. § 1162, 28 U.S.C. § 1360. Alaska was added to the list of such States in 1958, 72 Stat. 545. This statute disclaims the intention to permit States to interfere with federally granted fishing privileges or uses of property. Finally, the sale of liquor on reservations has been permitted subject to state law, on consent of the tribe itself. 67 Stat. 586, 18 U.S.C. § 1161. Thus Congress has to a substantial degree opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall." [2]

Later, in the Supreme Court's decision in the *Kake* case, the court reviews a number of decisions and federal statutes and concludes:

"* * * Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward* v. *Race Horse*, 163

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[2] As recently as 1956 the United States Supreme Court, in *Squire* v. *Capoeman*, 351 U.S. 1, 100 L. Ed. 883, 76 S. Ct. 611, quoted with approval from Chief Justice Marshall's opinion in *Worcester* v. *Georgia*, 31 U.S. 350 (6 Peters 515) (1832), the rule that language used in Indian treaties should never be interpreted to their prejudice.

U.S. 504; *Tulee* v. *Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing with in a reservation, *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655, 294 P. 557; *Moore* v. *United States*, 157 F. 2d 760, 765 (C.A. 9th Cir.). See *State* v. *Cooney*, 77 Minn. 518, 80 N.W. 696.

"True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams* v. *Lee*.[3] Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter."

I think it appropriate at this point to consider the holding in the *Tulee* case (7 Wn. (2d) 124, 109 P. (2d) 280 (1941)), which is cited in the foregoing quotation.

In that case, a member of the Yakima tribe of Indians was charged with having caught salmon with a dip bag net and with selling such fish commercially without having obtained a fishing license (costing $5) as required by statute. The place where the offense was alleged to have been committed was at one of the usual and accustomed ancient fishing places of the tribe referred to in the treaty of June 9, 1855 (12 U.S. Stat. 951). The defendant was convicted and appealed to this court, which held (by a vote of 5 to 3) that the treaty right to fish at such places was subject to the statutes of the state governing the taking of fish. In effect, the majority of this court held that the police power of the state was supreme and that the treaty-making power of the Federal Government was subordinate thereto in respect to fishing regulations.

The Indian whose conviction was thus affirmed appealed to the United States Supreme Court, where the decision of this court was reversed. *Tulee* v. *Washington*, 315 U.S. 681, 86 L. Ed. 1115, 62 S. Ct. 862 (1942). The supremacy of the treaty right of Yakima Indians to fish at their usual and accustomed places over the power of the state to exact a $5 fishing license was recognized by the Supreme Court in the following quotation from its opinion, at page 684:

"In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States* v. *Winans*, 198 U.S. 371, this Court held that, despite the phrase 'in common with citizens of the Territory,' Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area; and in *Seufert Bros. Co.* v. *United States*, 249 U.S. 194, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us, 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 of the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States* v. *Kagama*, 118 U.S. 375, 384; *Seufert Bros. C.* v. *United States*, *supra*, 198–199.

"Viewing the treaty in this light, we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for 'the support of the state government and its existing public institutions,' laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case."

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[3] In *Williams* v. *Lee*, 358 U.S. 217, 3 L. Ed. (2d) 251, 79 S. Ct. 269 (1959), the Supreme Court, in referring to the authority of Indian tribes over their reservations said:

"* * * The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564–566."

Although the court's decision contains language which purports to uphold the power of the state to impose restrictions of a regulatory nature on treaty Indians with respect to the time and manner of fishing outside the reservation, no such question was before the court for decision in the *Tulee* case. As pointed out in the first opinion in the *Satiacum* case, four judges of this court believed the language in the *Tulee* case to be dictum because it was not necessary to the decision.

In my opinion, the decision of the Supreme Court, on the question presented to it in the *Tulee* case, compels an affirmance of the trial court's judgment. If under the Yakima treaty the state may not exact a $5 license fee from a member of the tribe for exercising his treaty right to fish at the usual and accustomed places, how can the state completely prevent, for a 10-day period, a Swinomish Indian, who has precisely the same fishing rights under the Treaty of Point Elliott, from fishing at all. If the state can impose such prohibition for a period of 10 days, it may do so for 30 or 90 days or longer. In the *Tulee* case, the treaty Indian would have been deprived of $5 in consideration for a whole year's right to fish, while, in the present case, the treaty Indian is completely deprived by the state of his usual means of livelihood. Furthermore, his source of family food is entirely shut off during this period.

At this point, reference should be made to the thorough and exhaustive memorandum of the learned trial judge in which he discusses both the testimony and numerous exhibits admitted at the trial, and also many court decisions bearing on the questions involved. His summation is 48 pages in length and unfortunately cannot be quoted in full in this opinion.

In the memorandum opinion, the trial court described in detail the background and circumstances surrounding the making of the Treaty of Point Elliott in 1855 between the Swinomish Tribe and Governor Isaac I. Stevens of the Territory of Washington, who represented the United States. Concerning the dependence of the Swinomish Tribe on fishing as their principal means of livelihood at the time the treaty was negotiated in 1855, the trial court said:

"To say merely that these Indians were 'fish eating' would be to convey a wrong impression. The testimony clearly indicates that these people caught fish in order to exist. Fish was the main part of their diet not only in the spring and summer but it was dried and saved for winter. Their reliance upon fish is substantiated by Governor Stevens' statement at the Walla Walla Council May 29, 1855, following the *Point Elliott Treaty*. * * * The *Point Elliott Treaty* itself supports the contention by providing in *Article V* for the right of 'erecting temporary houses for the purpose of curing * * *' fish. There is also an interesting comment about the Lummi tribe located immediately to the north in *United States* v. *Stotts, supra* [49 F. (2d) 619]:

" 'I think the court may judicially know that the Indians subsisted during this time by hunting and fishing, and the tide lands were a necessary prerequisite to the enjoyment of fishing * * *'

"As a result of the Treaty and the Executive Order, the Swinomish Indians moved to the small peninsular reservation on the south tip of Perry's Island (Fidalgo Island). It was obviously a rocky, hilly bit of land covered by forest in most places except for portions that were tidal marsh. * * * Very little of it was then or is today conducive to profitable or successful farming. Even wild game was apparently not too plentiful on the peninsula because, according to Alex Edge, fish was all they used to live on.

"It was obvious from the nature of the peninsula and the background of the Indians who were to occupy it that their major means of subsistence on the peninsula would be to catch, eat and sell fish or to cut and sell timber. * * *

Later, in its written opinion, the trial court again referred to respondent's treaty rights as follows:

"As previously indicated, Governor Stevens' *Point Elliott Treaty* negotiations never hinted at or made mention of a limitation upon the Indians' right to fish at their usual and accustomed grounds. As he discussed the purposes of the Treaty and desires of the Great White Father, he left the distinct impression that the Indians could fish as necessary, as they have since time immemorial. * * * It will be remembered that these negotiations took place through interpreters.

"The Governor's statements were made at a time when the northwest was a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hindrance from the Federal or Territorial Governments. Regulations of fish and game were neither known nor dreamed of. The Indians had fished for salmon in the Skagit Bay area since time immemorial. The catching of salmon was necessary for the sustenance of themselves and their families. Neither the Governor nor the Indian chiefs

could possibly have visualized present day restrictions. They entered into the treaty agreement under conditions as they existed at that time. Thus, we must interpret the Treaty and the rights of the Swinomish Indians in light of what they then knew about need for regulation, keeping in mind that both parties knew the needs and abilities of the Indians would obviously grow in the future.

"Without any doubt the Governor and the Indians signed the Treaty fully intending that the Indians should be forever allowed to catch salmon 'at their usual and accustomed grounds' without restriction. We must follow that intent. As stated in *State* v. *Edwards, supra* [188 Wash. 467, 62 P. (2d) 1094],

" ' * * * they had a right to assume that, though the treaty limited them to a certain peninsula, their rights on that peninsula were as broad and unrestricted as they had been before. * * *

" '* * * we are bound to construe the grant contained in the treaty, as fixed by the executive order, as it would naturally be understood by the Indians.'

"In arriving at the foregoing conclusion our Supreme Court quoted at length from *Jones* v. *Meehan*, supra [175 U.S. 1, 44 L. Ed. 49, 20 S. Ct. 1] as follows:

" 'In construing any treaty between the United States and an Indian tribe, it must always * * * be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. * * *'

"It may be conceded that there is an ambiguity contained in the Treaty; however, that ambiguity, if there is one, should be resolved in favor of the Indians, *Winters* v. *United States*, supra [207 U.S. 564, 52 L. Ed. 340, 28 S. Ct. 207].

"Inasmuch as the defendant was fishing in a usual and accustomed fishing ground of the Swinomish tribe, he had a right to fish in the area where he was arrested. The treaty right provided for in *Article V of the Treaty of Point Elliott* is not subject to control by the State of Washington. * * *"

The portions of the findings of fact and conclusions of law quoted below are essential to an understanding of the basis for the trial court's judgment.

After finding that respondent was a member of the Swinomish Indian Tribe, which was a party to the Treaty of Point Elliott (12 Stat. 927), and was entitled to the protection of the treaty, the court found:

"C. *Was the defendant fishing at a location protected by his rights under the Treaty of Point Elliott?*

"FINDINGS OF FACT

"I. The area reserved for the Swinomish Indian Reservation was then and is a rocky, hilly bit of land covered by forest in most places except for portions that were tidal marsh. Very little of it was then or is today conducive to profitable or successful farming, and it was not then and is not now abounding in wild game. Without a salmon fishery, the reservation was incapable of producing adequate food. Fish from the immediately surrounding waters and the bounding river had always been their major, if not sole, diet.

"II. At the time of negotiation of the Treaty of Point Elliott the Swinomish Indians, and thereafter the Indians living on the Swinomish Indian Reservation, fished for a livelihood, taking fish from the surrounding waters including the Skagit River as it flowed past the south end of the peninsula upon which the reservation was located. The Indians used the caught fish for their own purposes and for sale and trade to white men. The catching of salmon was necessary for the sustenance of the Indians and their families.

"III. At the time of negotiating the Treaty of Point Elliott, Governor Stevens, who represented the United States Government, made no mention of any restriction on the Indians' right to fish, and represented that the Indians could fish as they needed, as they had since the time of their forefathers. The Indians intended that insofar as the Skagit River bounded the south end of the reservation its use was to be reserved to them for fishing as they needed for their liveli-

hood. It was the intent of the parties to the Treaty of Point Elliott that the Indians have reserved to them the right to fish in and use the Skagit River and take such fish as were necessary for their personal and commercial use.

"* * *

"VIII. The defendant was fishing in the area of the Skagit River as it was relocated by the Federal Government.

"D. *Was the defendant fishing at a 'usual and accustomed fishing ground' as that phrase is used in the Treaty of Point Elliott?*

"FINDINGS OF FACT

"I. The Indians originally fished with Indian traps in and near the area which is presently called the 'jetty drift.'

"II. The Indians speared fish in the shallow gutters made by the Skagit River on the tide flats all the way from Bald Island westerly to deep water, which would cover the area of the jetty drift.

"III. The Indians fished with bait from canoes near the Hole-in-the-Wall.

"IV. Article V of the Treaty of Point Elliott reserved to the Indians the right of taking fish at 'usual and accustomed grounds and stations.' "

I would affirm the trial court's judgment in this case because, while the Indians' methods of fishing have changed since 1855 when the Treaty of Point Elliott was made, the supremacy clause of the United States Constitution has not been changed. It still provides:

" 'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby*, anything in the Constitution or laws of any state to the contrary notwithstanding.' " (Italics mine.)

This court is bound by *all* treaties made under the authority of the United States. Such treaties are by the Federal Constitution declared to be "the supreme law of the land."

This court is also bound by the decisions of the United States Supreme Court as to the validity and interpretation of treaties.

As I read its decisions, Indian treaties were regarded by that court from 1832 to 1962 as being the supreme law of the land the same as treaties with foreign nations. See cases cited in the first *Satiacum* opinion.

In 1924, the rights of Japanese nationals under the then existing Japanese treaty were declared in *Asakura* v. *Seattle*, 265 U.S. 332, 68 L. Ed. 1041, 44 S. Ct. 515, to be supreme over the police power of the state of Washington.

In 1942, the *Tulee* case was decided which construed the Yakima treaty as preventing the state of Washington from charging a member of the tribe a $5 fee for a fishing license to fish at "the usual and accustomed places."

In 1953, the Supreme Court of Idaho upheld the treaty right of the Nez Perce Indians to hunt for game without obtaining a license from the state. *State* v. *Arthur*, 74 Idaho 251, 261 P. (2d) 135 (1953). The state's application for certiorari was denied, 347 U.S. 937, 98 L. Ed. 1087, 74 S. Ct. 627.

In 1962, in the *Kake* case (quoted above), we are told that even on Indian reservations state laws may be applied to Indians unless such application would interfere with self-government or impair a right granted or reserved by federal law. No treaty was involved in that case.

In the recent en banc decision of this court in *State* v. *Bertrand*, 61 Wn. (2d) 333, 378 P. (2d) 427 (1963), we had occasion to pass upon the question of whether state courts had jurisdiction to resolve internal disputes of the Quinault Tribe. In answering this question in the negative, this court quoted the following from Cohen, Handbook of Federal Indian Law (page 123), after observing that:

"It is difficult, if not impossible, to define the legal status of 'treaty Indian tribes' in a few words. It is sufficient for the purpose of this opinion to state:

" 'The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative powers of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself *affect the internal sovereignty of the tribe*, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal

sovereignty are vested in the Indian tribes and in their duly constituted organs of government.' (Italics ours.)"

The majority opinion in the present case relies on the *Kake* case and upon the dictum in *Tulee* and other decisions based thereon. I do not agree that the repetition of dictum (no matter how often repeated) makes it the law of the land. I think that to be binding on this court under the supremacy clause, there must be a decision of the Supreme Court in a case involving a treaty Indian who is claiming as against the state a treaty right relating to hunting or fishing.

As of the present time, we have two cases squarely in point: (1) the *Tulee* case, which upheld the treaty right of the Indian to fish at usual and accustomed places without paying for a fishing license, and (2) the decision of the Idaho Supreme Court concerning a similar right to hunt game (*State v. Arthur, supra*) in which the state's petition for certiorari failed to receive the four votes necessary to granting a hearing by the United States Supreme Court.

In view of the present state of the controlling decisions and the supremacy clause of the United States Constitution, what is now binding upon this court? The only logical answer is the *Tulee* case (disregarding the dictum).

If this court is to follow *Tulee*, it seems to me that the judgment of the trial court must be affirmed. If the state has no power to charge a treaty Indian $5 to exercise his treaty right to fish at the usual and accustomed places, then it follows that the state may not absolutely prohibit him from exercising such right for 10 days or any other period of time. Such action could result in his being deprived of his normal supply of food for an entire year. The Treaty of Point Elliott was intended to insure respondent's unrestricted right to fish to sustain himself and his family unless and until it shall be abrogated or modified by Congress.

The most recent decision of the United States Court of Appeals on this general subject is *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F. (2d) 169 (C.A. 9th-1963).

I recognize the very serious practical problem facing the state of Washington in the conservation of salmon both for commercial fishing and for sportsmen. But, until the Supreme Court holds in a case squarely presenting the issue that an Indian treaty is not the law of the land under the supremacy clause, the state's only legal remedy is that suggested in the last paragraph of the first *Satiacum* opinion which dealt with the Puyallup Indians. It was there stated, at page 529:

"To summarize, the treaty of Medicine Creek of 1855 is the supreme law of the land and, as such, is binding upon this court, notwithstanding any statute of this state to the contrary, and its provisions will continue to be superior to the exercise of the state's police power respecting the regulating of fishing at the places where the treaty is applicable until:

"(1) the treaty is modified or abrogated by act of congress, or

"(2) the treaty is voluntarily abandoned by the Puyallup tribe, or

"(3) the supreme court of the United States reverses or modifies our decision in this case."

The solution of the problem lies with the Congress. Certainly this court should not disregard the Treaty of Point Elliott as the supreme law of the land in the absence of controlling precedent from the Supreme Court.

As stated above, I would affirm the trial court's judgment.

Mr. BELL. I can say as a lawyer that the supreme court of the State of Washington went to great effort to solve the Indian problem, which is as well known to them as to others. The *McCoy* case is something they have given a great deal of thought and research to. I think it settles the question of the Indian and State fisheries and regulation between them and the State of Washington.

I have also attached at the very back of my prepared statement some excerpts from the minutes and reports of Indian treaties made by Governor Isaac Stevens with the Indian tribes west of the Cascade Mountains in 1855. I think this committee ought to understand what these men talked about in 1855, and it was not done in a vacuum. It was done in a proceeding much as this one, with a reporter present, a reporter at the table with counsel, with verbatim minutes kept, and we can at this late date, even, read it and have some understanding.

I have also included a copy of the treaty. It is in toto, but the committee might read article V but read it in context with all the other articles of the treaty. It is not taken out of context here particularly but it has a meaning a little different when read with everything else.

Now, I would like to point out to the committee that in 1855, the State of Washington was 60 days by horse from St. Louis and the people, the white people had occupied this territory by force of arms and the Indian people at that time were a subjected race. They had been conquered by physical power. The United States, however, in fairness, in order to secure title to the lands involved, and there were many millions of acres, and to assure order in the wild lands that was peopled by this race, made a purchase of this land for cash and for other considerations. These fishing rights we are talking about are these other considerations. It is a purchase price; it is a barter. It is as if it were money laid on a table and something was sold and something received thereby. The treaty clearly discloses by its very words that this was a transaction of bargain and sale, and in order to induce the Indian people to deal in this transaction, he was given the exclusive occupancy and possession of these lands we call reservations, but this did not fully assure him, for he fished for sustenance and without fish, he starved. So he would not treat with this white man unless he talked about his fishing rights. He was not as interested, possibly, in his land, obviously, as he was about his fishing. The United States could not give him any foods. You could not bring food 60 days by horseback from St. Louis. So he had to fish to live.

The Indian asked that he, though not a citizen, and at that time his status was different than it is today, he was not a citizen of the United States, he was a subjected person being removed to a reservation upon which he must live in the future. He asked that he be given, as to fishing, at least, the right to go off the reservation to secure his sustenance. He wanted to fish in his usual and accustomed places. He wanted to fish there protected and unmolested from the soldiers and citizenry of his conquerors. He realized he had just sold this place to others and they certainly would want to utilize it, too. He did not ask for the occupancy of these places to the exclusion of those to whom he had just sold it. All he sought in such places was equality, so he could fish as an equal, as if he were a citizen of the United States, instead of a member of a race just conquered by the United States.

The record attached shows that he was so assured, and he was told he could go off the reservation to his usual and accustomed places for the purposes of fishing, hunting, and berry gathering and for no other purpose and that, while so engaged, he would be protected from discrimination and treated with equality by the white man who had bought the place and could there be expected to be similarly engaged.

Today, the Indian is a citizen and thus he no longer needs a treaty to give an assured equality before the law when he exercises his treaty right to get to and thereafter fish at his usual and accustomed places off the reservation.

It is the position of the Tulalip Tribes as an Indian people signatory to this treaty of Point Elliot that both Senate Joint Resolutions 170 and 171 be rejected. They understand Senate Joint Resolution 170 to declare that by reasons of the decisions of the U.S. Supreme

Court, off-reservation fishing rights are subject to regulation by the State. This the Tulalip Indians have always believed and have conducted themselves accordingly.

The power of the State to regulate the time and manner of fishing has nothing to do with the treaty nor has it any relation thereto. It is simply the State's exercise of its police power to protect the general welfare and conserve the fishing resources. By law of the State of Washington all wild animals and game fish are its property and the taking thereof of food fish, which includes salmon, is controlled by regulation of the director of fisheries and of game.

The Tulalip people claim no treaty right to fish off the reservation at usual and accustomed places which gives to them a status greater than that of other citizens. They merely claim the right to fish at such places in common with other citizens on a basis of equality subject, as are all others, to the police power of the State of Washington, their right—and we have not talked much about what this treaty right is—we have talked about it but we have not defined it here in these 2 days, and I may not define it correctly, but I am going to try to—their right is solely to fish. Thus they need not be licensed in order to be permitted to do so, and they cannot be deprived of the right to fish by denial of access to the water. But once there, the treaty is clear, as interpreted by the Supreme Court in the *Tulee* and *Kake* cases that they are there on a basis of equality with other citizens.

The other citizens have no right to fish and thus are merely permitted to do so by the State which licenses them, nor can such other citizens claim a treaty privilege to go over the lands of others to get to a fishing ground. But once fishing in waters under State jurisdiction, the State's power to reasonably regulate all people as citizens, including Indians, in the time and manner of fishing outside of the reservation is unquestioned.

This State's regulatory power does not arise in the treaty, is not dependent thereon, nor does it further any treaty provisions nor derogate therefrom. To so resolve by the Senate that it does so is an idle and erroneous act and statement of the law. It will not, in effect, add to, change, or vary any existing powers of the State, any jurisdictions, or any rights, now or in the future, to be had by a State.

Besides, it will merely cause confusion because it erroneously infers, this is Resolution 170, and lends credence to the belief that the State's power to regulate an off-reservation Indian fishery is in some mysterious and unknown manner determined to arise from the treaty, which is not so. It arises, I assume, from the enabling act that this Congress gave to the State of Washington, and its constitution.

Nor can a subsequent State legislative act interpret the treaty, or of the Congress, for that matter. Interpretation is a judicial function and such functions cannot be physically performed or accomplished by any legislature. In the nature of things, legislatures cannot interpret law and by law and constitutions, legislatures are forbidden to do it.

Therefore, to resolve, as in Resolution 170, is an idle and useless exercise of legislative function, stating only the already obvious, to wit, that State legislation on the subject must be in furtherance of and not in derogation of treaties.

It is also erroneous because State legislation on the subject of regulation of fish and game does not derive its fundamental power to do so from Federal authority, but it rather springs from the attributes of the State's own sovereignty.

Senate Joint Resolution 171, we propose, is equally lacking of purpose and based upon misconception. In the first place, it rests as to its need for its enactment according to its whereas clauses upon the precept that judicial decision of *Tulee* v. *Washington*, *Maison* v. *Confederated Tribes*, *Washington* v. *McCoy*, have not resolved the issues between the State and the Indians. This is erroneous, as they have done so and with clarity and firmness. And I attached the *McCoy* decision for the Senate committee to make this decision of its own in reading that decision.

Resolution 171 then proposes to purchase the Indians equality with other citizens. This impoverishes the United States, because regardless of the amount of money paid to the Indian people for their so-called off-reservation rights, they will still have them as American citizens. No Congress can purchase a citizen's equality with other citizens and certainly Indians are citizens of the United States.

Today, Indians can get access, usually, to usual and accustomed places by public highway or by navigable stream or by both, and they will do so, even after selling their rights to trespass to get to such places. In 1855, they could not.

In fact, though possibly they could trespass as a matter of treaty right in order to go to usual and accustomed grounds and stations, they do not do it today. When they go to fish today at these places just like everybody else, they drive the car down the highway and park in the public parking lot provided by the State Game Department of the State of Washington and dump their boat off a trailer and rev up their kicker like everybody else.

Off-reservation fishing rights granted by treaty consist basically of, one, a property right in the nature of an easement on the lands of others to get to the usual and accustomed fishing places wtihout trespassing; and two, the right not to be excluded therefrom by other citizens or by the State after their arrival at the fishing site. This concept leads to the allowance of fishing by Indians at such places without need of the State's permission through licensing and the payment of money to Indian people by Government when such places are destroyed and lose their existence such as was paid to the Yakima when the Dalles Dam flooded and took away their usual place, Celilo Falls.

Resolution 171 will not compensate for the destruction of the fishing place, because such is not contemplated. As citizens, Indians cannot be deprived of their equality with other citizens when, originally, as a noncitizen in 1855, he could have been so excluded where it not for the treaty.

The State of Washington, in regulating the fishing by Indians without a treaty right off the reservation, would still have to exercise its police power in a reasonable manner, equally applicable to all citizens, not arbitrarily and capriciously and with regulations germane to the subject to be regulated; that is, reasonably necessary to the conservation of the fishery resources.

Simply speaking, they could not say "You cannot drink." They will have to talk about fishing.

So about all the purchase would do under Resolution 171 would be to possibly change the burden of proving the regulation of a proper use of State police power, by shifting the burden from the State to the Indian citizen, which is the burden I, as a white man, bear without any treaty right.

If I am arrested because I went 30 miles an hour in a 25 mile-an-hour zone, I cannot prove that the State is unreasonable. I cannot make the State prove it is unreasonable because it fixed 25 miles an hour as a speed limit. The Indian, however, if he had treaty right, could. Thus it shifts the burden but it does not shift the ultimate thing to be proved, and that is that the State, in the exercise of its police power, has the right to say 25 miles an hour is a safe speed as a top speed because of the safety of people and the regulation of traffic. The same with fishing.

This would, in other words, change the substantive right of the treaty. It would be solely procedural.

It is open to question whether the United States will, under Resolution 171, therefore purchase anything of consequence, though the price may be high—I heard $27 million for two sites here today—because Indians have always been foremost amongst our people as fishermen. But it does contain a moral, Resolution 171. If possible, it is a clear expression of congressional intent that the United States is willing to break the faith of 100 years with the Indian people and to unilaterally and without their consent, destroy a treaty. It has been done before. It, I think, is probably recognized as one of the moral shames of our country, that we have broken these treaties. If the United States today will not keep its promises and its treaties, even though they be with Indians, this attitude of mine and sandard of morals will not fail to be impressed upon the consciousness of other native minorities, including Negroes, as well as upon foreign nations. Today of all times is no time for the United States to break the most solemnly given promise.

We admit that Indians fish off the reservation and that there are excesses there, but such excesses continued and increased because the State of Washington's enforcement officers sat idly by and allowed them to continue and multiply for lack of normal procedure of arrest and trial. State law enforcement officials took movies of State fishery law violations by Indians and showed them to audiences throughout the State of Washington, and they did not arrest the violators. The result was and is predictable. Great public outcry occurred against the Indian people as a whole because of the excesses of the few. Inflamed by such propaganda, sports organizations and conservationists demanded correction. Such demands have resulted in these hearings

This calculated lack of law enforcement, well publicized, has done its evil work. If the State would aggressively enforce the law, the off-reservation fishing problem of Indians would be over. Only law enforcement by the State of Washington will protect the fishery resources and the *Tulee* and *McCoy* decisions clearly point the way.

We urge, therefore, that the resolutions are innocuous and accomplish nothing except spend the people's money. The State of Washington has the power to protect itself, as do all sovereign States, and we urge it should.

Thank you very much.

Senator MECHEM. You speak of violations that some people were discovered to be involved in. What violation can an Indian be involved in under these treaty rights as they are spelled out?

Mr. BELL. I think he can disobey the laws of the State of Washington off the reservation. I think he has no privilege except the right to get to the place to fish there without the permission of the State once he gets there. But he must fish according to the laws of the State of Washington like any other citizen. He fishes in common only. Therefore, if he violates the laws of those places, I think he should be arrested.

Senator MECHEM. He can fish in an unaccustomed place in an illegal manner?

Mr. BELL. He cannot fish in an illegal manner, according to our view, in either accustomed or unaccustomed places. Accustomed places are no haven to violate the law of the State of Washington, according to the *McCoy* decision.

Senator MECHEM. Thank you, sir.

Mr. Panner, Mr. Scott, and Mr. Jackson.

STATEMENT OF OWEN PANNER, ATTORNEY FOR CONFEDERATED TRIBES OF WARM SPRINGS; ACCOMPANIED BY ED SCOTT, CHAIRMAN, WARM SPRINGS COUNCIL; AND VERNON JACKSON, SECRETARY-TREASURER

Mr. PANNER. Mr. Chairman, I am Owen Panner, the attorney for the Confederated Tribes of the Warm Springs Reservation of Oregon. Seated on my left is Mr. Ed Scott, who is chairman of the Tribe Council of Warm Springs, and on his left is Mr. Vernon Jackson, the secretary-treasurer of the Warm Springs Tribes in Oregon.

The Confederated Tribes of the Warm Springs Reservation of Oregon consists now of approximately 1,700 members. The area that was ceded to the United States in exchange for the treaty of 1855 consisted of approximately 10 million acres and the tribe received for their own use in this area about one-half million acres. Involved also, of course, is the reservation of the treaty rights to fish at usual and accustomed fishing stations off the reservation.

The Warm Springs Tribe is a Wheeler-Howard Corp. It is controlled and regulated by tribal council. We have a membership roll and the membership is definitely established. Tribal members are issued fishing cards, identification cards, identifying them as members of the Warm Springs Tribe. The tribe does regulate its off-reservation fishing sites as well as fishing within the reservation. The tribe is conservation minded and believes in the regulation of the fishing resources which the Indians have always believed in.

I am going to delete from my statement what I believe to be cumulative on the basis of the testimony that has been given here in the past and shorten it up considerably.

First, however, I would like to say that I do not believe that there is any question but that both of these resolutions involve the abrogation of treaty rights insofar as the Warm Springs Tribe and the other treaty tribes in the Northwest are concerned. No matter how we put it, either Senate Joint Resolution 170 or 171 will involve the abrogation of the treaty. Senate Joint Resolution 170 purports to turn over the

regulation of fishing rights to the States involved, and as a practical matter, in the States of Washington and Oregon, no separate consideration has ever been given to the Indians as such in the passage of their State laws.

Turning the regulation over to the States of Washington and Oregon would place the Indians in precisely the same situation as the non-Indians and this would, without question, under the decisions in the *United States* v. *Winans* in the U.S. Supreme Court, and the *Tulee* case, would abrogate their treaty rights.

Senate Joint Resolution 170 would give them no compensation.

Senate Joint Resolution 171 would attempt to compensate them but on a very, very inadequate baisis.

We should make it clear here that the Warm Springs Tribe is opposed to both 170 and 171. We do not want compensation for our Indian fishing treaty rights.

I want to say also that I think that the attempt to abrogate these treaty rights by either 170 or 171 are unnecessary. I am satisfied that no one who has read the decisions of the U.S. Supreme Court can come to any conclusion except that the States do have authority to regulate off-reservation fishing rights provided they can show that it is necessary to so regulate them for conservation purposes.

Now, I take this opportunity to disagree wholeheartedly with my fellow tribal lawyer, Mr. Bell, from the Tulalip Reservation. I am happy that I had the opportunity to appear after Mr. Bell, because I do not believe that his views with respect of off-reservation fishing coincide with the views of any other attorneys that I have come in contact with working for Indian tribes. There is no question under the *Winans* decision and the *Tulee* decision in the U.S. Supreme Court but the Indians do have special rights at their usual and accustomed fishing stations off the reservation. I will give the interpretation of the State of Washington decisions to him. But with respect to usual and accustomed fishing stations off the reservation, there is no question but that the Indians, in my opinion, do have treaty rights.

The case of Maison against the Umatilla Tribes, court of appeals case, reaffirms and establishes this. The only requirement, however, that either the U.S. Supreme Court or the Ninth Circuit Court of Appeals have ever put on the States, insofar as regulation of off-reservation fishing rights are concerned, are that the States must show that the regulation is necessary for conservation purposes. And this is certainly not unreasonable. I think if we are going to insist that we limit treaty rights, the States should be required to show that it is necessary to do it. That is all they have to do right now; to this extent I would agree with Mr. Bell.

These two resolutions are absolutely unnecessary, in my opinion. The States of Washington and Oregon have never made any effort to regulate Indian fishing with a view toward considering their treaty rights. They have uniformly taken the position that Indians should have no different rights than non-Indians off reservation, and they come to the conclusion, then, that they will prosecute them and if they lose the case, they won't make any effort to show that the regulation was necessary for conservation purposes. So I do not think there is any question but that the two resolutions are not necessary now to the enforcement of conservation measures by either of the two States.

I want to say, too, that the Warm Springs Tribe, as was indicated by the testimony of the director of the Oregon Fishing Commission, has cooperated with the fish commission and the game commission. We have very little argument with them in Oregon. The tribe is regulating its fighting rights; we are getting along as well as can be expected under the circumstances. I think that undoubtedly, all of the tribes are becoming more and more aware of the problems that are being faced because of the overtaxing of the resource.

But it should be apparent to this committee that the Indians' percentage of fish, the quantity of fish caught by the Indians, is very inconsequential and is decreasing from what it was many years ago, whereas the take by commercial fishermen and sports fishermen is drastically on the increase. If we eliminated all Indian fishing, based upon the percentages furnished by the departments with which we are in slight conflict, we would make only a very small dent in the overall problem. If you took all of the Indian fishing out, the sports fishermen still would not catch as many fish as they would like to, the non-Indian commercial fishermen still would not catch as many fish as they would like to. The pollution problems, the ocean fishing problems with which we are involved, the sports fishermen, the non-Indian commercial fishermen, are factors which heavily outweigh any Indian interests.

I sometimes suspect that the Indian is consistently made the defendant in these attacks because of the fact that these sports fishermen put such extreme pressure on the leaders of their organizations. I think sometimes we are a pretty handy scapegoat. It is pretty easy to say: "It is all the Indian's fault; we cannot do anything about them." I often wonder just how much of a red herring, in fact, this is when it comes to the departments of fisheries and the departments of game in both of the States.

So I appreciate your giving us this opportunity to appear, Senator. I am particularly appreciative because I realize that you, personally, are not directly acquainted with us. So we are grateful for you taking the time today to hear us out.

Thank you.

Senator MECHEM. If we were dealing with Navajos and Apaches, we would not have any problem. They do not eat fish and do not catch them.

Mr. PANNER. That is right, sir.

Senator MECHEM. Do you have any other statement you wish to make here, either you or Mr. Scott or Mr. Jackson?

Mr. PANNER. No, sir.

Senator MECHEM. Thank you.

We have a statement here from the Swinomish Tribe of Washington for inclusion at this point.

(The statement referred to follows:)

STATEMENT OF SWINOMISH INDIAN TRIBAL COMMUNITY

Gentlemen, it is requested that the following statement of the Swinomish Indian Tribal Community of the Swinomish Reservation at La Conner in the State of Washington be considered by this committee at the hearing on Senate Joint Resolutions 170 and 171 to be held August 5, 1964, and introduced as part of the records of said hearing.

The Swinomish Indian Tribal Community is opposed, at this time, to the enactment of Senate Joint Resolutions 170 and 171.

There are approximately 400 members of the Swinomish Indian Tribal Community, many of whom are dependent upon fishing for a living, deriving their right to fish from article 5 of the Treaty of Point Elliott of 1855 (12 Stat. 1927). The main source of income to the tribal community is from fishing. The reservation is hilly and rocky and not suited for agricultural pursuits.

Ever-increasing pressure to curtail the right of Indians to fish is being brought by various groups and organizations. Suggestions to restrict Indian fishing are based upon erroneous or false information. The true reasons for the decline of our fisheries resource is not solely the Indian fisheries, but a number of other factors including the construction of dams, logging of headwaters, pollution of streams, unrestricted sports fishing, heavy commercial fishing, and other factors.

The Indian never has been and will not be wasteful of the fisheries resource, for it is the source of livelihood for him and his descendants as it was for his ancestors. From time immemorial the Indians of this area have been dependent upon fishing for a living.

SENATE JOINT RESOLUTION 170

The Swinomish Indian Tribal Community opposes the enactment at this time of Senate Joint Resolution 170 for the following reasons:

(1) By article 5 of the Treaty of Point Elliott of 1855 (12 Stat. 1927), it was provided that:

"The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory * * *."

At the time of the execution of the treaty, at all times since, and at the present time, the Indians have interpreted this to mean that they have the right to fish in usual and accustomed places without regulation by the State of Washington.

For the U.S. Senate at this time to unilaterally place a different interpretation upon the treaty provisions would violate the understanding that the Indians have had and about which the U.S. Senate has been silent for more than the past 100 years.

(2) The interpretation of the treaty is a judicial and not a legislative function.

For the Senate of today to say that a treaty ratified by a Senate over 100 years ago has a certain meaning today which may be contrary to the meaning intended at the time of enactment, would be an invasion of the judicial function. The interpretation of the Indian fishing rights under the provisions of the treaty is one for the courts. The U.S. Supreme Court has never ruled squarely on this provision, any statements thereon being dicta.

It is acknowledged that the U.S. Senate may unilaterally abrogate the treaty, which, in effect, the enactment of Senate Joint Resolution 170 would do (*Stephens* v. *Cherokee Nation*, 174 U.S. 445).

(3) In any event, Senate Joint Resolution 170 erroneously interprets the treaty.

Indian treaties are to be liberally construed, to the end that the Indian will retain the benefits conferred by the treaty at the time of execution (*Tulee* v. *Washington*, 315 U.S. 681).

At the time of the execution of the treaty, the Indians who were parties thereto, being the forebears of the members of the Swinomish Indian Tribal Community, ceded and granted to the United States a vast area, but reserved to themselves the right to fish. This was not a grant of right to the Indians, but a grant from the Indians to the United States and a reservation to the Indians of those rights not granted.

At the time of speaking to the Indians assembled for the purpose of having explained to them the Treaty of Point Elliott and the signing thereof, Governor Stevens at no time made any mention of restrictions on the rights of the Indians to fish. Nothing was said about fishing in common with the whites or what it would mean. It must be remembered that Governor Stevens' statements were made to Indians who spoke no English and found it necessary to rely upon an interpreter. Reference to the minutes of the treaty council, January 22, 1855, contain Governor Stevens' words, which include the following:

"You understand well my purpose, now you want to know what we desire to do for you. *We want to give you* houses and having homes you will have the means and *the opportunity* to cultivate the soil to get your potatoes and *to go*

over these waters in your canoes to get fish. We want more, if you desire to go back to the mountains and get your roots and your berries you can do so and you shall have homes and shall have these rights, the Great Father desiring them * * *."

"* * * *the Great Father* * * * wants you to have a place where your children can learn to read and write, learn to be farmers and mechanics and *also wants you to take your fish* and go back to the mountains and get berries. Is this good, don't you want this?" [Emphasis furnished.]

In none of the minutes of the meeting is there any reference to "fishing in common with all the citizens of the territory" (see documents relating to the negotiation of the treaty of January 22, 1855, with the Dwamish, Suquamish, and other Indians). Copies of these documents have been forwarded to the committee and attached to the triplicate originals of this statement.

In a later treaty negotiation, Governor Stevens mentioned the right of the coastal Indians to fish. Meeting with the Indians near Walla Walla on May 29, 1855, Governor Stevens told the assembled tribes:

"You will be allowed to pasture your animals on land not claimed or occupied by settlers, white men. You will be allowed to go on the roads, to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the reservation."

It is to be noted that in telling the Indians there assembled of their fishing rights, reference is made to fishing in common with the whites. No such statement was made to the coastal Indians when negotiating the treaty with them. Governor Stevens further continued and told the assembled tribes near Walla Walla, referring to the Treaty of Point Elliott:

"My friends, I have held four councils on Puget Sound, I have made treaties with all the Indians on that sound. They number more than all the tribes here present. They have all agreed, should the President decide, to go on one reservation. That reservation is only about one-fiftieth part as large as this; they have, however, few horses and cattle. They have not 300 head. *They take salmon and catch whale and make oil.* They ask for no more land. They think they have land enough. You will be farmers and stock raisers and wool growers and you need more." [Emphasis furnished.]

Excerpt taken from proceedings at the council held at Camp Stevens, Walla Walla Valley, on the 29th day of May 1855. See page 420 of "Report on Source, Nature, and Extent of the Fishing, Hunting, and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon," U.S. Department of the Interior, Office of Indian Affairs, Division of Forestry and Grazing, Los Angeles, Calif., July 1942.

It must be assumed that the statements of Governor Stevens were made in good faith. All of the facts relative to the making of the treaty must be considered in arriving at the understanding and intent of the parties, including the speeches of Governor Stevens.

When all of these factors are considered, it would appear without any doubt that Governor Stevens and the Indians who signed the Treaty of Point Elliott fully intended that the Indians would forever be allowed to catch salmon at their usual and accustomed grounds without restriction. The Indians certainly had a right to expect that their rights to fish would be as broad and unrestricted as they had been before the treaty was executed.

The phrase, "in common with all citizens of the territory," meant that the Indians could not restrict the rights of others to fish off reservations. It was not a restriction on the right of the Indian to fish.

If there is any ambiguity in the treaty, it should be resolved in favor of the Indians, *Winters* v. *United States*, 207 U.S. 564.

The interpretation of the Treaty of Point Elliott suggested by Senate Joint Resolution 170 is erroneous.

State v. *McCoy*, 63 Wn. (2d) 433 (Dec. 19, 1963), involved the right of the defendant, a Swinomish Indian, residing on the Swinomish Indian Reservation, to fish at an off-reservation, usual and accustomed fishing ground during a period closed to commercial fishing by the regulations of the Washington State Department of Fisheries. Trial was had before the Honorable Charles F. Stafford, judge of the Superior Court of the State of Washington for Skagit County. Copies of Judge Stafford's excellent memorandum opinion upholding the right of the Swinomish Indian to fish at usual and accustomed fishing

grounds without being subject to the regulations of the Washington State Department of Fisheries are attached to the triplicate originals of this statement.

An excerpt from that opinion, pages 34–36, is particularly pertinent:

"The State also contends that this Indian treaty right must be restricted because they will deplete the fish and thus hurt many others who rely upon the fishing industry for a livelihood.

"The water rights cases also considered this problem. It was contended that the Indians must exhaust the water in the river by exercising their rights and thus would injure the settlers farther down the river. This argument was rejected * * *.

"The line of reasoning established in the *Winters* case, the *Conrad Investment Co.* and the *Ahtanum Irrigation District* cases applies with equal force to the instant action. The fact that the white man's nontreaty use of a fishery may be lessened in value is no reason for denying the Indian a right established by treaty. The instant case is not a mere action between private citizens, nor one concerning ordinary civil rights of parties. It is one that involves the dealings between an all-powerful Federal Government on the one hand and the untutored savage of 1855 to 1873 on the other. Even more than that, this is a criminal action brought to enforce a penalty statute against a ward of the Federal Government who apparently was endeavoring to exercise the rights granted to him by the Treaty * * *.

"As previously indicated, Governor Stevens' *Point Elliott Treaty* negotiations never hinted at or made mention of a limitation upon the Indian's right to fish at their usual and accustomed grounds. As he discussed the purposes of the Treaty and desires of the Great White Father, he left the distinct impression that the Indians could fish as necessary, as they have since time immemorial * * *. It will be remembered that these negotiations took place through interpreters.

"The Governor's statements were made at a time when the northwest was a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hindrance from the Federal or Territorial Governments. Regulations of fish and game were neither known nor dreamed of. The Indians had fished for salmon in the Skagit Bay area since time immemorial. The catching of salmon was necessary for the sustenance of themselves and their families. Neither the Governor nor the Indian chiefs could possible have visualized present day restrictions. They entered into the treaty agreement under conditions as they existed at that time. Thus, we must interpret the Treaty and the rights of the Swinomish Indians in light of what they then knew about need for regulation, keeping in mind that both parties knew the needs and abilities of the Indians would obviously grow in the future.

"Without any doubt the Governor and the Indians signed the Treaty fully intending that the Indians should be forever allowed to catch salmon 'at their usual and accustomed grounds' without restriction. We must follow that intent. As stated in *State* v. *Edwards*, supra:

" '* * * they had a right to assume, that though the treaty limited them to a certain peninsula, their rights on that peninsula were as broad and unrestricted as they had been before.

" '* * * we are bound to construe the grant contained in the treaty, as fixed by the executive order, as it would naturally be understood by the Indians.'

* * * * * * *

"Inasmuch as the Defendant was fishing in a usual and accustomed fishing ground of the Swinomish tribe, he had a right to fish in the area where he was arrested. The treaty right provided for in *Article V of the Treaty of Point Elliott* is not subject to control by the State of Washington."

The Washington State Supreme Court reversed *State* v. *McCoy* and remanded for a new trial, which has not yet been held. If the defendant be found guilty on a new trial, the case will be appealed to the U.S. Supreme Court on the issue of whether or not the defendant has the right, under the provisions of the treaty of Point Elliott, to fish off the Swinomish Reservation but at a usual and accustomed fishing ground without regulation by the State of Washington.

SENATE JOINT RESOLUTION 171

Swinomish Indian Tribal Community also opposes enactment of Senate Joint Resolution 171 at this time.

(1) It is felt that there is insufficient information upon which to base legislation such as proposed by Senate Joint Resolution 171.

The true extent of Indian fishing and the effect which it has upon the fisheries resource is unknown. The true effect of the other factors affecting the fisheries resource, such as blocking of rivers, construction of dams, logging of headwaters, pollution of streams, and so forth is not known.

Special interests frequently make exaggerated and even erroneous statements concerning Indian fishing and its effect upon the fisheries resources. Such statement should not be used as the basis for legislation.

(2) A proper and adequate survey or study should be made of the entire fishing industry, with special emphasis upon determining what effect, if any, the Indian fishery has upon the resource. This study should be by an impartial agency. It is not believed that it should be made by the Washington State Department of Fisheries.

Such survey should secure accurate statistics relative to the effect of the non-regulated sports fishing in the Pacific Northwest upon the fisheries resource and of the non-Indian commercial fishing, as well as Indian fishing.

Only after such study can it be determined whether it is advisable or necessary to acquire Indian treaty fishing rights.

(3) Senate Joint Resolution 171 should be clarified, in any event, to make it clear that the acquisition of any Indian fishing treaty rights applies only to the off-reservation fishing rights and in no way affects the right of Indians to fish on their reservations.

It is therefore respectfully submitted that neither Senate Joint Resolution 170 nor Senate Joint Resolution 171 should be enacted at this time.

RATIFIED TREATY NO. 283 DOCUMENTS RELATING TO THE NEGOTIATION OF THE TREATY OF JANUARY 22, 1855, WITH THE DWAMISH, SUQUAMISH, AND OTHER INDIANS

MONDAY, JANUARY 22, 1855, *12 o'clock M.*

Governor Stevens:

My children you are not my children because you are the fruit of my loins but because you are children for whom I have the same feeling for from little children the fruit of my loins. You are my children because I will labor for you persistently for all my life. What will a man do for his children. A man for his own children will see that they are well cared for. He will see that they have clothes to guard them from the wintry season. He will see that they have food to guard them against being hungry. And as for thirst you have your own glorious brooks. But as for food you yourselves now, as in time past, can take care of yourselves. I have called you my children and as my children I have spoken to you of the food that could save you from hunger and your flowing brooks that could save you from thirst but I give to my own children food and drink and sometimes more. I want that you shall not have simply food and drink now but that you may have them forever. Not only do I want you to have food and drink but I want you to have clothes to guard you from the extremities of winter. I find that many of you are Christians and I saw amongst you yesterday the sign of the cross which I think the most holy of all signs. I address you therefore mainly as men who are Christians and know that this life is mainly a preparation for a life to come. You want not simply a home on this earth where you and your children will simply be cared for but you want a home for the next world. I have told you about you yourselves and your future homes and that you all want to be Christians.

You understand well my purpose, now you want to know what we desire to do for you. We want to give you houses and having homes you will have the means and the opportunity to cultivate the soil to get your potatoes and to go over these waters in your canoes to get your fish. We want more, if you desire to go back to the mountains and get your roots and your berries you can do so and you shall have homes and shall have these rights, the Great Father desiring them. Why am I able to say these things? Here are 2,000 men, women, and children who have always treated white men well. Did I not come through your country one year since, were not a great many now here witnesses of it? Did I then make promises to you? [all say he did not]. I am glad to hear this because I came through your country not to make you promises but to know that you were. To know what you wanted, to know your grievances, and to report to the Great Father about you. I have been to the Great Father and told him what they are. Here you are on this sound making journies of three or

four days but I made a journey of fifty days to tell the Great Father. You live on this shore and went to the Great Father and I wrote to you what he told me. I reached the Great Father and I told the Great Father this: I told the Great Father that I had traveled six moons and I never found an Indian who did not give me food and raiment and would not take care of my horse on any journey to the Great Pacific. I told the Great Father I was amongst 10,000 Indians and they took me to their lodges and offered me all they had. And I will ask every person present if he does not know I was away six months and then will pause [shout in reply, we know it's so]. To you all I went back to the Great Father and you know I have come back but here Mason was called out. My children, although I went back to the Great Father I left a father with you who will always be with you and will take care as of his own children.

But my children have you not also had also an older brother with you who has taken care of you and struck strong blows for you [now three cheers for Mr. Simmons]. Mr. Simmons speaks in Chinook [now cheers for Simmons]. My children, it rejoices my heart. My tumtum is alright. I see now that although I went away for eight months I left with you hyasstyee and your older brothers who have taken care of you if you say that is not the case say so. If it is, give them cheers or I won't go on [three cheers]. My tumtum is right and I am glad yours is. Our hearts are all the same. The Great Father has sent me back amongst you and the Great Father wishes you to send him back a paper showing your desires and wishes. The Great Father thinks you ought to have homes as I have before observed. The Great Father knows that you are Christians looking to the future world and he knows that you have wives and children. The Great Father wants you to have a school where you can learn agriculture and to be artisans and to get two blankets when you have one now and learn to take care of yourself as white people the Great Father wants this in fact. He wants you to have a place where your children can learn to read and write, learn to be farmers and mechanics and also wants you to take your fish and go back to the mountains and get berries. Is this good, don't you want this? If you don't we will talk further [all answer "it is," etc.] and [three cheers]. My children, and of course you are my friends, I have simply told you the heart of the Great Father and what are his wishes and desires but the lands are yours and we mean to pay you for them and we thank you that you have been so kind to all the white people of the Great Father who have come from the east. Those white children have always told you that the Great Father would pay you for those lands and the Great Father has sent me here today for that purpose.

The white people of the Great Father, no more his than you, have come here, some to build mills, some to till the land and some to build ships. My children I believe that I have got your hearts and I wanted to have your hearts before I had that put down on paper. Now I have one thing to say to you, we will put our hearts down on paper and then we'll sign our names. We will sent [sic] that paper to the Great Father and if he says it is good it will stand forever but you all know that God governs us in this universe and the Great Father may find something in that paper that is not right. If the Great Father thinks it is not right he will send it back and tell you where it is not right and will see if his heart will compound with yours. The paper if not right you will give simply your voice, and voice simply will be regarded. Now we'll have the paper drawn up in a short time and what we ask is that you (?) 7,000 Indians, that your chiefs and headmen sign the paper.

[High mass.]

Does anyone object to what I said. Does my venerable friend Seattle object to what I have said. I want Seattle to give his voice to me and to his people.

Seattle speaks.

Government [sic] Stevens: My friend Seattle has reminded me of the thing which was in my heart. You shall have a physician and I trust one that will cure your souls as well as your bodies. Now my friends, though you are still my children, if Seattle's heart is right I want you to say so [three cheers for Seattle].

Now we call upon Patkainan. Patkainan we addressed Seattle as a venerable man. You are a young man full of life and energy and may be good for fifty years. We address Patkainan as a man of experience and a man that has influence over his people and we want him to say if what we have said is right. We pause for a reply.

Patkainan speaks.

Governor Stevens: Does Patkainan, the great chief of the Snoqualmoo, say what is good? If so, say so [three cheers for Patkainan]. Governor Stevens: Chow-its-hoot stand forth. We want to know your heart.

Chow-its-hoot speaks.

Governor Stevens: What the Lummi chief has said does my heart good and I want you to say if it is good.

Now cheer for old Bartamenti.

Governor Stevens: Last but not least Goliath. We want you to speak. Goliath a young man who brings delight to the Indian wigwams, we want him to speak.

Goliath speaks.

Governor Stevens: My children you have heard what Goliath the great chief of Skagit says and if it is good let me here [sic] you say so by your voices which will be your hearts [three cheers]. Governor Stevens: My child we have now the paper which we will have read and explained to you.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

No. 2187. Memorandum Opinion

STATE OF WASHINGTON, PLAINTIFF *v.* JOE MCCOY, DEFENDANT

The trial commenced December 13, 1960. On December 15, 1960, the case was recessed until January 24, 1961, to enable counsel to obtain exhibits then enroute from Washington, D.C. On January 24, 1961, additional testimony was taken and a further recess was granted to obtain additional exhibits from the National Archives. All exhibits received were admitted by stipulation of counsel and the matter was finally submitted to the Court for determination March 21, 1961.

The evidence reveals that in the early morning hours of July 28, 1960, Joe McCoy was arrested by the Department of Fisheries officers as he fished from his boat in the jetty drift near the Swinomish Indian Reservation in Skagit County, Washington.

The "jetty drift" is an irregular semi-triangular area of water lying near the mouth of the North Fork of the Skagit River. It is bounded roughly by a rock jetty running between Goat Island and McGlinn Island on the north and by Goat Island and Ika Island on the west and east (see Plaintiff's Exhibit 1 and Defendant's Exhibit 2). At extreme low tide the area is bare and dry except for shallow gutters of water that run through the tide flats from the Skagit River (Defendant's Exhibit 2). When the tide is high a slightly triangular-shaped tide rip or drift is formed. It is apparently caused by the River being diverted by the rock jetty as it meets the waters of Puget Sound (Plaintiff's Exhibits 4 and 5).

At the time of the arrest the Defendant was alone, operating a 18-foot gill net boat powered by a 25-horse outboard motor. It was equipped with a 600-foot modern nylon gill net with an 8¼-inch mesh, 18 meshes deep. The Defendant had rented all of the equipment from another person.

When arrested McCoy had just completed his second pass through the jetty drift and the gill net was still in the water, extending northerly from the boat toward the rock jetty. His location at the time of arrest is marked with a red "X" upon Plaintiff's Exhibit 1 and Defendant's Exhibit 2. He admitted that the six Chinook salmon found in his boat had been caught in the jetty drift area. At the time he was catching fish for sale to commercial buyers for commercial purposes rather than for his own personal consumption.

On July 28, 1960, there was a Department of Fisheries closure order in effect for Area 9 (Plaintiff's Exhibit 3), which covered the vicinity of the jetty drift. No fishing for Chinook salmon was authorized at the time in question. The Defendant was arrested for violating the order and was charged with unlawful fishing. The violation of a Department closure order is a criminal offense; however, Defendant contends that the order does not apply to him as a Swinomish Indian.

At the time of the occurrence the Defendant knew of the Departmental order. Likewise, the Department officers expected to find the Defendant or some other Swinomish Indian fishing in the closed area. This action was brought as a test case.

The Defendant's contention raises several basic questions:

I. Are the provisions of the Treaty of Point Elliott applicable to this Defendant?

II. Was the Defendant fishing on or within the confines of the Swinomish Indian Reservation?

III. If the Defendant was not fishing on or within the confines of the Swinomish Indian Reservation, was he fishing at a location protected by his rights under the Treaty of Point Elliott?

IV. Was the Defendant fishing at a usual and accustomed fishing ground?

V. Has the State proved the necessity of regulating usual and accustomed grounds for the purpose of conservation of salmon?

I

Are the Provisions of the Treaty of Point Elliott Applicable to the Defendant?

The *Treaty of Point Elliott*, 12 Stat. 927 (Defendant's Exhibit 30) was signed January 22, 1855, and proclaimed April 11, 1859. It has been stipulated that said Treaty originally applied to all Indian tribes in the area; that the Swinomish Indian Tribe was a party to the Treaty; and that its members are entitled to such rights as are therein established.

Joseph Billy, an elderly Swinomish Indian, traced his ancestry to two signers of the Treaty. One was a Chief of the Skagit Tribe and the other a Swinomish Chief. He also attempted to trace the lineage of the Defendant. Although his testimony was not too clear, he did assert that Joe McCoy was related to the same two signers through his mother.

However, it was established that McCoy is an American Indian whose forebearers were members of the Swinomish Indian Tribe. In more recent years his parents joined the Swinomish Indian Tribal Community and enrolled the Defendant at birth (Defendant's Exhibit 16). The Defendant has lived upon the Swinomish Indian Reservation all of his life. As such tribal member he is entitled to such rights as are available to the Tribe under the *Treaty of Point Elliott.*

II

Was the Defendant Fishing on or Within the Confines of the Swinomish Indian Reservation?

A. General Location of the South Boundary as Defined by the Treaty and Executive Order

Article II of the Treaty provided, as follows:

"There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: * * *

"* * * the peninsula at the southeastern end of Perry's island, 'called Shais-Quihl * * * All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use * * *."

The parties have stipulated that "Perry's Island" is now known as Fidalgo Island and that the Reservation referred to in the Treaty is the Swinomish Indian Reservation located on the peninsula at the southeastern end of the Island.

On September 9, 1873, the boundary between the Reservation and the rest of Fidalgo Island was established by Executive Order (Defendant's Exhibit 29) as follows:

"Agreeably to the within request of the acting Secretary of the Interior, it is hereby ordered that the Northern Boundary of the Swinomish Reservation in the Territory of Washington, shall be as follows, to-wit: beginning at *low water mark* on the shore of Similk Bay at a point where the same is intersected by the North and South line bounding the East side of the surveyed tract of 9.30 acres, or Lot No. 1 in the N.W. corner of Section 10 in Township 34 North, Range 3 East; thence North on said line to a point where the same intersects the Section line between Sections 3 and 10 in said Township and Range; thence East on said Section *line* to the S.E. corner of said Section 3; thence North on East line of said Section 3 to a point where the same intersects *low water mark* on the western shore of Padilla Bay." [Emphasis supplied.]

The Reservation, as defined, is the large peninsula on the southeastern end of Fidalgo Island (Plaintiff's Exhibit 1). The northerly boundary runs from a point located at *low water* slightly east of the middle of the shore on Similk Bay, thence northeasterly across the small neck of land about one mile to a point located at low water on Padilla Bay. Otherwise the peninsula (or Reservation) is bounded on the westerly side by Similk Bay, Saratoga Passage and Skagit Bay and on the easterly side by the Swinomish Slough.

The Reservation boundary was further defined in 1936 by *State* v. *Edwards*, 188 Wash. 467. The Supreme Court held that the boundary line of the westerly side of this reservation was established at the *extreme low tide mark*. The area in question was between Hope Island and Pull-and-Be-Damned Point.

Although the Court limited its decision, the language of the *Edwards* case applies to the instant action. It dealt with the same reservation and same tribe of Indians. The tide lands herein are immediately adjacent to those referred to in the *Edwards* case. What that case said about the knowledge and understanding of the Swinomish Indians in the early days would apply equally to this case.

"*The Indians, by their continuous use of these tide lands to the extreme low water* mark for the digging of clams and the like, *have demonstrated their understanding of what was meant by 'low water mark'* and, * * * we must hold that the judgment of the trial court * * * is just and right." [Emphasis supplied.]

Although the *Edwards* case clearly demarked the westerly boundary of the Reservation as far south as Pull-and-Be-Damned Point and, although the easterly boundary is fairly well defined by the Swinomish Slough (Defendant's Exhibit 2), there is no such clear demarcation of the south boundary. The question presently before this court is the correct location of the southern boundary between Pull-and-Be-Damned point and the Hole-in-the-Wall.

Unlike the easterly, westerly, and northerly boundaries, the southern boundary has never terminated at a natural salt water line of demarcation. The Reservation peninsula lies parallel to the mainland (Plaintiff's Exhibits 1, 9, and 10 and Appendix A) with the tide flats of both the mainland and peninsula running one into the other (Plaintiff's Exhibits 1 and 9 and Defendant's Exhibit 2 and Appendix A). This makes it difficult to determine whether the tide flats belong to the mainland as they run west or to the Reservation peninsula as they run south and, thus, where the extreme low tide line of such tide flats are.

Under these circumstances it is necessary to determine where the original line of *extreme low tide* was located between Pull-and-Be-Damned Point and the Hole-in-the-Wall. If the area of the jetty drift is situated over submerged tide lands that were originally *attached* to the Reservation at extreme low tide the State has no power to control the fishing in that area, *State* v. *Edwards*, supra.

B. SPECIFIC LOCATION OF THE SOUTH BOUNDARY OF THE PENINSULA RESERVATION

Plaintiff's Exhibit 1 and Defendant's Exhibit 2 are of little assistance in locating the original southern boundary of the peninsula. All man-made structures shown thereon were added long after the *Executive Order* of 1873, for example:

1. All jetties or dikes (see also Defendant's Exhibit 21 for their location).
2. The deep-water channel that runs northerly of the Goat-McGlinn island jetty.
3. The course of the Skagit River as re-routed to its present location south of the Goat-McGlinn island jetty.

However, the foregoing two exhibits are of assistance wherein they illustrate:

1. The location of various permanent natural landmarks such as Fidalgo Island, the Reservation peninsula, Goat Island, Ika Island, Bald Island, McGlinn Island, Seal Rocks, Skagit Bay, Martha's Bay, Swinomish Slough, Pull-and-Be-Damned Point, the Hole-in-the-Wall and Gallaher's Point.
2. The location of the old Indian fish traps south of the peninsula.
3. The tide flats as they look today at extreme low tide.
4. The location of man-made structures erected since 1873.
5. The location of the "jetty drift" and the place of arrest.

Prior to 1893, when the Federal Government began building a series of dikes and jetties at the south end of the Reservation peninsula (hereinafter called the peninsula), the North Fork of the Skagit River (hereinafter called the River) emerged into Skagit Bay some place between Bald Island and McGlinn Island (Plaintiff's Exhibits 9 and 15, Defendant's Exhibits 19 and 20, and Appendix A). At extreme low tide the River followed a fairly well defined channel which curved

from a northwest course at Bald Island to a westerly course toward McGlinn Island less than half a mile away (Plaintiff's Exhibit 9).

At McGlinn Island the River split (Plaintiff's Exhibits 26 and 27). The smaller arm ran northerly between McGlinn Island and Gallaher's Point (Plaintiff's Exhibit 9) and thence out through the Swinomish Slough (hereinafter called the Slough) to the north (see Appendix A).

The area between McGlinn Island and Gallaher's Point through which the north arm flowed had only about two feet of water at mean lower low water and much less at extreme low (Plaintiff's Exhibits 9 and 25, p. 1; and 26, p. 1). As explained by the State's hydraulic expert, the River's regular direction of flow through the Slough was northerly. owever, the River's flow could be reversed by the salt water current through the Slough when the tide was higher on the Padilla Bay end than on the Skagit Bay end of the Slough (see Appendix A).

The River's main stream flowed in a westerly direction south of McGlinn Island, along the south end of the peninsula and thence out to Skagit Bay (see Appendix A). In so doing it ran past the Hole-in-the-Wall, Martha's Bay, and Pull-and-Be-Damned Point. At the Point it became quite shallow, dissipating itself into shallow gutters in places on the exposed tide flats (see Appendix A). It finally reached deep water near Seal Rocks (see Appendix A). Plaintiff's Exhibit 9 and the yellow line on Defendant's Exhibit 2 illustrate the River's original course from Bald Island to Seal Rocks. Defendant's Exhibit 2 illustrates the manner in which the River presently dissipates itself in gutters over the tide flats, although the River as shown is in a much different location than in 1873.

At high tide the River dissipated itself into the waters of Skagit Bay near McGlinn and Bald Islands. Thus, it was not too much in evidence other than by the current it produced. However, its current had a tendency to follow the two courses mentioned above.

No uniform depth was maintained by the River channel at extreme low tide as it ran westerly past the Hole-in-the-Wall, Martha's Bay, and Pull-and-Be-Damned Point toward Seal Rocks. By subtracting four feet from charts related to *mean lower low water* it is possible to determine depth of water at *extreme low tide*. We, therefore, find that at *extreme low tide* the Hole-in-the-Wall had only four to six feet of water (Plaintiff's Exhibit 9 and Defendant's Exhibit 20), while at Martha's Bay it varied from one foot or less to three feet in depth at *mean lower low water*. This means that at *extreme* low tide the River channel was devoid of tidal water from near the Hole-in-the-Wall to the west end of Martha's Bay (Plaintiff's Exhibits 9 and 15 and Defendant's Exhibit 20). At Pull-and-Be-Damned Point the channel deepened abruptly. In places it was as deep as nine feet at *extreme low tide* and then, except for deep gutters, the channel flattened out to about one foot in depth at *extreme low* tide (Plaintiff's Exhibits 9 and 15 and Defendant's Exhibit 20).

As explained by George Lemke, the foregoing *extreme low* tide figures do not mean that river water did not run in the channel between the Hole-in-the-Wall and Pull-and-Be-Damned Point at extreme low water. The soundings on the above-mentioned charts were made in relation to tidal waters and not the River. Whether river water actually flowed in the channels at *extreme low* tide would depend upon the height of the river at a given time. Sufficient height would cause enough pressure behind the stream to force it out over the tide flats. It would naturally follow the channels and gutters to the Bay as paths of least resistance.

The Court is convinced that even at extreme low tide the River originally flowed in a well defined channel between the Hole-in-the-Wall and Pull-and-Be-Damned Point. However, in the Martha's Bay area it was very shallow at extreme low tide, not exceeding one to two feet. According to Alex Edge, Joseph Billy, and Pat Willup (three elderly Indians) it was so shallow that boats with as little as a three-foot draft found it necessary to wait for the tide at Seal Rocks to keep from running aground. At times the River in this channel was so low that an Indian dug-out canoe had to wait for the tide. At these times one could wade across the River in the most shallow places in as little as six inches of water.

It is interesting to note that after converting the charts to extreme low tide readings none of them made prior to 1893 (e.g. prior to the building of the dikes) seriously contradict the testimony of the three old Indians. Furthermore, considering a combination of extreme low tide and a low river (not uncommon in

the summer) the story related by the old men is entirely credible and worthy of considerable weight.

Mr. Joshua Green, one of the State's most important witnesses, gave testimony as to the depth of the River at extreme low tide. He asserted that from the Hole-in-the-Wall westerly to deep water there was never less than four feet of water in the River channel. He said that he had worked on the steamer Fairhaven (Defendant's Exhibit 17) which had a draft of from three and a half to four feet. This vessel departed regularly on a daily schedule from Seattle to LaConner via the River and the Slough. He contended that it had never been necessary to wait for the tide between Seal Rocks and the Hole-in-the-Wall.

Mr. Green admitted on cross-examination that the Fairhaven had been struck in the River channel on occasion. This coincides with the testimony of Alex Edge and Pat Willup. They recalled that as boys they had seen boats stuck at Pull-and-Be-Damned Point at low tide. It also throws some doubt upon Mr. Green's conclusion that the channel was never less than four feet in depth.

Mr. Green also stated that until he quit active steamboating in 1900 his boats always used the River channel that ran just south of the peninsula between the Hole-in-the-Wall and Pull-and-Be-Damned Point. According to him, there was no change in the channel between 1888 and 1900 when he quit. His recollection is correct that the original channel ran just south of the peninsula between the Hole-in-the-Wall and Pull-and-Be-Damned Point (see Defendant's Exhibit 2 location in yellow crayon). However, the remainder of his recollection fails to coincide with the maps and charts of those days.

Four major diking projects were completed between 1893 and 1897, as a result of which the position and condition of the River channel were radically changed (Defendant's Exhibit 21, Plaintiff's Exhibits 24, 25, 26, and 27, and Appendixes A, B, and C). In 1893 the original 6,120-foot jetty was built, extending from a point 400 feet west of the Hole-in-the-Wall to a point 300 feet northwest of Goat Island (Defendant's Exhibit 21, Plaintiff's Exhibits 25, pp. 2, 6, and 7; 26, p. 2 and Appendix B). A small opening was left at the east end of the jetty near the Hole-in-the-Wall to accommodate small boats and canoes (Plaintiff's Exhibit 25, p. 4). Thus, the Fairhaven would have been cut off from the old channel as early as 1893. The River current and channel were by that time diverted to a point south of the jetty (Defendant's Exhibit 21 and Plaintiff's Exhibit 25, p. 6). The new mouth was moved approximately 3,600 feet south of its original position at Pull-and-Be-Damned Point to the new location just north of Goat Island (see Appendix C).

By 1894 the River had been completely diverted from the south shore of the peninsula (Defendant's Exhibit 21). The old channel had become "very shoal", having only one or two feet of water at mean lower low water (Plaintiff's Exhibit 26, p. 6) and, of course, less at extreme low tide (see Appendix B).

Thus, Mr. Green's recollection must be faulty insofar as he contends that the channel did not change between 1888 and 1900 and insofar as he asserts that the Fairhaven ran in and out of the old channel until 1900. If the Fairhaven ran in and out of the channel without regard to tide it must have used the new channel dug south of the jetty in 1894.

In the final analysis, Mr. Green's testimony fails to refute that of Alex Edge, Joseph Billy and Pat Willup with regard to the very shallow nature of the original river channel at extreme low tide. One of the basic reasons for diking the old channel, diverting the river and digging a new channel was to rectify the shallow nature of the old River channel (Plaintiff's Exhibits 24, 25, and 26).

1. Defendants contention as to location of south boundary of Reservation based on above facts

Defendant contends that the Reservation's south boundary is located on the tide flats some place south of Goat and Ika Islands in the vicinity of his arrest. He asserts that the very shallow nature of the original River channel bounding the south end of the peninsula prevents it from being considered a natural water boundary.

However, the *Point Elliott Treaty* mentioned only Perry's Island. Had the contracting parties intended to include Goat and Ika Islands within the confines of the Reservation it could have been accomplished easily by name or other reference in the Treaty or in the Executive Order of 1873. Furthermore, Plaintiff's Exhibits 10 and 11 delineate a retracement and re-establishment of the lines of the original survey in their true position in accordance with the best available evidence of the position of the original corners. According to these maps, Goat

and Ika Islands, like Whidbey Island, were excluded from the 1874 resurvey of the Swinomish Indian Reservation.

Defendant also contends that since *State* v. *Edwards*, supra, places the boundary of the Reservation at extreme low tide, the tide flats extending to Goat and Ika Islands and south thereof belong to the Reservation (see Appendix A and Defendant's Exhibit 2). He points to the fact that prior to the construction of the first jetty in 1893 the tide flats south of the original River channel were exposed at extreme low tide over an extended area south of Goat and Ika Islands and south of the jetty drift. In fact, they were exposed even at mean lower low tide (Plaintiff's Exhibit 9). However, the Defendant and his witnesses have failed to indicate just how far south their proposed boundary should be. They merely say that it includes the jetty drift and thus place it within the confines of the Reservation. To extend the argument to its logical extreme, one must move the boundary south of the peninsula many miles, and at least as far as the tide flats extend to the south (see Defendant's Exhibits 2 and 13 combined).

While Indian treaties should be interpreted broadly in favor of the original understanding of the Indians, they cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties, *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423. The Court doubts that *State* v. *Edwards*, supra, extends the intention of the contracting parties to the extreme asserted by the Defendant.

2. Actual location of south boundary of Reservation based upon above facts

State v. *Edwards*, supra, set the Reservation boundary at *extreme low tide*. Even at extreme low tide the River originally followed a well defined channel along the south shore of the peninsula from the Hole-in-the-Wall past Martha's Bay to Pull-and-Be-Damned Point. There it eventually dissipated itself in gutters on the tide flats in the vicinity of Seal Rocks. Defendant's Exhibit 2 illustrates how the same river dissipates itself on the tide flats at low tide. However, this is a recent picture of the river in its new location.

At extreme low tide the River was non-navigable because of its shallow guttered condition west of Pull-and-Be-Damned Point and its very shallow condition in the area of Martha's Bay, *Brewer-Elliott Oil & Gas Co.* v. *United States*, 270 F. 100; *State ex rel. Pealer* v. *Superior Court*, 58 Wash. 565. However, despite this the River channel was a well known, well defined, visible, natural fresh-water line of demarcation between the south end of the peninsula and the tide flats farther south. In fact, at tide stages other than extreme low, the River was navigable. The River actually prevented the tide flats, on its south, from attaching to any uplands of the peninsula on its north. Thus, the tide lands were not a part of the Reservation, *U.S.* v. *Snohomish River Boom Co.*, 246 F. 112. Even considering the intent of the parties in 1855, it is obvious that this natural fresh water barrier would have been considered a logical boundary between the uplands of the peninsula and the miles of tide flats to the south.

A tract of land bounded by a non-navigable stream is deemed to extend to the middle of the stream. Thus, the south boundary of the Reservation was the center of the River at extreme low tide as it ran past the Hole-in-the-Wall, Martha's Bay and Pull-and-Be-Damned Point, *United States* v. *Ahtanum Irrigation Dist.*, 236 F. (2d) 321; *Hirt* v. *Entus*, 37 Wn. (2d) 418.

It is impossible to pinpoint the line of demarcation with exactness. However, it was located south of the mean lower low water mark as shown on Plaintiff's Exhibit 9. Inasmuch as extreme low tide is three or four feet lower than mean lower low water, it is possible to obtain an approximation of the extreme low water line of the channel by drawing a line through all soundings of three or four feet in depth on Plaintiff's Exhibit 9. By so doing one can get also a rough indication of the center of the non-navigable channel followed by the River at extreme low tide.

By using the above-mentioned formula, the Court places the south boundary of the Reservation, between the Hole-in-the-Wall and Pull-and-Be-Damned Point, south of the mean lower low water line as shown on Plaintiff's Exhibit 9 as follows:

0 ft. south of M.L.L.W. line at the Hole-in-the-Wall.
550 feet south of M.L.L.W. line, 1,000 feet west of the Hole-in-the-Wall
450 feet south of M.L.L.W. line, 2,000 feet west of the Hole-in-the-Wall.
350 feet south of M.L.L.W. line, 3,000 feet west of the Hole-in-the-Wall.
600 feet south of M.L.L.W. line, 4,000 feet west of the Hole-in-the-Wall
300 feet south of M.L.L.W. line, 5,000 feet west of the Hole-in-the-Wall.
100 feet south of M.L.L.W. line at Pull-and-Be-Damned Point.

The Defendant was fishing much farther south than this. Thus, he was not within the original boundary of the Reservation.

III

If the Defendant Was Not Fishing on or Within the Confines of the Swinomish Indian Reservation, Was He Fishing at a Location Protected by His Rights Under the Treaty of Point Elliott?

As previously indicated, the south boundary of the Reservation, between Pull-and-Be-Damned Point and the Hole-in-the-Wall, was the center or thread of the River at extreme low tide. The jetty drift is not within the confines of the Reservation thus bounded. The question then arises as to whether his Treaty rights permitted him to fish in the jetty drift with the same force and effect as if he had fished on the Reservation.

A. What Treaty Rights Exist With Regard to Fishing in the River at its Original Location?

It was the intent of the contracting parties that the Indians have reserved to them the right to fish in the River as it bounded the south end of the Reservation. Such rights would allow them to use the River and take such fish as were necessary for their personal and commercial use.

The Swinomish Indian Reservation was carved out of a much greater tract of land which the Indians owned and had a right to occupy and use. It was adequate for the habits and wants of an uncivilized people. *Pioneer Packing Co.* v. *Winslow*, 159 Wash. 655; *Tulee* v. *Washington*, 315 U.S. 681; *United States* v. *Winans*, 198 U.S. 371. When the Indians agreed to change their habits and become civilized people, using the smaller Reservation area, the *Treaty of Point Elliott*, supra, was not a grant of rights *to* the Indians but a grant *from* them and a reservation of those not granted, *United States* v *Ahtanum irr. Dist.*, supra; *United States* v. *Romaine*, 255 F. 253; *Pioneer Packing Co.* v. *Winslow*, supra. This being the case, all rights not specifically granted were reserved to the Indians, *Skeem* v. *United States*, 273 F. 93; *United States* v. *Winans*, supra; *Winters* v. *United States*, 207 U.S. 564; *Pioneer Packing Co.* v. *Winslow*, supra.

Before the Treaty the Indians had the right to use not only all of the Skagit River (including both sides) but to use it for its full length, as well as all other streams in a vast area. The Indians did not surrender any part of their right to use the Skagit River regardless of whether it became the boundary or whether it flowed entirely within the Reservation, *United States* v. *Ahtanum irr. Dist.*, supra. We cannot assume that when they agreed to move to the peninsula, immediately to the north of the River, that they surrendered all rights to use it, *United States* v. *Ahtanum irr. Dist.*, supra. Nor is it to be supposed that in making the Treaty the Government intended to take from the Indians any of the rights that they had theretofore enjoyed in the River that bounded their peninsular Reservation, *United States* v. *Romaine*, supra.

Indian treaties are to be liberally construed, to the end that Indians will retain the benefits conferred by the treaty at the time of its execution, *United States* v. *Stotts*, 49 F. (2d) 619; *Tulee* v. *Washington*, supra; *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78; *United States* v. *Walker River Irr. Dist.*, 104 F. (2d) 334.

Article II of the Point Elliott Treaty (Defendant's Exhibits 30 and 34) reads in part as follows:

"There is, however, reserved for the present use and occupation of said tribes and bands the *following tracts of land*, viz * * * the peninsula at the south-eastern end of Perry's Island, called Shais-quihl * * *. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use * * *." [Emphasis supplied.]

The reference to a reservation of "land" was not intended to limit the Indians to mere occupancy of the uplands of the peninsula, *State* v. *Edwards*, supra; *Heckman* v. *Sutter*, 119 F. 83; *United States* v. *Romaine*, supra; *United States* v. *Stotts*, supra. The all-inclusive word "land" as used in a statute or a treaty can and frequently does include "non-navigable" waters, *Conrad Inv. Co.* v. *United States*, 161 F. 829; *United States* v. *Walker River Irr. Dist.*, supra, that form the boundary of a reservation, *United States* v. *Walker River Irr. Dist.*, supra; *Brewer-Elliott Oil and Gas Co.* v. *United States*, supra; *Conrad Inv. Co.* v. *United States*, supra; *United States* v. *Ahtanum Irr. Dist.*, supra; even though the river was not specifically mentioned, *United States* v. *Walker River Irr. Dist.*, supra. The same has been held to be true of "navigable" waters and rivers where the Treaty and Executive Orders preceded statehood, *Moore* v. *United*

States, 157 F. (2d) 760; *Alaska Pacific Fisheries* v. *United States*, supra; *Winters* v. *United States*, supra; *Hynes* v. *Grimes Packing Co.*, 165 F. (2d) 323, even though not specifically mentioned, *Alaska Pacific Fisheries* v. *United States*, supra. Even the fact that a Government survey fails to show or include the river or tide lands does not prejudice the rights of the Indians if, in fact, the intent of the treaty was that it was to be considered a part of the reservation, *United States* v. *Stotts*, supra.

Likewise, it is not necessary that tide lands be specifically mentioned in the Treaty (Defendant's Exhibits 30 and 34) or the Executive Order (Defendant's Exhibit 29), or that it be shown in the Survey (Plaintiff's Exhibits 10, 11, and 12) in order for it to be deemed a part of the Reservation, *State* v. *Edwards*, supra; *United States* v. *Stotts*, supra. Whether it is to be considered as a part of the Reservation is largely determined by the understanding of the parties at the time the treaty was made, *State* v. *Edwards*, supra.

Thus, whether the contracting parties intended that the Indians have a reservation of the uplands of the peninsula, as well as a right to use the boundary River for the purpose of fishing must be determined by the historical facts surrounding the making of the Treaty. In this regard one must consider the purpose for which the Reservation was formed, *Skeem* v. *United States*, supra; *Alaska Pacific Fisheries* v. *United States*, supra; the original needs and wants of the Indians, *Winters* v. *United States*, supra; *Conrad Inv. Co.* v. *United States*, supra; how they met those needs and wants immediately following the treaty, *State* v. *Edwards*, supra; the actions of the parties at the time of negotiating the treaty, and whether the Reservation was capable of providing a living without access to the surrounding waters, *State* v. *Edwards*, supra; *Alaska Pacific Fisheries* v. *United States*, supra.

To say merely that these Indians were "fish eating" would be to convey a wrong impression. The testimony clearly indicates that these people caught fish in order to exist. Fish was the main part of their diet not only in the spring and summer but it was dried and saved for winter. Their reliance upon fish is substantiated by Governor Stevens' statement at the Walla Walla Council May 29, 1855, following the *Point Elliott Treaty* (Defendant's Exhibit 22, p. 12). The *Point Elliott Treaty* itself supports the contention by providing in *Article V* for the right of "erecting temporary houses for the purpose of curing * * *" fish. There is also an interesting comment about the Lummi tribe located immediately to the north in *United States* v. *Stotts*, supra:

"I think the court may judicially know that the Indians subsisted during this time by hunting and fishing, and the tide lands were a necessary prerequisite to the enjoyment of fishing * * *."

As a result of the Treaty and the Executive Order, the Swinomish Indians moved to the smaller peninsular Reservation on the south top of Perry's Island (Fidalgo Island). It was obviously a rocky, hilly bit of land covered by forest in most places except for portions that were tidal marsh (Plaintiff's Exhibits 1, 4, 5, 6, 7, 10, and 11 and Defendant's Exhibits 2, 17, and 19). Very little of it was then or is today conducive to profitable or successful farming. Even wild game was apparently not too plentiful on the peninsula because, according to Alex Edge, fish was all they used to live on.

It was obvious from the nature of the peninsula and the background of the Indians who were to occupy it that their major means of subsistence on the peninsula would be to catch, eat and sell fish or to cut and sell timber. As aptly stated in the *Alaska Pacific Fisheries* case, supra:

"The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation * * *."

The same reasoning was followed in *Moore* v. *United States, supra.*

"It is the consideration of such circumstances which determiines the government's intent in making a reservation, whether by a Congressional Act as in the Alaska Fisheries case or a departmental reservation as in our decision in *United States* v. *Walker River Irr. Dist.*, 104 F. (2d) 334 * * *."

It is not logical to assume that the Indians voluntarily or knowingly agreed to reduce the area of their occupancy and to give up the waters and the very fish therein which made the Reservation livable or adequate, *United States* v. *Ahtanum Irr. Dist.*, supra; *Winters* v. *United States*, supra.

However, it is not necessary to speculate upon the Indian's need to fish or upon the Government's intent that the Indians have the right to fulfill that need. In this regard one may refer to the minutes of the Treaty Council, January 22, 1855 (Defendant's Exhibit 33). Although the Defendant's Exhibits 22 and 33 are very similar, the quotations are taken from Defendant's Exhibit 33 because it is a photostatic copy of the Government document and probably more accurate than Defendant's Exhibit 22.

As one considers Governor Stevens' statement to the assembled Indians it must be remembered that they spoke no English and found it necessary to rely upon an interpreter (Defendant's Exhibit 22, p. 8). It must also be remembered that they were not skilled in diplomacy or masters of a written language. The people who listened to Governor Stevens were uncivilized men and women whose existence depended upon fish either to eat or sell, whose proposed reservation had no river running through it but did have one that formed its south boundary. Likewise, their proposed reservation was hardly conducive to successful farming. How would they have interpreted the Governor's glowing words?

"My children, you are not my children because you are the fruit of my loins but because you are children for whom I have the same feeling for from (sic, probably means 'as if'; see Defendant's Exhibit 22) little children the fruit of my loins. You are my children because I will labor for you persistently for all of my life. What will a man do for his children. A man for his own children will see that they are well cared for. He will see that they have clothes to guard them from the wintry season. He will see that they have food to guard them against being hungry. And as for thirst you have your own glorious brooks. But as for food you yourselves now, as in time past, can take care of yourselves.

"*I have called you my children* and as my children *I have spoken to you of the food that could save you from hunger and your flowing brooks that could save you from thirst* but I give to my own children food and drink and sometimes more. *I want that you shall not have simply food and drink now but that you may have them forever* * * *"

* * * * * * *

"*You understand well my purpose*, now you want to know what we desire to do for you. *We want to give you houses and having homes you will have the means and the opportunity* to cultivate the soil to get your potatoes and *to go over these waters in your canoes to get fish. We want more. If you desire to go back to the mountains and get your roots and your berries you can do so and you shall have homes and shall have these rights*, the Great Father desiring them."

* * * * * * *

"The Great Father wants you to have a school where you can learn agriculture and to be artisans and to get two blankets when you have one now and learn to take care of yourself as white people the Great Father wants this in fact. He wants you to have a place where your children can learn to read and write, learn to be farmers and mechanics and *also wants you to take your fish and go back to the mountains and get berries.* Is this good, don't you want this?"

It is interesting to note that *Governor Stevens made no mention of restrictions on the Indians' right to fish* in his explanation of the Treaty. Nothing was said about fishing in common with the whites, or what it would mean. It was made abundantly clear that the Indians could fish as needed as they had since the time of their forefathers (Defendant's Exhibits 22 and 33). The matter of "usual fishing grounds" and "fishing in common with the whites" appeared for the first time in the Treaty itself after he had made the above-quoted speech. In later treaty negotiations the Governor did mention these things to the Indians near Walla Walla (Defendant's Exhibit 22, p. 12) and to the Yakima tribes, *State* v. *Tulee*, 7 Wash. 124; see the dissent at page 146. However, these were different tribes in another part of the State and subject to different treaties.

Further light is shed on the type of life led by these Indians, as well as their needs in this area, by reference to the Walla Walla conference of May 29, 1855. Governor Stevens told the assembled tribes (referring to the *Point Elliott Treaty*):

"I have made treaties with all the Indians on that Sound. They number more than all the tribes present. They have all agreed * * * to go on one reservation. That reservation is only about one-fiftieth part as large as this; *they have however, few horses and cattle. They have not three hundred head. They*

take salmon and catch whale and make oil. They ask for no more land. They think they have land enough. You will be farmers and stock raisers and wool growers and you need more" (Defendant's Exhibit No. 22, p. 12).

From the foregoing it can be seen that Governor Stevens did not seriously consider that the Swinomish Indians were to be farmers and stock raisers. They had been and were to be fishermen. It is obvious that the Indians must have had a similar estimate of their situation in light of the reservation they were willing to accept on the south end of Fidalgo Island. It was well suited to the kind of life they had lived and the manner in which they had always supported themselves, provided they were allowed to fish in the manner Governor Stevens insinuated in his above-quoted speech.

If Governor Stevens was not sincere and the Government secured from the Indians the large domain ceded to it by the making of promises it did not intend to keep, and did not keep, then fraud was practiced on the Indians and the wrong done to them should be rectified. On the other hand, if the promises made by Governor Stevens were made in good faith, as I am sure they were, then all of the facts relative to the making of the Treaty should be considered in arriving at the intent of the parties, including the speeches of Governor Stevens, wherein he explained the meaning of the proposed Treaty and the desires of the Federal Government.

The interpretation of this same treaty, with regard to this same tribe, was faced by our Supreme Court in *State* v. *Edwards*, supra. In quoting from *Jones* v. *Meechan*, 175 U.S. 1, our Supreme Court said:

"* * * 'in construing any treaty between the United States and an Indian tribe, it must always * * * be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who had no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians * * *."

Historically the factual situation facing the Swinomish Indian at the time of negotiating and signing the *Point Elliott Treaty*, supra, was much the same as that referred to in *Alaska Pacific Fisheries* v. *United States*, supra.

"While bearing a fair supply of timber, only a small portion of the upland is arable, more than three-fourths consisting of mountains and rocks. Salmon and other fish in large numbers frequent and pass through the waters adjacent to the shore, and the opportunity thus afforded for securing fish for local consumption and for salting, curing, canning, and sale gives to the islands a value for settlement and inhabitance which otherwise they would not have.

"The purpose of the Metlakahtians in going to the Islands was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the Islands as a suitable location for their colony because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

"The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life."

* * * * * * *

"*The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation.*" [Emphasis supplied.]

Without a salmon fishery the Reservation was incapable of producing adequate food. Fish from the immediately surrounding waters and bounding River had always been their major, if not sole, diet. They also sold fish to the white

settlers for some of their support. The River, with its fish, formed the south boundary of the Reservation. These things were obvious to the negotiating parties (Defendant's Exhibits 22 and 33). It must have been contemplated by both parties that the River would be a part of the Reservation. At the very least, the Indians must have intended to reserve the right to *use* it for fishing purposes. To hold otherwise would be to contend that the parties intended to reserve to the Indians a rocky peninsula upon which they were to live but upon which it would be next to impossible to produce food and a means of subsistence. This is wholly illogical.

This approach to the problem is not new to the law governing Indian treaty rights. The "water rights" cases have held that where reservations have been created for Indians there has been impliedly reserved therewith the right to use all of the water reasonably necessary for their needs, *Winters* v. *United States*, supra; *United States* v. *Fallbrook Public Utility Dist.*, 165 F. Supp. 806; *United States* v. *Walker River Irr. Dist.*, supra.

The treaty in the above-cited *Winters* case specifically designated the center of the river as the boundary. In the instant case the Court *found* the south boundary of the Reservation to be the center or thread of the River in its non-navigable state at extreme low tide. However, it was the need of the Indians and their past use of the river as based upon that need that was the basis for the *Winters* decision and not whether the Treaty of Executive Order designated the center of the river as the boundary, *Winters* v. *United States*, supra; *Conrad Investment Co.* v. *United States*, supra; or whether the boundary ran "to" the River, *United States* v. *Ahtanum Irr. Dist.*, supra; *United States* v. *Walker River Irr. Dist.*, supra; or whether the water, although not named, did in fact form the boundary, *State* v. *Edwards*, supra.

As explained in the cases just cited, whether the lands only were to be reserved or whether the waters of the stream were to be reserved for the use of the Indians is to be determined by the intent of the parties. Doubts whether the reservation of lands for Indians include rights to water power or even other latent resources such as minerals, petroleum, etc., as a practical matter, almost uniformly have been resolved in favor of the Indians, *United States* v. *Walker River Irr.* v. *Dist.*, supra; *Justice Stone, United States Opinions of Attorneys General*, Vol. 34, page 171.

The intent is not required to be evidenced by any specific language in the treaty, executive order or statute. The intent may be derived from the wording of the instrument under consideration, from the surrounding circumstances, the situation and needs of the Indians, and from the purpose for which the lands were reserved, *United States* v. *Walker River Irr. Dist.*, supra; *Winters* v. *United States*, supra; *United States* v. *Ahtanum Irr. Dist.*, supra; *Conrad Investment Co.* v. *United States*, supra.

The practice of adapting the theory of the "water rights" cases to a "fishery" case is not novel. As indicated, this has been done regularly in the Federal cases and was done by our Supreme Court in *Pioneer Packing Co.* v. *Winslow*, supra.

The Court has considered the historical facts surrounding the present case, as well as the needs of the Swinomish Indians at the time of the Treaty and subsequent thereto. The Court has also considered the location of the River, as well as the Indian's original need to use the River as a mean of subsisting on the Reservation. It is clear the Indians intended that insofar as the River bounded the south end of the Reservation its use was to be reserved to them for fishing as needed for their personal and their commercial use.

As between the Federal and State governments, the United States was sovereign in its territories. It had the right and the power to dispose of absolutely any and all of its public land therein, high or low, wet or dry, navigable or non-navigable, *Brewer-Elliott Oil and Gas Co.*, supra, *Conrad Investment Co.* v. *United States*, supra. The power of the Federal Government to reserve the waters and exempt them from control under the State laws is no longer in question, *Conrad Investment Co.* v. *United States*, supra; *United States* v. *Walker River Irr. Dist.*, supra.

While the United States usually held its navigable waters in trust for future states, there was no requirement that this be done. It has frequently exercised the absolute power to grânt such rivers, or the land under them, or the use in them, or some other interest in them irrevocably wherever it became necessary to do so to perform some obligation or to carry out other public purposes

appropriate to the objects for which is has held the lands in its territories, *Brewer-Elliott Oil and Gas Co.* v. *United States*, supra. When such irrevocable exercise of the power has taken place prior to statehood, the State has taken the river, whether navigable or non-navigable, subject to the prior dedication, *United States* v. *Walker River Irr. Dist.*, supra; *United States* v. *Winans*, supra; *Brewer-Elliott Oil and Gas Co.* v. *United States*, supra.

Even if one were to consider the Skagit River to be navigable at all stages of the tide, there is no inconsistency between the rights of the Indians to use it as a fishery and the fact that the Federal Government also holds the navigable stream in trust for public navigation. As stated in *Moore* v. *United States*, supra:

"The fact that navigable waters are a part of a reservation held in trust for the Indian fisheries does not conflict with the trust also to hold them for the public for navigation. * * *"

The right of the Swinomish Indians to use the River, as it bounded the south end of the Reservation, for fishery purposes was not abrogated when the Territory of Washington was later admitted into the Union. *Section 4 of the Enabling Act* provides:

"That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. * * *"

Thus, had the Defendant fished in the area of the Skagit River as it bounded the south end of the Reservation he would have been where he had a right to fish under the *Point Elliott Treaty*. His activities would not have been subject to the laws of the State of Washington. However, he did not fish at such place. He was arrested in the jetty drift south of the River's original location.

B. WAS THE DEFENDANT'S TREATY RIGHT AFFECTED BY DIVERTING THE RIVER FROM ITS ORIGINAL LOCATION?

The Defendant did not fish in the area of the Skagit River as originally located. He fished in the area of the River as re-located. When the Federal Government moved the River to its new location the right to use the River as a fishery was not thereby extinguished. The Indian's right to use the River was transferred to the new location.

In 1893 the United States Corps of Engineers changed the original course of the River by diverting it almost 3,600 feet to the south. Thereafter it no longer formed the south boundary of the Reservation between Pull-and-Be-Damned Point and the Hole-in-the-Wall (Defendant's Exhibit 21 and Appendixes A and B). In 1896 they built another dike from McGlinn Island to Gallaher's Point on the mainland. This completely blocked the flow of the River north of McGlinn Island and out the Swinomish Slough toward Padilla Bay (Defendant's Exhibit 21 and Appendix C). In 1938 the Engineers built a jetty between Goat Island and McGlinn Island (Plaintiff's Exhibit 1, Defendant's Exhibit 21, and Appendix D). This last project caused the River to be diverted a total of approximately 6,000 feet south of its original course past Pull-and-Be-Damned Point and Martha's Bay to a new opening between Goat Island and Ika Island (Plaintiff's Exhibit 1, Defendant's Exhibits 2 and 21, and Appendix D). As a practical matter, this series of engineering projects destroyed the Indians' opportunity to exercise their fishing rights in the original River channel. The same thing happened to their right to use the north arm of the River that flowed north through the Swinomish Slough. However, they still had the use of the Slough itself. Although this latter problem is not now before the Court, it is mentioned as part of the total picture.

The Federal Government was not alone in the diking and channel project. Defendant's Exhibit 24, pages 1–6, indicates that the Town of LaConner sought the work and that the Washington State Legislature asked the Federal Government to make the improvement. In this regard see *House Memorial No. 5*, page 739 and *Senate Joint Memorial No. 22*, page 783, Laws of 1889–1890. Although the legislative Resolutions and Memorials are not law, *State ex rel. Todd* v. *Yelle*, 7 Wn. (2d) 443, *50 Am. Jur. Statutes*, sec. 4, 338, they prove that the Legislature of this state encourage the work done by the Federal Government and voiced

"A recommendation already approved and endorsed by the boards of trade or municipalities of the cities of Olympia, Tacoma, Seattle, LaConner and Whatcom, and petitions numerously signed by the people along the line; and as in duty bound your memorialists will ever pray." *House Memorial No. 5*, supra.

The Federal Government's deliberate act of diverting the River and the act of the State Legislature in recommending and acquiescing therein did not automatically extend the southern boundary of the Reservation southerly to the new River location. When a river or other natural body of water is designated as a boundary line, that line remains fixed with reference to the original location of the river. It may be changed by legal instrument or by adverse possession (neither of which is applicable here). It may also be changed by accretion or the natural gradual washing away on one side of a river bank and a gradual building up on the other. Under such conditions the owner's boundary changes with the changing course of the stream, *Heikkinen* v. *Hansen*, 157 Wn. Dec. 741; *Harper* v. *Holston*, 119 Wash. 436; *Hirt* v. *Entus*, supra.

However, in this case there is no evidence of accretion. The River's course was changed by engineering projects designed for the specific purpose, among others, of diverting its flow. Although the Reservation's boundary was not extended south to the new River location, the diversion of the River did not thereby extinguish the Indians' right to use the River as needed for fishery purposes. That right was originally established by treaty. It was superior to the power of the State of Washington to regulate fishing at that location.

The Federal Government's act of diverting the River (recommended and acquiesced in by the State Legislature and local white residents, for their own benefit) did not change these rights. To hold otherwise would make a mockery of treaty rights. The parties could not have intended that the use of the bounding River would be available to the tribe for only thirty or forty years, thereafter to be diverted without a substitute being provided for subsistence or livelihood. The Indians would never have agreed to allow the Federal Government or the State to take, at will, the only major source of food for the Reservation. As aptly stated in *United States* v. *Walker River Irr. Dist.*, supra:

"The good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserving the lands only, leaving the waters of the stream to be diverted without limit by the settlers above."

The Swinomish tribe is under the guardianship of the United States and its property and land and affairs are subject to the control and management of the Federal Government, *United States* v. *Creek Nation*, 295 U.S. 103; *United States* v. *West*, 232 F. (2d) 694; *United States* v. *Shoshone Tribe*, 304 U.S. 111. However, this power of control and management is not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it is subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions, *United States* v. *Creek Nation*, supra; *United States* v. *West*, supra; *United States* v. *Shoshone Tribe*, supra. The power of the Federal Government, as such guardian, does not enable it to give the tribal lands to others, or to appropriate them to its own use or purposes, without first rendering just compensation for them, *United States* v. *Creek Nation*, supra; *United States* v. *West*, supra; *United States* v. *Shoshone Tribe*, supra. That would not be the exercise of guardianship or management but an act of confiscation, *United States* v. *Creek Nation*, supra; *United States* v. *Shoshone Tribe*, supra; *United States* v. *West*, supra; *United States* v. *Ahtanum Irr. Dist.*, supra.

This is true whether the right of the Indians in the land was a fee simple title established by treaty, *United States* v. *Creek Nation*, supra; whether it was a conveyance under a statute with title remaining in the United States and a right of use being reserved for the benefit of the Indians, *United States* v. *West*, supra; whether it was a conveyance under a statute with an equitable interest being given to the Indians, *Healing* v. *Jones*, 174 F. Supp. 211; or whether it was a conveyance of a right of occupancy with all its beneficial incidents, with title remaining in the United States, *United States* v. *Shoshone Tribe*, supra.

It is true that the foregoing cases deal with the payment of just compensation for a governmental taking or appropriating of tribal lands; however, the same general theory is applicable here, e.g. the right of the Indian to be dealt with fairly by the guardian and the corresponding duty of the guardian to manage the affairs of the Indian so that his main source of food and livelihood is not taken from him without some adequate substitute either in kind of in compensation.

Thus, although the Defendant was not fishing on the Reservation or in the area of the River's original location along the south boundary, he was fishing where he had a right to be under the treaty right to use the Skagit River, as needed, for fishing.

IV

WAS THE DEFENDANT FISHING AT A USUAL AND ACCUSTOMED FISHING GROUND?

Even if one assumes that the Defendant had no right to fish in the jetty drift under the conditions heretofore discussed, it was at least a usual and accustomed fishing ground of the Swinomish tribe. *Article V of the Point Elliott Treaty* provided (Defendant's Exhibit 30):

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

The record is clear that in the early days fishing was good in the entire Skagit Bay area and through the Swinomish Slough. The Indians originally fished at low tide with Indian traps near the present jetty drift area. They also speared fish in the shallow gutters made by the River on the tide flats all the way from Bald Island westerly to deep water. They also fished with bait from a canoe near the Hole-in-the-Wall.

As previously explained, this fish was their main source of food year around. Likewise, they caught fish to sell to the white settlers who farmed for a living on the flats east of the slough.

A. IS THE RIGHT TO FISH AT USUAL AND ACCUSTOMED GROUNDS SUBJECT TO REGULATION BY THE STATE OF WASHINGTON?

The Treaty right to fish "at usual and accustomed grounds", as provided in *Article V of the Treaty of Point Elliott* is not subject to the control of the State of Washington.

Tulee v. *Washington*, supra, is cited to support the right of a State to impose regulatory restrictions upon the Indians' Treaty right to fish "at usual and accustomed grounds", when such regulations are necessary for the conservation of fish. However, the question before the Court in the *Tulee* case was the State's power to *license* the Indians' fishing right. The reference to a State's right to impose necessary regulations for conservation purposes *was purely dicta*. Unfortunately this dicta has been cited in numerous subsequent decisions by non-critical application of the *Tulee* case. It is now cited to support a proposition that was never actually declared to be the law based on any issue before the Court. This error should not be perpetuated further.

Aside from the *Tulee* case, the State contends that regulation must be permitted because today the Indians follow more modern methods of fishing and thus take more fish than in former years. Their argument is set out in the separate opinion of Judge Rosellini in *State* v. *Satiacum*, 50 Wn. (2d) 513 at page 534:

"The treaty with the Indians should be construed in the light of the conditions and circumstances existing at the time it was executed. It was never anticipated or imagined that at that time the present technological advances in the method of taking fish would be developed. Nylon net was unknown. The Indians did not possess the technical knowledge or materials to manufacture nets in lengths sufficient to span an entire stream. The outboard motor was nonexistent.

"To interpret the treaty in a manner that would permit the Indians to use the best and most advanced techniques and equipment to the extent that the fish are destroyed would, in my opinion, go far beyond what was intended either by the citizens of the Territory or the Indians. Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each sought to share."

The same argument has been advanced frequently in the "water rights" cases and has been rejected. These cases have almost uniformly held that the Indian is neither limited to the mere extent of his needs as of the date of the treaty, nor is he limited to the extent to which he was able to make use of those rights on the date of the treaty. It was contemplated that the rights under the treaty would grow to meet future needs. As stated in *United States* v. *Ahtanum Irr. Dist.*, supra:

"At the time of making the treaty construed in the Winters case it is plain there was little or no irrigation then being carried on by the Indians * * *.

The Indians might not have known the exact meaning of the word 'Irrigation' had it been used in the treaty. *No one even thought in the Winters case that the rights of the Indians to the use of the water reserved should be limited to the quantities used at the date of the treaty. The implied reservation looked to the needs of the Indians in the future when they would change their nomadic habits and become accustomed to tilling the soil.*"

* * * * * * *

"It is plain from our decision in the *Conrad Investment Co.* case, supra, that the paramount right of the Indians *was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirements should grow to keep pace with the development of the Indians agriculture upon the reservation.*" [Emphasis supplied.]

In this same regard, the *Conrad Investment Co.* case held:

"What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch creek may be reasonably necessary, *not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case.*" [Emphasis supplied.]

Skeem v. *United States*, supra, also dealt with the contention that the Indians' water rights should be limited to the quantity necessary for their original needs. This was rejected with the following noteworthy comment:

"The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil, and the treaties should be construed in the light of that purpose and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use."

The quantum of that right should not be measured by the use that was made at the time the treaty was made. The reservation was not merely for the use as it existed at that time, but for the future as well, *United States* v. *Ahtanum Irr. Dist.*, supra.

"It could not but be realized that the Indians, unskilled in the art of farming, would necessarily make slow progress, and that in any race for the actual appropriation of the stream this backward people would inevitably be left at the barrier. The good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserving the lands only, leaving the waters of the stream to be diverted without limit by settlers above." *U.S.* v. *Walker River Irr. Dist.*, supra.

This Court agrees with the theory of the above-mentioned cases. The right of the Swinomish Indians to fish "at usual and accustomed grounds" should not be limited to needs as they existed in 1855 nor to the methods of fishing then used. It was contemplated by the parties that their knowledge and skills would grow and that their needs would also increase. After being induced to move to the Reservation and relinquish their nomadic habits one cannot say logically that they cannot apply modern methods to their treaty rights.

The State also contends that this Indian treaty right must be restricted because they will deplete the fish and thus hurt many others who rely upon the fishing industry for a livelihood.

The "water rights" cases also considered this problem. It was contended that the Indians might exhaust the water in the river by exercising their rights and thus would injure the settlers further down the river. This argument was rejected. *United States* v. *Ahtanum Irr. Dist.*, supra, is typical:

"It does not appear that the waters decreed to the Indians in the *Winters* case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the *Winters* case * * * shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our *Conrad Inv. Co.* case, supra, held that what the non-Indians appropriators may have is only the excess over and above the amounts reserved for the Indians. *It is plain that if the amount awarded the United States for the benefit of the Indians in the Winters case equaled the entire flow of the Milk River, the decree would have been no different.*" [Emphasis supplied.]

The line of reasoning established in the *Winters* case, the *Conrad Investment Co.* and the *Ahtanum Irrigation District* cases applies with equal force to the instant action. The fact that the white man's non-treaty use of a fishery may be lessened in value is no reason for denying the Indian a right established by

treaty. The instant case is not a mere action between private citizens, nor one concerning ordinary civil rights of parties. It is one that involves the dealings between an all-powerful Federal Government on the one hand and the untutored savage of 1855 to 1873 on the other. Even more than that, this is a criminal action brought to enforce a penalty statute against a ward of the Federal Government who apparently was endeavoring the exercise the rights granted to him by the Treaty, *State* v. *Edwards*, supra.

As previously indicated, Governor Stevens' *Point Elliott Treaty* negotiations never hinted at or made mention of a limitation upon the Indians' right to fish at their usual and accustomed grounds. As he discussed the purposes of the Treaty and desires of the Great White Father, he left the distinct impression that the Indian could fish as necessary, as they have since time immemorial (see the quotations above from Defendant's Exhibit 33). It will be remembered that these negotiations took place through interpreters.

The Governor's statements were made at a time when the Northwest was a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hindrance from the Federal or Territorial Governments. Regulations of fish and game were neither known nor dreamed of. The Indians had fished for salmon in the Skagit Bay area since time immemorial. The catching of salmon was necessary for the sustenance of themselves and their families. Neither the Governor nor the Indian chiefs could possibly have visualized present day restrictions. They entered into the treaty agreement under conditions as they existed at that time. Thus, we must interpret the Treaty and the rights of the Swinomish Indians in light of what they then knew about need for regulation, keeping in mind that both parties knew the need and abilities of the Indians would obviously grow in the future.

Without any doubt the Governor and the Indians signed the Treaty fully intending that the Indians should be forever allowed to catch salmon "at their usual and accustomed grounds" without restriction. We must follow that intent. As stated in *State* v. *Edwards*, supra:

"* * * they had a right to assume, that though the treaty limited them to a certain peninsula, their rights on that peninsula were as broad and unrestricted as they had been before.

* * * * * * *

"* * * we are bound to construe the grant contained in the treaty, as fixed by the executive order, as it would naturally be understood by the Indians."

In arriving at the foregoing conclusion our Supreme Court quoted at length from *Jones* v. *Meehan*, supra, as follows:

"In construing any treaty between the United States and an Indian tribe, it must always * * * be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians on the other hand, are a weak dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms which the treaty is framed is that imparted to them by the interpreted employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians * * *."

It may be conceded that there is an ambiguity contained in the Treaty; however, the ambiguity, if there is one, should be resolved in favor of the Indians, *Winters* v. *United States*, supra.

Inasmuch as the Defendant was fishing in a usual and accustomed fishing ground of the Swinomish tribe, he had a right to fish in the area where he was arrested. The treaty right provided for in *Article V of the Treaty of Point Elliott* is not subject to control by the State of Washington. In this regard the trial court adopts the opinion in *State* v. *Satiacum*, supra, as written by Judge Donworth and concurred in by Judges Schwellenbach, Ott and Foster. Nothing would be accomplished by a review of the excellent opinion written by Judge Donworth.

B. FUTURE PROTECTION OF SALMON FISHERIES

Although the State has no power to regulate the Indians' right to fish "at usual and accustomed fishing ground," the State does not lack protection. It may request Congress to establish Federal regulation of Indian fishing in this area or in other treaty areas throughout the State. The United States may abrogate or change Indian treaties by passing a clear and express act which is of such a nature that the treaty and the act cannot in any reasonable view stand together, *Stephens* v. *Cherokee Nation*, 174 U.S. 445; *Seneca Nation of Indians* v. *Brucker*, 262 F. (2d) 27; *Nicodemus* v. *Washington Water Power Co.*, 264 F. (2d) 614; *United States* v. *5,677.94 Acres of Land*, 162 F. Supp. 108. However, the fact that lawful control may be established by proper Federal action does not justify the State in its attempt to short-cut the necessary procedures, despite the apparent need.

V.

HAS THE STATE PROVED THE NECESSITY OF REGULATING USUAL AND ACCUSTOMED FISHING GROUNDS FOR THE PURPOSE OF CONSERVATION OF SALMON?

Even assuming that the *dicta* of the *Tulee* case is applicable to this action, the State must still prove that the regulation is necessary for the purpose of conservation, *Makah Indian Tribe* v. *Schoettler*, 192 F. (2d) 224. The State has failed to sustain this burden.

The fishery officials who testified made it abundantly clear that there were alternative methods of regulation that had not been used prior to applying a complete periodic closure of treaty waters to Indians. The Department of Fisheries has attempted to curtail the Indians' treaty rights by closing usual and accustomed fishing grounds without first curtailing the fishing privileges of others with non-treaty rights.

Mr. Maines advised the Court that prior to salmon reaching the River (and the Indian fishery near the jetty drift area) they are subjected to the white commercial fishermen and sportsmen. According to the State's witnesses there is a very active commercial salmon fishery in the Straits of Juan De Fuca and in north Puget Sound, to say nothing of the intensive salmon sports fishery in the same area. In this particular area (Area 9) sports fishing for salmon has been open in the salt water as well as in the Skagit River from its mouth to Gilligan Creek.

Sport fishing for salmon on the Skagit River has increased considerably in the past few years. Referring to Chinook salmon alone, the catch was as follows:

Year	Fishermen trips estimated	Estimated number Chinook taken
1956	10,000	550
1957	12,000	1,006
1958	41,000	4,138
1959	80,000	8,311
1960	37,000	5,884

The lower catch in 1960 was caused by a series of limited three-day River closures, plus a ten-day River closure at the peak of the salmon run. However, these closures did not apply to sports fishing on the salt water in the remainder of Area 9.

The Chinook salmon catch of licensed commercial gill net fishermen in Skagit Bay (e.g., roughly Area 9), exclusive of the River, was as follows:

1931–55 estimated at approximately 22,000 salmon a year.

1955–58 estimated at approximately 8,000 salmon a year.

1959 estimated at approximately 8,379 salmon.

It should be noted that all of these figures exclude Indian trap catches.

These figures take on added significance when one considers that, according to the Director of Fisheries, the sports catch of salmon is equal to, if not greater than, the commercial fishery catch on the inside waters (e.g. Straits of Juan De Fuca and Puget Sound).

Mr. Moore testified that it is wasteful to take Blackmouth (immature Chinook salmon). However, the Department admitted that while the River was closed periodically to sports and commercial fishing of salmon and while Area 9 was periodically closed to commercial fishing of Blackmouth and Chinook salmon, the Skagit Bay area and, in fact, the entire Puget Sound *remained open* to salmon sports fishing despite the large catch as compared to commercial fishing. Although sportsmen were limited as to the size of fish and daily catch, all the Department did was to ask the sportsmen for a *voluntary* closure on Silver salmon (and probably others) while the total commercial closures were in effect. Although Mr. Moore commented upon the success of the voluntary closure, it was left to the whim of the individual sportsman, rather than being enforced by Department regulation.

Thus, even though the State made no official closure of the area to salmon fishing for sport, it attempted to close the area to Indians who sought to fish commercially under a treaty right. It is inconsistent to close an area to the commercial fishing of Indians who have a treaty right and yet to leave it open for sportsmen who fish for recreation and who have no treaty right.

Under the circumstances of this case the State has failed to prove that there was a necessity for regulating the Indian treaty fishery at the jetty drift by total periodic closure. To allow a large non-treaty fishery (e.g., the sports fishery) to run with mere restrictions and no enforceable total closures is inconsistent with their claimed need for regulation.

The Indians' treaty accords to them rights against State interference which do not exist for other citizens, *Makah Indian Tribe* v. *Schoettler*, supra. Although the closure of waters at the mouth of streams, as well as the closure of streams, during portions of the year is one method of conserving the resource and may be generally fair and convenient, it cannot be permitted to curtail treaty fishing rights of Indians where there are alternative methods of attaining the same objectives, *Confederated Tribes of Umatilla Indian Reservation* v. *Maison*, 186 F. Supp. 519.

VI

CONCLUSION

The decision in this case is strictly limited to the facts and circumstances existing in the instant case. The burden of proof was on the State to prove beyond a reasonable doubt that the Defendant was guilty of fishing in an area closed to him by an applicable law of the State of Washington. This buden has not been sustained.

The Defendant is not guilty.

Dated this 25th day of May 1961.

CHARES F. STAFFORD,
Judge of Department No. 1.

Senator MECHEM. The record will be left open for approximately 10 days if anyone else wishes to file a statement or a supplementary statement or anything of that kind.

(Whereupon, at 4:45 p.m. the hearings in the above-entitled matter were concluded.)

APPENDIX

STATEMENT BY SENATOR WAYNE MORSE ON SENATE JOINT RESOLUTION 170 AND SENATE JOINT RESOLUTION 171

Mr. Chairman, I received this morning a telegram from Mr. Mark C. McClanahan, tribal attorney for the Confederated Tribes of the Umatilla Indian Reservation. Mr. McClanahan informs me that because of the shortness of time, representatives fo the Confederated Tribes of the Umatilla Indian Reservation will be unable to send a delegation to present testimony. They wish, however, to register their strong opposition to both measures and they intend to follow their telegraphed communication with a more detailed statement for your hearings record. I ask your permission to incorporate in the hearings record, the telegram I have received which sets forth the grounds of the opposition which I know will be given careful consideration by the members of the subcommittee in executive session.

PORTLAND, OREG., *August 4, 1964.*

Hon. WAYNE MORSE,
U.S. Senator, Senate Office Building, Washington, D.C.:

The Confederated Tribes of the Umatilla Indian Reservation have just learned of the hearing scheduled for August 5 on Senate Joint Resolutions 170 and 171. They will be unable to send a delegation, but wish to register their strong opposition to both bills, which will be followed by detailed statement in the near future. The Umatillas are the Tribe referred to in the case cited in the sixth whereas to Senate Joint Resolution 171.

Umatillas oppose Senate Joint Resolution 170 because it would permit State regulation of purely subsistence fishing such as involved in said case. In recent years the Umatillas' main fishing has been primarily for subsistence purposes only and their commercial fishing has been limited, as stated below. In the abovementioned case, the State of Oregon attempted to prohibit subsistetnce fishing in spite of the uncontradicted evidence from its own records that the salmon and steelhead runs in the streams involved had increased more than 1,000 percent in the last 20 years. The court found as a fact that the Umatillas had never endangered any fish run. Instead, the Federal Government destroyed one of its main fishery resources in 1914 when it built a dam across the Umatilla River. The Umatillas recognize that sportsmen and State officials seem to have an obsession against anyone having special fishing rights. The continuation of the Umatillas' special rights is necessary because the people are poor and have preserved this part of their former culture. The State regulatory agencies which are much more responsive to the numerous sportsmen than to the comparatively few Indians have demonstrated that they are unable to take account of the special needs of the Umatillas.

As to Senate Joint Resolution 171, first there is no need to eliminate such rights or the easements in land which go with them. The Umatillas have never endangered any fish run. Second, for several years the Umatillas have voluntarily severely restricted their commercial fishing under an agreement with the Oregon Fish Commission and the Washington Department of Fisheries, whereby, at the State's request, Umatillas agree to refrain from gill netting and from fishing in certain places sepcified by the States. Meanwhile the Yakimas have refused to prohibit gill netting and their commercial fishing continues at its former rate. The effect of the valuation provisions of this bill would be to reward the Yakimas for their refusal to follow modern conservation practices and to discriminate against the Umatillas for their voluntary cooperation in the interests of public relations and conservation. Unless this matter is quickly disposed of, the Umatillas will reconsider their present agreements and determine whether to reestablish their commercial fishing on a par with the Yakimas.

MARK C. MCCLANAHAN, *Tribal Attorney.*

Statement of the Washington State Sportsmen's Council

This statement is presented in behalf of the Washington State Soprtsmen's Council which is the officially recognized spokesman of the organized sportsmen of the State of Washington. We nonprofessionally represent the sports fishermen of the State. Our goals are the preservation, conservation, and propagation of the anadromous fisheries resources of the Pacific Northwest. We in no way represent any commercial segment of the fishing industry.

The citizens of the State of Washington have long recognized the need for management of our State rivers for the continued renewal of our fisheries resources. Through the years huge sums of money have been expended on behalf of the citizens by various State and local agencies for the conservation and propagation of anadromous fish. The sportsmen have insisted that all river development plans include provisions for preservation of the salmon and steelhead trout. The importance of conservation of anadromous fish to the State of Washington is reflected in the fact that the sport salmon fishing industry alone has a capitalized value of $580 million. This has been realized by various other factions responsible for the decline of salmon resources. The hydroelectric power industry has invested millions of dollars to insure the safe passage of the fish over its dams. The logging industry has modified traditional methods of logging at its own expense to effect conservation of the various fisheries. The pulpmills are constantly endeavoring to decrease the pollution caused by their operation in order to preserve the fishery. The commercial and sport fishermen are rigidly regulated to allow proper fish escapement necessary to sustain the maximum yield. Such regulation often takes the form of prohibition when necessary.

Regulations for the conservation and preservation of the anadromous fish runs must of necessity be administered by impartial agencies in order that all citizens of the State benefit equally. For this reason the citizens have elected to entrust this regulation to various State agencies which have within their power the right to act arbitrarily in matters where a particular faction or groups of people are acting in a manner that is detrimental to the fish runs. Positive regulation of fish runs, and the waters in which they abound, is an absolute necessity.

It is our belief that the problems of fisheries regulation are of a local nature affecting, in particular, the State of Washington and its internal regulatory agencies. For years it has been recognized by local agencies that a commercial fishery for anadromous fish above the mouths of our river systems is totally incompatible with a sustained yield of a particular fish run. Recognizing this, commercial fishing has been for years prohibited completely in our river systems, except for the pathetic situation of the Columbia River.

This State's history has indicated that the nature of the problem created by the Indians' off-reservation fishing is of a local nature, more adaptable to State rather than Federal regulation. The problem of maintaining a maximum sustained yield of any given anadromous fish run in light of non-Indian activities such as the logging, pulp, power, and commercial fishing industries has been successfully resolved by State regulation. The single factor which has heretofore prevented the State of Washington fish management authorities from maintaining a maximum sustained yield of anadromous fish in our Indian-fished rivers is the completely unregulated Indian net fishing and not the inability of the State to meet the problem. Thus, by paying deference to the dictates of the U.S. Supreme Court, that off-reservation fishing rights reserved by treaty are subject to State regulation (*Tulee* v. *State of Washington*, 315 U.S. 681 (1942)) and by affirming the right of the State to so regulate by passing Senate Joint Resolution 170, the State of Washington will be able to further meet and resolve the problem of the declining anadromous fish runs. These runs will, unless regulation be effected, become extinct within the next few years to the detriment of both Indians and non-Indians. Many of our rivers, which in the past have supported substantial runs, are not virtually void of anadromous fish as a result of unregulated fishing.

The past efforts and results attained by the State fish management agencies qualify them as the proper entities to effect fishery regulation. Their efforts have resulted in the virtual creation of fish runs where none has heretofore existed. An example of this is the Samish River, Issaquah Creek, and Deschutes River in the State of Washington, where new runs of salmon have been started with transfers of stock from the Soos Creek State Salmon Hatchery. These new runs have almost reached the point where they are now self-sustaining.

The State's steelhead trout program has resulted in an increase of that fishery where not hampered by Indian unregulated fishing. The steelhead propagation and planting program has been exclusively financed by license fees paid by over 300,000 sports fishermen. State regulation of these fisheries is essential to their continued existence.

The present unregulated Indian fishing contains within itself the seed of its own destruction. No regulation can only result in extinction. Such cannot be the intent of the various Indian treaties. The fish belong to the people, and it is our position that the Indian, while off the reservation, can fish in common with the non-Indian, subject, however, to the same regulations that the State imposes to effect conservation.

With reference to Senate Joint Resolution 171, it is the feeling of the sportsmen of the State of Washington that they do not wish to deny anyone any propery rights that he has legal claim to. Should a legal right to fishing by Indians, off their established reservations, for commercial purposes, exist these rights should be purchased for a fair and just amount as defined in Senate Joint Resolution 171. Relinquishment of such off-reservation commercial fishing rights should be in total with no recourse so that authority to regulate all off-reservation fishing shall be completely in the hands of the State agencies charged with regulatory authority. While the extent of the Indians' right to commercially fish off their reservations is uncertain, we feel that the principle of Senate Joint Resolution 171 is a practical and pragmatic solution to this existing problem.

STATE OF OREGON,
FISH COMMISSION OF OREGON,
Portland, September 10, 1964.

Mr. JAMES H. GAMBLE,
Professional Staff Member, Senate Interim Committee,
Washington, D.C.

DEAR MR. GAMBLE: We would like to make a very important addition to our statement on Senate Joint Resolutions 170 and 171 presented to your committee in person by me on August 5, 1964.

The basis for purchasing the Indian fishing rights as provided in Senate Joint Resolution 171 is the value of the fishery for the most recent 3 years of record. This provision encourages the Indians to fish to the maximum between now and the time this measure might become law, to provide for the greatest possible payment. This defeats the purpose of our present negotiations with the Umatilla, Warm Springs, and Yakima Indians. We are, as pointed out in our statement, encouraging them to accept responsibility for maintaining the runs of salmon and steelhead on a maximum sustained yield basis. In the case of the Yakimas, it has taken the form of the enactment of tribal ordinances restricting fishing in several ways. In the case of Umatillas and Warm Springs, there is a signed agreement with us which, among other things, prohibits fishing commercially with gill nets. If they continue to demonstrate this type of cooperation they would be severely penalizing themselves for obtaining a significant eventual payment, according to present provisions of Senate Joint Resolution 171. We definitely do not want these tribes to expand their fishing activities to establish a high base for payment. The overall purpose of both Senate Joint Resolutions 170 and 171 is to provide greater insurance for conservation of the runs and this settlement basis defeats it.

We have no specific word changes or other recommendations at this time as to how the eventual goal can be realized consistent with the views offered above. However, we will be happy to work with the committee and others involved in developing an acceptable approach. We believe the thoughts offered here are consistent with the main principle of our earlier statement that all citizens should be considered equally by conservation laws. The method of attaining it will have to be revised. We feel much has been gained and the resource has benefited substantially from the cooperation received to date from the Umatilla, Warm Springs, and Yakima Tribes. All of this could be lost if the tribes are encouraged to establish immediately as an extensive a commercial fishery as possible irrespective of the needs of the resource.

We appreciate your keeping a record open after the hearing and will appreciate your making this a part of it.

Sincerely,

ROBERT W. SCHONING,
State Fisheries Director.

NATIONAL WILDLIFE FEDERATION,
Washington, D.C., August 3, 1964.

Hon. HENRY M. JACKSON,
Chairman, Senate Committee on Interior and Insular Affairs,
Washington, D.C.

DEAR SENATOR JACKSON: The National Wildlife Federation appreciates the invitation to comment upon Senate Joint Resolution 170 and Senate Joint Resolution 171 regarding Indian fishing rights, and we would like to have this letter made a part of the record of the current hearings on the proposal.

By way of identification, the National Wildlife Federation is a private organization which seeks to attain conservation goals in the public interest through educational means. The federation has affiliates in all States. These affiliates are composed of individuals who, when considered with associate members and other supporters of the National Wildlife Federation, number an estimated 2 million persons.

The National Wildlife Federation supports the principles expressed in Senate Joint Resolution 170 and Senate Joint Resolution 171 and hopes the Congress may see fit to approve of them. It is our belief that the Congress should give specific direction in this matter and not rely upon further litigation in the courts, a process which thus far has resulted only in confusion. A definitive resolution of the controversy is necessary and desirable.

The problem, of course, revolves around treaties with tribes in the Pacific Northwest, which gave Indians the right to take fish at their usual and accustomed fishing places in common with all other citizens. Persons of Indian descent have used these treaty "rights" to gain off-reservation advantages unfair to other citizens. They have used methods illegal to others, both with respect to manner and to time of use, to take fish. In many instances, Indians have used their advantages to monopolize the taking of fish produced at public expense in hatcheries and released for public benefit.

Conditions have changed drastically since the treaties were signed and, in fairness, Indians should be subject to the same State laws and regulations, as relating to the time and manner of off-reservation fishing, as other citizens without distinction.

We hope the committee will consider such regulations as being reasonably necessary for the conservation of fish and will so direct. We recommend the resolution be rested on powers of the Federal Government to regulate the treaty fishing rights in the interest of conservation.

Senate Joint Resolution 171 permits the purchase of legal Indian fishing rights. If the committee and the Congress, and the Department of the Interior determine that such fishing rights exist, we believe they should be purchased in order that the public interest can be served.

Thank you for the opportunity of making these observations.

Sincerely,

THOMAS L. KIMBALL,
Executive Director.

INTER-TRIBAL COUNCIL OF WESTERN WASHINGTON INDIANS,
Marysville, Wash., June 25, 1964.

Senator HENRY M. JACKSON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR JACKSON: Enclosed is a resolution that expresses the wishes of our organization relative to our fishing activities.

Please give it your most careful consideration.

Sincerely yours,

WAYNE W. WILLIAMS, *Secretary.*

[Enclosure]

RESOLUTION OF INTER-TRIBAL COUNCIL OF WESTERN WASHINGTON INDIANS

Whereas Representative Jack Westland of the Second Congressional District of the State of Washington has recently introduced legislation into the House of Representatives of the United States calling upon Congress to declare that under the various treaties between the Indians of the Pacific Northwest and the United States, the treaty right guaranteed to the Indians of the Pacific Northwest to fish at usual and accustomed grounds nevertheless gave to the States the right to regulate such fishing; and

Whereas by Senate Joint Resolution 170, Senator Warren G. Magnuson of the State of Washington has introduced a resolution stating that in accordance with and in furtherance of the purposes of any treaty with the American Indians that secures the right to them to take fish at all usual and accustomed places in common with other citizens, the States may enact laws of a regulatory nature concerning the time and manner of fishing outside Indian reservations which are equally applicable to all Indians and all other citizens without distinction; and

Whereas Senator Magnuson has also introduced Senate Joint Resolution 171 which would authorize the Secretary of the Interior to purchase the rights secured under treaty of fishing at usual and accustomed places in extinguishment of such right; and

Whereas Senator Magnuson has introduced a later resolution calling for a comprehensive survey of the fishing industry, being Senate Joint Resolution 174: "Joint resolution to authorize and direct the Bureau of Commercial Fisheries to conduct a survey of the marine and fresh water commercial fishery resources of the United States, its territories, and possessions;" and

Whereas the tribes of the Pacific Northwest desire that the fish runs be increased so that there are more fish available for all parties: commercial fishermen, Indian fishermen, and sportsmen, and are desirous of engaging actively and constructively in any program to insure that the fish runs do increase; and

Whereas it is the opinion of the Indians of the Pacific Northwest that there is no definitive study, nor has any such study been made, which covers the salmon resources, and it is the belief of the Indians that the statistics and data introduced at prior hearings by representatives of the Washington State Departments of Fish and Game and by sportsmen are unreliable and should not be used as a basis for abrogating or limiting treaty rights; and

Whereas it is to the interest of all that the cause or causes of depletion of salmon runs be accurately determined, which can be done only by means of a comprehensive survey and study; and

Whereas regulation of Indian fishing in contravention of treaty rights, without proof that such restrictions would increase the salmon runs or prevent their further depletion by other contributing factors which would be disclosed by such survey and study, would work an undue hardship on Indian fishermen; and

Whereas the Indians recognize that there must be escapement of spawning salmon for the purpose of maintaining and building up fish runs, and are willing to regulate themselves so that such escapement can be assured, but also believe that the Indian fisherman should be allowed his reasonable share of the fish catch or harvest under his treaty guarantees, and data is not available without a survey or study to determine percentages of catch which shoud be allocated to Indian fishing, commercial fishing, and sports fishing; and

Whereas if the survey indicates steps that can be taken by the Indian fishermen, commercial fishermen, and sports fishermen on an equitable basis so that all are cooperating to the end that the fish runs will be rehabilitated, the Indians are ready, willing, and able to regulate themselves, provided the authority therefor is clarified so that the tribal authorities may regulate not only on-reservation fishing but off-reservation fishing; and

Whereas Indians attempting to fish at their customary fishing grounds in competition with others find they are so outnumbered and outmaneuvered by the larger number of non-Indian fishermen that the Indian fisherman should have set aside to him exclusive fishing places or fishing times on his usual and accustomed fishing grounds, and when this is done he will comply with regulations; and

Whereas at the time of negotiating the various treaties with the Indians of the Pacific Northwest, Governor Stevens made no mention of any restriction on the right of the Indians to fish and did not mention to them or refer to the phrase "in common with all other citizens of the territory": Now, therefore, it is hereby

Resolved by the Intertribal Council of Western Washington Indians, That Congress be requested to enact legislation authorizing a comprehensive survey of the fishing industry from the time of spawning through catching, processing, and distribution, including a detailed study of the extent of Indian fisheries, the percentage of Indian catch as to the catch of other commercial fisheries and sports fisheries, and the effect of Indian fishing upon the fish runs or fishery resources. The intertribal council supports the proposed legislation of Senator Magnuson calling for such survey, provided the same be enlarged to include the study of Indian fishing as above requested; and it is further

Resolved, That it is the consensus of the Intertribal Council of the Indians of Western Washington that any further action on Senate Joint Resolution 170 and Senate Joint Resolution 171 is premature. Further action thereon should be

withheld until a comprehensive survey is made to determine whether regulation is necessary and, if so, to what extent it is necessary, so that there be no violation of the rights guaranteed by the United States to the Indians of the Pacific Northwest by the various treaties entered into more than 100 years ago. It could then be determined what type of additional or other legislation would be necessary and desirable so that the interest of the Indians, as guaranteed by the treaties, be protected; and it is further

Resolved, That Congress should recognize that the treaties entered into with the Indians of the Pacific Northwest guaranteed to them the right to fish. Should regulation be required, there should be set aside exclusive fishing grounds for Indians so that they may provide for their livelihood as they have from time immemorial; and it is further

Resolved, That copies of this resolution be forwarded to the Senators and Representatives of the State of Washington, Federal agencies concerned, and proper congressional committees.

Adopted this 21st day of June 1964.

INTERTRIBAL COUNCIL OF WESTERN WASHINGTON INDIANS,
By SEBASTIAN WILLIAMS, *President*.

CASCADE LOCKS, OREG., *July 21, 1964*.

Hon. WAYNE MORSE,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MORSE: We are greatly perturbed by the rapid increase in the number of unregulated Indian set nets that are fishing commercially in the pool upstream from Bonneville Dam. To our knowledge, this portion of the Columbia River is not within any Indian reservation, although it is a historic fishing area for many Indian tribes. Present laws prohibit commercial fishing by white Americans upstream from Dodson, Oreg., and ban the use of fixed gear such as set nets.

Since the law enforcement agencies of Oregon and Washington were doing little or nothing to control these Indians (even when the nets blocked small streams leading to salmon hatcheries), we wrote the respective fisheries offices for more information. Copies of their replies are enclosed. We are also sending copies of these letters to key groups of sportsmen in both States so that they will know what is happening to our Columbia River salmon and steelhead trout.

Senator Magnuson has submitted Senate Joint Resolutions 170 and 171 for consideration by the Congress. Perhaps neither of these proposals is satisfactory, but we believe that the old treaties with these people are out of date because of multiple-use practices of our rivers, reduced numbers of fish, and use of modern gear by Indians. It is a sad state of affairs when laws which protect and regulate our natural resources do not apply to all citizens, including Indians. If old treaties prevent good management practices to the detriment of all except a minority group, then we insist that the interest of the majority should govern.

The enclosed letters show that the State and Federal fisheries men agree on one thing: They need help that they cannot obtain except through action of the Congress. Will you please investigate this problem and take what measures you deem advisable during this legislative session? Our organization will be glad to learn your decision and to help in every possible way.

With sincere best wishes,

CLARENCE N. AMOTH,
Secretary, Bonneville Rod & Gun Club.

U.S. DEPARTMENT OF THE INTERIOR,
FISH AND WILDLIFE SERVICE,
BUREAU OF COMMERCIAL FISHERIES,
Seattle, Wash., June 8, 1964.

C. N. AMOTH,
Secretary, Bonneville Rod & Gun Club,
Cascade Locks, Oreg.

DEAR MR. AMOTH: Thank you very much for your letter of May 26 which expresses the sincere interest of your group in the Indian fishery problem. You may be somewhat shocked to learn that your estimates of the magnitude of the fishery in the Bonneville Pool area are quite low. Our latest records show 95 set net locations, mostly along the Washington shore. We estimate the spring Chinook catch this year by the Indians in this area will reach 20,000 fish.

We are acutely aware of this situation and the serious consequences which will result unless action is taken to alleviate or eliminate the problem. You are quite correct in that the treaty is out of date in light of present multiple-use practices of our river systems, numbers of fish, and use of modern gear. However, under the due process of law and justice, the Indians have the rights they are asserting on reservations. There is some question about their rights of off-reservation fishing as demonstrated by the changing interpretations of the courts in recent cases.

Actually, changes in the situation must necessarily be brought about by congressional action. The feelings of Congress are clearly spelled out in Senate Joint Resolutions 170 and 171. However, there has been no public law acted upon, which is essential before any legal action can be taken.

We very much appreciate your concern over this serious problem. Organized groups such as yours can do much toward an eventual solution of this problem through your congressional delegation. Again, I wish to thank you and members of your club for your timely letter and deep concern in this matter.

Sincerely yours,

SAMUEL J. HUTCHINSON, *Regional Director.*

STATE OF OREGON,
FISH COMMISSION OF OREGON,
Portland, Oreg., June 2, 1964.

Mr. C. N. AMOTH,
Secretary, Bonneville Rod & Gun Club,
Bonneville, Oreg.

DEAR MR. AMOTH: In your letter of May 26, 1964, you expressed concern about the growing Indian fishery above Bonneville Dam. We do not know how rapidly this fishery will continue to expand nor how many fish it will catch from the various runs later this year or in future years. You express the belief that laws regulating commercial fishing should apply to all citizens of every race. In case you are not aware, Senator Magnuson from Washington has introduced Senate Joint Resolutions 170 and 171 which deals with this very matter. Copies are enclosed for your information.

Our department is very much concerned about the growing Indian fishery and has taken positive steps to control it. We believe that considerable progress has been made in the last couple year, although we have not reached what we consider to be a completely acceptable solution. Because there is far more to this matter than can be explained in a letter, it might be appropriate to have someone from this office discuss it at one of your future group meetings. If you agree to this, I believe it would be well to have a representative of the State police, who has worked very closely with us on this matter through the years, be present to comment on enforcement aspects. If you are interested and can set a date, I will contact the State police.

Thank you for your interest.

Sincerely,

ROBERT W. SCHONING,
State Fisheries Director.

STATE OF OREGON,
OREGON STATE GAME COMMISSION,
Portland, June 12, 1964.

Mr. C. N. AMOTH,
Secretary, Bonneville Rod & Gun Club,
Cascade Locks, Oreg.

DEAR MR. AMOTH: This is in response to your recent letter concerning the the prosecution of a fishery on salmon above Bonneville Dam in the Columbia system outside of reservations and particularly between Fort Rains and the Dalles Dam.

It is noted that you directed copies of your letter to the other State fishery agencies of Washington and Oregon and to the U.S. Fish and Wildlife Service. This is a matter to which all of the recipients of your letter had been addressing themselves for sometime with deep concern. It is a matter which indeed should receive very serious and continuing attention in the interest of perpetuation and enhancement of this resource. It has been one in which a solution has not been reached.

Without going into the extensive detailed background and the many frustrating problems connected therewith, I believe that I can advise that it is the generally held view of the agencies involved that the most direct resolution of this problem appears to be through appropriate congressional legislation. Senator Magnuson has introduced into the present session of Congress Senate Joint Resolutions 170 and 171 which present, we believe, a logical and equitable route for relief of this problem. These resolutions enunciate a means of resolving the problem but until such Federal action is accomplished, it has been very difficult for State action to be successfully taken. You can aid materially by familiarizing yourself with these proposals and then urging enactment of Federal legislation along the lines proposed therein.

This commission has recognized the treaty rights on reservations themselves. The off-reservation situation, however, in which we have taken action is a matter over which we have deep concern. The courts have not, at this point, found in our favor but there is some indication, reflected in various interpretations of the courts in recent cases, that all citizens should be afforded the "in common" rights on nonreservation waters.

We believe at this point that the best opportunity of solving the problem is for the enactment of necessary Federal legislation which will constitute a sound basis for overcoming the difficulties referred to in your letter.

This is a difficult legal problem and we are most grateful for your interest. We trust that your organization and similar ones will keep abreast of the developments in this matter and would encourage your continuing association with it.

Sincerely yours,

P. W. SCHNEIDER, *Director*.

STATE OF WASHINGTON,
DEPARTMENT OF GAME,
Olympia, Wash., June 2, 1964.

Mr. C. N. AMOTH,
Secretary, Bonneville Rod & Gun Club,
Cascade Locks, Oreg.

DEAR MR. AMOTH: I am in receipt of your comprehensive letter in which you point out factually the problem which is occurring in the Columbia River as a result of the Indian fishery being carried on there, and in which you even more clearly point out the very great potential drain which may well occur on this fishery resource in the future as a result of these practices.

May I first say that if the fisheries agencies involved had a clear and unqualified right to regulate this fishery, this would have been done a long time ago. We have, on many occasions, attempted to regulate Indian fisheries which are based on an assertion of an implied or stated right resulting from an Indian treaty made with the Federal Government. In nearly every case, the right of the State to impose this type of regulation has been contested in the courts and, on many occasions, the courts have held that the right of the State is either lacking or, at best, highly qualified.

During the past year, I am sure you are aware that on many occasions the Washington Department of Game and the Washington Department of Fisheries have taken Indians to court as a result of these fishing practices and that the courts have viewed the matter with varying degrees of interpretation; meanwhile, there has been created a highly emotional and unsatisfactory public situation as to whether or not these Indians do have rights and whether or not they should be observed.

It is certainly true that whatever the treaty makers intended, they could not in their wildest dreams have conceived of the civilized situation which exists today and the resulting drain which Indians make on diminishing fishery resources utilizing the most modern and efficient methods available and creating a pressure upon these fisheries which they cannot long stand.

Whether or not these Indians do have unassailable treaty rights to do the things they are doing is a controversial one in the courts. There are decisions which hold they can do these things; there are others which say they cannot. We are vigorously attempting to bring cases to the judicial system which will clarify these points.

I think every person who has worked with this problem reaches an eventual conclusion that the matter can only finally be handled by a restatement or a redefinition of the treaties by the U.S. Congress. Treaties were made by the Federal Government before the State of Washington was a State. They were

made with Indian tribes who were regarded as being, at least in that era, sovereign peoples. Only the Federal Government can now, really and finally, say what the treaties meant.

You may be aware that Senator Magnuson has presented bills to the Congress which have as their purpose a reassertion of the rights of the State to manage these fisheries and a formula for compensating Indians who are entitled to a compensation under them.

I certainly agree with you that the present situation is one which is completely unsatisfactory, is not in the real long range interest of the Indians themselves, and can only result in an eventual decimation of our fishery resources.

I do also, however, again advise you that the State of Washington has in every way attempted to exhaust every legal device available to it to bring this matter to a head, even to the point that we have been very considerably criticized for alleged persecution of the Indians involved.

We will continue to do these things, but success can only be had if the Congress of the United States decides to assume its responsibility in connection with this matter.

Very truly yours,

JOHN A. BIGGS, *Director.*

STATE OF WASHINGTON,
DEPARTMENT OF FISHERIES,
Olympia, Wash., June 2, 1964.

C. N. AMOTH,
Secretary, Bonneville Rod & Gun Club,
Cascade Locks, Oreg.

DEAR MR. AMOTH: We are attaching a copy of a letter which was recently sent to a correspondent and which will answer many of the questions you posed in your letter regarding the Bonneville Pool Indian Fisheries.

You further asked, "Can the organized sportsmen of Oregon and Washington help in any way?" We believe they can help by urging Congress to support Senator Magnuson's bills—Senate Joint Resolution 170 and Senate Joint Resolution 171. These bills would support the right of the States to manage and regulate Indian fisheries off-reservation areas and also purport to buy out Indian fisheries where they are damaging State resources.

As you can see from the attached letter copy, the States of Oregon and Washington have extreme difficulty and are operating under different sets of circumstances; both circumstances supported by different court decisions.

We appreciate your interest and remain,

Very truly yours,

GEORGE C. STARLUND,
Director.
ROBERT S. ROBISON,
Fisheries Administrative Officer.

STATE OF WASHINGTON,
DEPARTMENT OF FISHERIES,
Olympia, Wash., May 20, 1964.

FRANCES M. CLARK,
Washougal, Wash.

DEAR MRS. CLARK: We have your letter of May 7, 1964, and will answer your questions to the best of our ability. These questions certainly cover a wide range of Indian and management problems on the Columbia River.

Question 1. How many bona fide Indians are fishing in the Columbia River at the present time?

Answer. We estimate 85 to 100 Indians are fishing and will very shortly have a list of the fishermen and their locations from the Yakima Indian Nation.

Question 2. Are only Yakima Indians fishing?

Answer. The only ones fishing with set nets and gill nets are Yakima Indians, some Umatillas and Warm Springs are fishing with dip nets.

Question 3. Who sets the Indian commercial season?

Answer. The Yakima Nation fishing council and tribal councils set the season in the Bonneville Pool under a Federal attorney general's ruling that Indian fishing is a tribal right not an individual right and that tribal councils may promulgate regulations. Oregon Fish Commission has worked with the Yakima Indians in the setting of seasons and believe the Indian ordinance for Bonne-

ville Pool fishing is the best agreement that can be made under the circumstance of an Indian treaty right and a right to share in the harvest and management of the resource. Oregon, of course, is faced with the *Umatilla* decision. We have the *McCoy* decision, and the two cases do determine the course and policy of each State.

Question 4. Is there any limit on the number of nets per Indians?

Answer. Not to our knowledge.

Question 5. Do you know the exact number of nets between Bonneville Dam and The Dalles Dam?

Answer. The number was approximately 100 nets in late April. They can vary and are expected to increase in August and September.

Question. How many nets above The Dalles Dam?

Answer. The number is four.

Question 6. Since the Indians were paid for their fishing rights, why do they feel they should be allowed to fish commercially with gill nets?

Answer. The Indians were paid for the sites which were to be inundated by The Dalles Pool. They were not paid for their fishing rights, and these rights are never extinguished under the treaty, unless they are outright abrogated by Congress and are paid for.

Question 7. When white men fished above the dam at Cooks, Wash., they had to stay 15 miles above Bonneville Dam. When it was closed to gill netting above the dam they were not even paid for their drift fishing rights. To allow the Indians to fish there and not allow the white fishermen to fish there, I feel it is discriminating.

Answer. Our attorneys indicated to us that they feel the Indians have a superior right to the white man in this area, which is an old and accustomed fishing ground, is well documented in history, and the area is an ancient living site, trading, hunting, fishing, and gathering ground for the Northwest tribes.

Question 8. Why are set nets allowed when they were outlawed years ago?

Answer. The Indian fishing rights in this area are still to be determined. With the present court case burden involving Indian problems within the State of Washington, we are not in any position at this time to do more than just study the Bonneville Pool fishery and prepare data and evidence which can support the need for regulation.

Question 9. How exactly does the Indian treaty read?

Answer. We are providing an exact copy of the Yakima Nation Treaty.

Question 10. Does the Federal Government provide any part of the Indians income or is fishing their only source of income?

Answer. The Federal Government does not provide any income to the Indians; fishing is not the only source of income for the Yakima Nation. They maintain herds of cattle, horses, conduct farming, grow hops, grain, and produce and in short, many of the Indians have an agricultural economy which is geared pretty much to the same economy of the whole Yakima Valley. Many Indians own outright and lease grazing, timber, and other resources.

Question 11. Why does the Federal Government recognize the Indian fishery as a legal fishery? Why does the State of Oregon recognize the Indian fishery as a legal fishery?

Answer. The Federal Government believes under the treaty, this old ceded area is an accustomed fishing ground and can be fished under regulation. The Bureaus of Interior and Indian Affairs have encouraged the Yakima Tribe to set up regulation within their tribal government. Oregon feels they can at least gain some restrictions by working with the tribe to set up the best possible season management. Oregon, as stated in our answer to question No. 3, is faced with the Ninth Circuit Court of Appeals decision in the *Umatilla* case. This case states, that only as a last resort may the Indians be restricted. Washington will attempt to take such action, consistent with the theme of necessary and required conservation, as we can apply, to this accustomed fishing-ground fishery. This undoubtedly means court action. If we were to reserve the right to regulate to this agency, we would be in court immediately.

We must dispose of our other cases first as only two attorneys are assigned to both Washington Department of Fisheries and Washington Department of Game.

Question 12. Why are the laws of Washington not being enforced?

Answer. Even though the *McCoy* decision is the law of this State and states the department of fisheries of this State can manage and regulate off-reservation Indian fisheries, this case is not the law of the State of Oregon. The States of Oregon and Washington are bound by a compact where the regulations of the two States must be mutually consented to. Our problem is, of course, while

McCoy is the law of the State of Washington and we can enforce this law in the State of Washington, the fishing is both in Oregon and in Washington which is being practiced by the Yakima Indians. Oregon is faced with the *Umatilla* decision which says regulation and conservation laws which are imposed by the State of Oregon must be indispensable or as the last alternative; in essence, indicating the Indians have a superior right to these fish and only where it is absolutely essential that the fish escape, can Oregon do anything about it. Oregon, on the other hand, is working with and agreeing to regulations with a group of U.S. citizens and we, by the *McCoy* decision, do not recognize Indian ordinances as having any force of law in this State.

Question 13. Are the white buyers required to show records of the fish bought from the Indians?

Answer. Yes. They are required by law from both States.

Question 14. Why are the buyers allowed to buy fish taken from a closed area such as the Bonneville Pool?

Answer. Licensed buyers can buy fish from anyone when fish are taken legally and according to regulation. There is an extreme question yet to be answered in court as to whether the fish taken from the Bonneville Pool by Indians are legal or not. If this is, in fact, proven to be an accustomed fishing ground, one which the States can regulate, then the fishery becomes a legal fishery, subject to whatever restrictions, in the interest of conservation, the States may wish to apply.

Question 15. What about the cash buyers in Portland? Are they required to keep records of the fish bought from Indians?

Answer. In both Oregon and Washington buyers of salmon, no matter from where the salmon originate, must report on official State reports.

Question 16. What is the number of fish necessary for good escapement? How many would you like to have for escapement?

Answer. Both Oregon and Washington feel a minimum of 80,000 chinook are necessary for escapement of the spring run which is the run being currently fished from May 2 to May 27.

Question 17. Over 65,000 fish (salmon) had gone over the Bonneville Dam by April 30; what was the reason for not opening the commercial season below the dam and who made the decision?

Answer. Both the Oregon Fish Commission and the Washington Department of Fisheries felt 80,000 chinook was the minimum number which would give us the best return. And it was anticipated that we would not gain 80,000 escapement past Bonneville, and past the Indian fishery, unless the season was set at May 2 and not April 30. The decision was made by the Oregon and Washington fisheries agencies. In other words, the Indian fishery above the dam had to be compensated for and the only way it could be compensated for was to take fish from the lower river gillnet fishery.

Question 18. What do you predict will be the total number of fish caught by the Indians in the Bonneville Pool during the spring run of salmon? What will be the total pounds taken?

Answer. It was originally estimated that 20,000 spring chinook would be taken. Our new estimate based on the abundance of the runs, the catches to date are a maximum of 15,000 fish. The fish in the Indian fishery are averaging about 15 pounds each.

Question. What do you predict will be the total number of fish caught by the Indians in the Bonneville Pool during the fall run of salmon? What will be the total number of pounds taken?

Answer. Based on last fall's catch and effort in the Bonneville Pool, and the fact of increasing gear, our best estimate is for a fall catch of 25,000 to 30,000 fish approximating 450,000 to 500,000 pounds. We will have to await the actual opening day catches during the fall before this estimate can be refined.

Question 19. Do any spring salmon go into any of the streams between Bonneville and the Dalles Dam?

Answer. Yes. There is a good run of salmon into the Wind River, and spring salmon also utilize the Klickitat River.

Question 20. Do you know the distance from Bonneville Dam to the first set net in operation below Fort Rains?

Answer. Yes. We believe it is somewhere around 200 to 300 yards.

Question 21. Is anything at all being done to stop the Indian fishery or control it in any way?

Answer. Neither agency can do anything as we indicated before, until our caseload is completely out of the way. We have court cases currently pending on almost all Indian reservations and problems regarding Indians in the State of Washington. We cannot take on more than we can handle. If a weak point develops in any regulations imposed by the Yakima Indians Tribal Council or emergencies develop we will, at this time, attempt to do something.

Question 22. Is it legal for white men to furnish nets, boats, transportation on the highways to carry fish to the buyers and share in the profits of these illegally caught fish (taken in closed waters, during a closed season, in a set net etc.) as long as the white man does not pull in the net or handle it in any way or handle the fish?

Answer. As we stated before, there is a real question as to whether or not these are illegally or legally caught fish. If the Indians have a perfect right, and a right under treaty, to be in this area and to fish the area, then the fish are legally caught. This is a point of law which will have to be proven in court as such time as we are properly documented and are in a position to appear in court, completely armed with affidavits, data, and evidence. Keep in mind the management of the Columbia River salmon fisheries is a joint effort between two States. Oregon and Washington cannot operate unilaterally, but at the moment each State is faced with different circumstances and policies.

Question 23. What do you predict will be the commercial catch below the Bonneville Dam?

Answer. Commercial catch is anticipated to be around 45,000 chinook for the spring run.

Your questions are pertinent and well received by the Department of Fisheries. Despite the complications, we are hopeful of ultimate solution.

Very truly yours,

George C. Starlund,
Director.
Robert S. Robison,
Fisheries Administrative Officer.

Washougal, Wash., *July 29, 1964.*

Senator Warren G. Magnuson,
Washington, D.C.

Dear Senator Magnuson: Enclosed please find the original sheets of a petition which has been circulated to persons directly affected by this off-reservation Indian fishery. We learned only a very short time ago that a hearing will be conducted on August 5, regarding Senate Joint Resolutions 170 and 171. Had we known earlier of this hearing, we could have obtained many more signatures of persons involved in this problem.

To be of any value, legislation must be effective enough to establish, without a doubt, complete control of the Indian fishery. The discrimination that has been practiced against the commercial fishing industry below Bonneville Dam this year must be stopped immediately if this industry is to survive.

It is ridiculous, to say the least, that the Indians are allowed to fish with a year 1855 treaty and use modern, up-to-date gear and disobey every law known to the commercial fishery. They are most assuredly not fishing "in common with the citizens of the territory" as they are in an outlawed area and using outlawed gear and practicing no conservation whatsoever. If they are citizens of the United States, they should have to obey existing laws when they are off reservation.

We assume that you understand that white men are involved in this Indian fishery and are reaping the harvest financially for themselves with the Indians receiving very little remuneration for his rights. If this problem is not solved this year, by next spring the Indian fishery will be so efficient as to completely deplete each run of fish in a single season. The Indian fishery is actually a white man operation inasmuch as they supply boats, trucks for transportation and the most modern nylon nets and use the Indians fishing rights and Indian labor. We would definitely challenge the worth of the Indian fishery to the Indians. We firmly believe the only solution to this problem is either for the Indians to revert to the equipment used when the treaty was signed in 1855 if they insist on fishing above Bonneville Dam commercially, or else fish commercially in legal areas below Bonneville Dam using the same gear and regulations as the legal commercial fishery below Bonneville Dam now uses.

Conservation should be shared by all three factors involved; the sports fishery, the commercial fishery, and the Indian fishery. At the present time, conservation is practiced only by the commercial fishery.

This is a very desperate situation and we sincerely hope that all persons involved in this situation will benefit equally. May we hear from you regarding the outcome of this hearing as soon as possible?

Yours very truly,

FRANCES M. CLARK.
RUTH HANSEN.

JULY 15, 1964.

Senator WARREN G. MAGNUSON,
Washington, D.C.

DEAR SIR: Due to the increasing catches of fish in the Bonneville Pool by the Indians, the Columbia River fishery below Bonneville Dam has been seriously penalized by loss of fishing time at the profitable stages of the runs. This is done by the State Fishery Departments of Washington and Oregon to compensate for the large amounts of fish taken by the Indians in their off-reservation fishing.

The Columbia River fishery is in danger of immediate extinction unless the Indian fishery is also forced to practice the same conservation measures as are practiced by the Columbia River fishery below Bonneville Dam.

At the present time, the Columbia River fishery below Bonneville Dam is being regulated to time, gear, etc., while the Indian fishery operates independently, using outlawed gear, fishing in a closed area, and setting their own seasons to their advantage disregarding conservation. Their gear investment is minimal and they are not required to contribute financially or conservationwise to the propagation of future fish runs. The Columbia River fishery below Bonneville Dam has always practiced conservation, even to the point of voluntarily closing their fishery when they felt that escapement was at a minimum.

This year during the normal fishing season between June 16 and July 15, the commercial fishery below Bonneville Dam was restricted for conservation purposes to a 2-day commercial salmon season and a 3-day blueback season, whereas the Indian fishery above Bonneville Dam was unregulated and fishing unrestricted.

Why should the off-reservation Indian fishery be allowed to fish above Bonneville Dam at the expense of the entire fishing industry below Bonneville Dam? We feel that both Indians and white men should have equal opportunity to fish in legal areas and one set of laws should apply to both. At the present time, the Columbia River fishers is being discriminated aganist by extreme loss of fishing time due to the States lack of power to regulate the Indians. When off reservations, we feel the Indians should be forced to obey existing regulations.

We know of your interest in the fisheries and being an official elected by the people of the Pacific Northwest, we feel that you have a definite interest in the industry of your State. We hope that this will make you aware of the very grave seriousness of this matter of the off-reservation Indian fishery in the pool above Bonneville Dam. In this day when unemployment is becoming a national issue, it seems very logical to attempt to maintain already existing self-supporting industries. The Pacific Northwest can ill afford the unemployment of thousands who would be affected by the extinction of the Columbia River fishery below Bonneville Dam if the Indian fishery above Bonneville Dam is allowed to continue to flourish. At this moment, the commercial fishery on the Columbia River needs immediate Federal Government support. We have information from the Department of Fisheries that the Columbia River must be controlled unilaterally by both Washington and Oregon, but their powers disagree and at the moment nothing can be done until Federal legislation is enacted.

We, the undersigned, are dependent on the Columbia River fishery as our means of livelihood. We recognize that there is a very serious danger that the fishery below Bonneville Dam will become extinct unless some legislation is enacted rapidly to control the off-reservation Indian fishery in the Bonneville Pool. We urgently request immediate investigation into this matter.

(The above petition was signed by 956 citizens of Washington and Oregon.)

WASHOUGAL, WASH., *August 3, 1964.*

DEAR SENATOR: This signed petition is in addition to those mailed to you earlier in regard to the Indian situation on the Columbia River.

We certainly do appreciate your interest in our grave problem and are hoping a solution can be sought before we have another year like this one.

We have three children that we want to raise to be college students, and can be possible if my husband's fishing business isn't dangered.

There are many interested people here to know the outcome of your August 5 meeting.

Thank you.

KEN AND INEZ GREENFIELD.

SEATTLE, WASH., *August 4, 1964.*

Senator FRANK CHURCH,
Chairman, Senate Subcommittee on Indian Affairs,
New Senate Office Building, Washington, D.C.

DEAR SENATOR CHURCH: The American Civil Liberties Union of Washington has become increasingly concerned with the status of American Indians, particularly as their treaty rights are involved. The problem has become acute in the State of Washington because of the pressures over off-reservation fishing by Indians.

We have examined Senate Joint Resolution 170, introduced by Senator Magnuson, in light of our concern for Indian treaty rights. We find that Senate Joint Resolution 170 would take away from the Indians without due process of law a right expressly guaranteed to them in the treaties made by the U.S. Government. Its effect would be to destroy a vital part of their way of life in violation of the word of our Nation.

Of equal concern to us is the fact that this would be another example of America giving short shrift to a covenant made with the American Indian. These examples do not do credit to our country in the eyes of history or in the eyes of the rest of the world. It particularly is not in keeping with one of our basic tenets: The respect for the right of a racial or cultural minority to preserve its way of life.

We therefore respectfully urge this committee to recommend against the enactment of Senate Joint Resolution 170 and to study alternative approaches to the problem.

DAVID H. GUREN,
Executive Director, American Civil Liberties Union of Washington.

WASHINGTON STATE SENATE,
Oroville, Wash., August 27, 1964.

Hon. WARREN G. MAGNUSON,
U.S. Senator,
Washington, D.C.

DEAR SENATOR MAGNUSON: I note, and apologize for, the silly position on Indian rights of the American Civil Liberties Union of Washington, an organization of which I am a member and an honorary director. David Guren, executive director of that organization, recently telegraphed you in condemnation of your introduction of Senate Joint Resolution 170 (July 29). The resolution relates to the treaty fishing rights of Indians and Mr. Guren claims that Senate Joint Resolution 170 would take away such rights "expressly guaranteed to them in the treaties made by the U.S. Government. Its effect would be to destroy a vital part of their way of life in violation of the word of our Nation."

This statement is hogwash on at least two counts: (1) The Indian fishing treaties provided some 100 years ago for Indian fishing at usual and accustomed places. This certainly implies the use of "usual and accustomed" methods of fishing as of the time of the treaty because the purpose of the treaties was to preserve a then existing way of life for the Indians. The 1,000-foot nylon nets that the Indians of today want to use in an almost totally commercial operation are far and away beyond the intent of the treaties.

(2) The old Indian way of life now claimed to be destroyed in Mr. Guren's terms is something that has been fading away for a long time. The voluntary changeover by the Indians from operating their fishery for their own food supply to a commercial enterprise is far more destructive of the "vital part of their way of life" than is the purport of Senate Joint Resolution 170.

It is high time that integration of the American Indian took place and that the question of Indian "treaty" rights come to final disposition. Our philosophy of equal rights for all citizens should prevail and the special guardianships for Indian tribes should now be eliminated. Most Indians are capable of making their own way and should be doing so without "treaty" rights.

The American Civil Liberties Union exists to defend the citizen rights established under our Federal Constitution. The sob sister involvement in the field of the treaty superrights of Indians is quite outside the purposes of ACLU. The Bill of Rights points toward equality of all citizens—special Indian privileges are at cross purposes to the fundamentals of Bill of Rights—and the ACLU should be on the opposite side of Mr. Guren's position.

Yours truly,

WILBUR G. HALLAUER,
State Senator, Okanogan and Douglas Counties.

OLYMPIA, WASH., *June 30, 1964.*

Hon. HENRY M. JACKSON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR JACKSON: I am enclosing a copy of the letter I wrote to Senator Magnuson today. I understand that you are also very interested in Senate Joint Resolution 171. If there is anything that I could do to help in the passage of this legislation, please let me know.

Sincerely,

ATLEY O. NELSON.

OLYMPIA, WASH., *June 30, 1964.*

Hon. WARREN G. MAGNUSON,
U.S. Senator,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MAGNUSON: I have been very interested in Senate Joint Resolution 171 which you introduced on April 17. I am wondering if the resolution will be acted on in any way before this session of the Congress adjourns.

One of my main duties with the Washington State Game Department is to work up steelhead punchcard data and evaluate the catch of steelhead in our rivers each year. On many streams the uncontrolled netting of steelhead by the Indians is threatening the sports catch of steelhead.

There are about 110,000 fishermen who fish for steelhead in our State. In the most recent attempt to assess the number of Indians who net steelhead, it would appear that there are not more than 125 who fish commercially for steelhead. It is a shame that this splendid resource for outdoor recreation could be threatened by such a small number of people.

If there is any way further that I could help in the passage of your resolution, please let me know.

Sincerely,

ATLEY O. NELSON.

STATE OF WASHINGTON, DEPARTMENT OF GAME: SUMMARY OF STEELHEAD CATCH DURING 1962

The year 1962 produced the largest catch of steelhead in the State of Washington, than for any year for which we have a record.

A total of 252,600 steelhead were caught during 1962.

Of these: 193,300 were winter-run steelhead, 59,300 were summer-run steelhead.

The total catch, each month, on each stream was calculated on the basis of projection factor of 3.69; 144,980 steelhead punchcards were issued to the fishermen. Of these 39,236 were returned. This is a 27.1-percent return.

Of the 39,236 punchcards returned, the percentage of successful fishermen is the highest since steelhead punchcards have been used.

	Percent
16,069 caught steelhead	40.9
9,756 fished without success	24.9
5,227 did not fish	13.3
8,184 were blank	20.8

In the 1960–61 winter season, the return of steelhead punchcards showed that 31.3 percent of the fishermen were successful.

The following table shows the monthly distribution of the catch for the winter-run and summer-run steelhead.

	Number	Percent		Number	Percent
Winter run:			Summer run:		
January	54,037	27.9	January	2,473	4.2
February	37,284	19.3	February	1,651	2.8
March	26,074	13.5	March	1,332	2.2
April	6,284	3.2	April	914	1.5
May	419	.2	May	1,281	2.1
June	149	.07	June	1,964	3.3
October	14	.007	July	8,707	14.7
November	1,246	.6	August	6,840	11.5
December	67,831	35.1	September	6,940	11.7
			October	9,484	16.0
			November	8,466	14.3
			December	9,300	15.3

WASHOUGAL, WASH., *July 22, 1964.*

Re off-reservation Indian fishery above Bonneville Dam.

Senator FRANK CHURCH,
Senate Office Building,
Washington, D.C.

DEAR SIR: This is a very earnest appeal to inform you, before the Senate Interior Indian Affairs Subcommittee hearings on August 5, of the seriousness of the situation involved. Unless Federal legislation is enacted with great rapidity, the fishing industry below Bonneville Dam will become extinct in an extremely short time.

At this point, please bear in mind that we are referring to the Columbia River fishery below Bonneville Dam, a century-old industry which employs thousands of people, in various phases of the industry, in the Pacific Northwest. If the Indian fishery is allowed to continue as is, the States of Washington and Oregon face the complete loss of this valuable industry. This would be a serious setback to this area. The fishing industry rates a high third in the economy of the State of Washington alone and nets the State $1¼ billion annually.

This year, the commercial fishery below Bonneville Dam lost the most valuable days of the spring season strictly due to Indian catches in the escapement pool and lost practically the entire summer season in the interest of conservation, while the Indians, fishing off-reservation in an illegal area and abusing their ancient treaty, have been able to fish at all times in an area closed to the white men, using gear illegal to the white men and practicing no conservation. The Indian fishery began April 12 and is still continuing as of this date. This discrimination against the legal commercial fishery below should no longer be permitted to exist.

At the time of the construction of the Dalles Dam, the off-reservation Indian fishery was paid in the vicinity of $28 million for the loss of their fishery, by the Corps of Engineers. At the same time, the white fishermen who had fishing rights above Bonneville Dam were paid nothing for the loss of their rights.

Federal Government action is of immediate necessity to restrain the Indian fishery until this matter is settled to the satisfaction of all concerned.

We have supplied Senator Warren Magnuson with as much material as we have been able to accumulate at this short notice.

It is extremely urgent that action be taken at once, as the salmon runs will rapidly be depleted and this takes considerable time to restore.

Yours very truly,

COLUMBIA RIVER FISHERMEN'S WIVES AUXILIARY,
RUTH HANSEN.

COLUMBIA RIVER FISHERMEN'S PROTECTIVE UNION,
Astoria, Oreg., August 3, 1964.

Hon. FRANK CHURCH,
Chairman Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, Washington, D.C.

DEAR MR. CHURCH: Our organization has adopted the statement of Mr. Theodore Bugas of the Columbia River Salmon & Tuna Packers Association, and we will also concur with his statement on Senate Resolutions 170 and 171 to regulate the Indian fishery.

Sincerely,

WM. WESTERHOLM,
Executive Secretary.

SHELTON, WASH., *July 25, 1964.*

DEAR SENATOR JACKSON: I am writing concerning Senate bill 170, buying the Indian fishing rights. As a missionary helper among the Indians I know how they live. I've stayed in their homes in different areas here in the Northwest, and I love the Indian people very much.

Many of the Indian people, especially our older folks, have made their living by fishing. They also enjoy their fishing very much. Because of a few Indians that have a problem with drinking, white people seem to get the idea that liquor is the only thing they spend their money on. This is not true. Our Indian people are not all like this and this idea has really ruined things for those who are trying to make an honest living.

I ask of you, Senator Jackson, please do not take the Indians fishing rights away from them. It is one of the few things they have left. Please, please, vote "No" on Senate bill 170.

Thank you Senator for the job you are doing. I am praying for this Nation.

Sincerely,

MISS COLLEEN K. CAMPBELL.

SEATTLE, WASH.

DEAR SENATOR JACKSON: I am writing concerning Senate bill 170, buying the Indians fishing rights.

I am from Norway and have not been in this country very long, but I have been working among the Indians as a missionary helper this summer. I have learned to love this people, and I have seen their houses, and their children's clothes and it is pitiful. Some of the Indians may have problems with drinking, but how about the white people? Nothing is taken away from them because of their drinking, so why should the fishing rights be taken away from the Indians?

So I ask you, Senator Jackson, please vote "No" on Senate bill 170.

I am praying for the Indians and also for this Nation.

Sincerely,

ASTRID MYRVOLD.

RICHLAND ROD & GUN CLUB, INC.,
Richland, Wash., July 28, 1964.

Senator HENRY M. JACKSON,
U.S. Senate,
Washington, D.C.

DEAR SENATOR JACKSON: The members of the Richland Rod and Gun Club are very much in favor of the joint resolutions (S.J. Res. 170 and 171) introduced in the Senate:

We are gratified that a Senator from our State introduced this legislation that would, if passed, solve some long-standing problems that sorely need solving.

It has not gone unnoticed that a huge sum of money was paid for damages to the Indian fishery when The Dalles Dam was built. With the increased use of modern methods of taken fish and the large number of Indians engaged in this commercial venture, one might wonder if the Indian fishery were not enhanced rather than damaged when Celilo Falls were flooded.

We urge you to see that these resolutions do not die in committee.

Sincerely,

W. P. STINSON, *President.*

RICHLAND, WASH., *July 27, 1964.*

Re Senate Joint Resolutions 170 and 171, Indian fisheries.

Hon. HENRY JACKSON,
Senator from Washington State,
Washington, D.C.

MY DEAR SENATOR: I would like to encourage you to keey up your efforts toward solving the Indian fishing problems. I don't know quite how to help you in this matter but as you suggested, I can make my own statement on the subject, hoping that the opinion from this low level will have some small weight and help solve the problem.

Rather than clutter this letter with such a statement I have written it separately and attached it hereto.

Thanks again.

HENRY J. BELLARTS.

A STATEMENT CONCERNING SENATE JOINT RESOLUTIONS 170 AND 171, INDIAN FISHERIES

My name and address is given below. I am a licensed and registered mechanical engineer in the State of Washington. I am employed by General Electric Co. at the Hanford Atomic Plant in that capacity.

My interest in the Indian fishery problem stems from my activities in conservation, sport fishing, and a strong desire to save a little bit of those things for generations to come.

My own fishing goes back some 50 years. I am 60 years old. My father before me, in Oregon, fished there in 1885 or thereabouts. My memory of fishing therefore goes back to that time sometimes referred to as "the good old days."

Despite the rulings of the courts in some instances, I hold that the Indian does not have an inborn right to fish and destroy fishing anywhere he may choose to go, as is happening here. When the Indian is off the reservation he should be subject to the same rules and regulations as the rest of us.

I do not want to deny the Indian the right to do as he pleases on the reservation. It is his to destroy, to use, to conserve as best he may. If I wish to use it I expect to pay a fee therefor.

Information from public sources indicates that a relatively few Indians are causing the present trouble. This indicates that the various tribes cannot control their own members in this matter and those who choose to do so are free of tribal restraint, and can fish to the detriment of other Indians. You can imagine what will happen if more and more of them free of all restraint.

The local newspaper reports that only six salmon escaped the Indians fishery in the Yakima River this past spring where they were fishing directly in pools of a fish ladder. (Did the courts find that a fish ladder existed in 1855 and was a "usual" place to fish?)

I object to the use of my license money, as used for hatcheries, to supply the Indian commercial fishery. I don't mind paying my own way but I don't like special privileges for others at my expense.

Therefore I support the subject bills as a good effort toward the solution of this problem, particularly Senate Joint Resolution 170 which restores to the States the right and power to regulate fisheries within their boundary.

If the situation is not resolved it can and will become worse with time as fishing becomes worse, competition for remaining fish increases and population presses closer upon traditional areas.

HENRY J. BELLARTS,
1702 Gaillard, Richland, Wash.

BELLINGHAM, WASH.,
July 15, 1964.

Mr. FRANK CHURCH.

DEAR FRANK: I sure hope you will be able to act favorably on Senate Joint Resolution 170 and Senate Joint Resolution 171 to buy out the Indian's fishing rights on the Nooksack River for steelhead trout.

The steelhead is a gamefish and the Indians have just about caught them all off with all their modern nets and gear.

I could go on for pages in detail about this but it will all be brought out in the hearing, I hope.

Hoping something can be done soon.

WALTER E. BROWN.

BELLINGHAM, WASH., *July 13, 1964.*

Senator FRANK CHURCH,
Chairman of Senate Interior Indian Affairs Subcommittee,
Washington, D.C.:

Urge favorable consideration be given Senate Joint Resolution 170 and Senate Joint Resolution 171; strongly suggest complete adequate data covering all phases of action proposed by resolution be carefully examined prior entering into price negotiations.

BEN H. SEFRIT,
President, Bellingham Chamber of Commerce.

LYNDEN, WASH., *June 26, 1964.*

Senator HENRY JACKSON,
U.S. Senate,
Washington, D.C.:

We strongly urge the passage of Senate Joint Resolution 170 to buy out Lummi Indian fishing rights. Sports fishing and economy of Whatcom County are poor. Senate Joint Resolution 170 will mean better fishing for all and will rebuild our recreation industry.

JIM VAN ANDEL, *Mayor, City of Lynden.*

LYNDEN, WASH., *June 26, 1964.*

Senator HENRY JACKSON,
U.S. Senate,
Washington, D.C.:

We strongly urge the passage of Senate Joint Resolution 170 to buy out Lummi Indian fishing rights. Sports fishing and economy of Whatcom County are poor. Senate Joint Resolution 170 will mean better fishing for all and will rebuild our recreation industry.

HAROLD KOOY,
President, Lynden Chamber of Commerce.

[From the Yakima Herald, Nov. 26, 1961]

HERE AND THERE

(With Harland Beery)

Today marks the beginning of a new era for steelhead in the Columbia River and its tributaries still accessible to the sea-run trout. Washington, in cooperation with Oregon and Idaho, opens the 1961–62 steelhead season with new limits designed to cut the catch by at least 25 percent. The overall, three-State goal is to reverse the prevailing trend toward extinction of the Columbia River steelhead.

To do this, representatives of the fish and game departments appointed by the three State Governors to a joint factfinding committee have determined that greater escapement of salmon is necessary. Each State has pledged limits that will cut their sports catch by 25 percent. The total effect, it is hoped, will be to increase the current escapement by at least 50,000 steelhead. (The new Washington limit is 30 fish a year, only 20 of which may be taken from the Columbia River system above Bonneville Dam.)

One of the most interesting facts uncovered by the Governors' committee was that it is the sportsmen and not the Oregon-Washington commercial fishermen who have been reducing the steelhead run. (Oregon is the only State of the three that recognizes a commercial season, but one-third of the Oregon commercial catch is taken by Washington commercials and sold in Oregon.) While the commercial catches have been holding steady, largely because of the flexibility of the Oregon commercial season, sports fishing for the fighting steelhead has mushroomed. The 5-year averages, 1956–59, show an average annual run of 361,000—228,000 taken by sportsmen, 95,000 by the commercials, and 38,000 (16 percent) escaped. The figures add up to a losing balance.

Reduction of the limits may be termed immediate action. But the long-range problem continues to be loss of spawning grounds through construction of

dams and hydroelectric projects. With the apparent loss of the Cowlitz River, despite the vote of the people against blocking that vital fishway, there appears little hope to rescue any streams for salmon runs. Other streams, such as the Yakima-Naches system, could be utilized, but water rights and lack of proper storage prevent the stable waterflow necessary to insure the proper spawning of steelhead. Depite these problems, increasing numbers of steelhead are being planted into the Yakima-Naches system in an effort to chart trends and the ability of the fish to utilize streams with limited waterflow.

All steelhead planted in the Yakima and Naches Rivers have been marked by removal of one or more fins. To make the project a success, sportsmen are urged to report all marked steelhead to State game personnel. (Robert J. Rennie, Yakima, is a member of the three-State committee.) Yakima-Naches plants for 1958–60, any of which could return this winter, numbered over 40,000 per year. An additional 470,000 steelhead migrants were planted in the Columbia River system this year and will begin returning within 2 years.

In steelheading, as in so many other facets of fishing and hunting, the ultimate success of the program will depend upon the support and cooperation of the sportsmen themselves. Cooperation, or lack of it, will judge the true interest of each sportsman.

(The affidavits referred to by Mr. Coniff in his testimony on page 26 are as follow:)

STATE OF WASHINGTON,
County of King, ss:

I, Richard Van Cleve, being duly sworn under oath, depose and say:

That I reside at 4537 51st NE., Seattle, Washington.

My educational background includes a degree of Bachelor of Science in Zoology from the University of Washington (1927) and a Ph. D. in Fisheries and Zoology from the University of Washington (1936).

My professional background can be briefly summarized as follows:

Scientist on the staff of the International Pacific Halibut Commission from 1926 to 1941.

Lecturer at the University of Washington from 1935 to 1941.

Chief of the Bureau of Marine Fisheries, California State Division of Fish and Game, from 1941 to 1946.

Chief Biologist in Charge of All Research for the International Pacific Salmon Fisheries Commission with headquarters in New Westminster, B.C., Canada, from 1946 to 1948.

Appointed Professor of Fisheries in the School of Fisheries, University of Washington, in 1948.

Acting Director of the School of Fisheries from 1948 to 1950.

Director of the School of Fisheries from 1950 to 1958.

Acting Dean of the College of Fisheries, 1958 to 1959.

Dean of the College of Fisheries, 1959 to the present.

Consultant for the Resources Section of the General Headquarters Supreme Command Allied Powers in Japan, 1951.

Consultant for the International Cooperation Administration for India, on Fisheries, 1957.

Consultant for the Bureau of Commercial Fisheries, Alaska Division, U.S. Fish and Wildlife Service, 1957.

Consultant for the California Department of Fish and Game, 1958.

United States Department of State Technical Representative to the Treaty Negotiations with Mexico, 1948.

United States Government Technical Representative to the Pink Salmon Treaty Negotiations with Canada, 1956.

I am a member of the following professional societies:

The American Association for the Advancement of Science.

The American Society of Ichthyologists and Herpetologists.

Society of Limnology and Oceanography.

Biometric Society.

Amercian Fisheries Society.

Fellow of the American Institute of Fishery Research Biologists.

I have published a number of articles in the field of fishery biology. The following articles primarily concern the anadromous fishery resource:

"The International Pacific Salmon Fisheries Commission and Conservation of the Fraser River Salmon Run," published in 1949.

"Preliminary Report on the Fishery Resources of California in Relation to the Central Valley Project," published in 1945.

"The Management of the High Seas Fisheries of the Northeastern Pacific," published in 1963.

In order to render an intelligent opinion concerning the need for preservation and conservation of the anadromous fishery resources of the Puyallup River, it is essential that the term be defined. I personally subscribe to the definition of conservation as set forth by the United Nations Conference on Conservation of the Living Resources of the Sea:

"The principal objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to secure a maximum supply of food and other marine products."

This has been modified since that time to recognize the fact that the maximum supply of food and other marine products must be obtained over an indefinite period of time and that the conservation involves the regulation of the living resources, the principal ones of which are the fish, in such a manner that these fisheries will yield the maximum supply of food and other marine products for an indefinite period of time. This definition has been generally accepted by experts in fisheries management and in fact was used as the objective of the International Convention for the High Seas Fisheries of the North Pacific Ocean.

These principles of conservation were embodied in a Treaty between Japan, Canada, and the United States. The pertinent provision of the Treaty states:

"To promote and coordinate the scientific studies necessary to ascertain the conservation measures required to secure the maximum sustained productivity of fisheries is of joint interest to the contracting parties."

This definition of conservation and the actual activity of conservation with respect to salmon requires that each stock of salmon be managed so as to produce the maximum possible catch it can produce year after year indefinitely. In the case of salmon, again, this requires for each stream and in many cases for each section of each stream the escapement each year of the optimum number of salmon which can spawn successfully in that section of the stream. These numbers may vary and do vary from stream to stream and from year to year according to the variations of conditions.

A comparison may be made between the Adams River in southern British Columbia, with which I am very familiar, and the Puyallup River. The Adams River is a medium sized stream approximately seven miles long. It accommodates in excess of 800,000 to 1,000,000 sockeye salmon. In this limited area a large number of fish are capable of spawning very efficiently. From the publications of the Washington State Department of Fisheries it is apparent that the optimum number of spawners which could utilize the Puyallup River would be far greater than the number indicated to have escaped to spawn in recent years if the unregulated gill net fishery were not present.

Escapement of the various segments of the salmon run is not only important in numbers. The various runs or races that occur and develop in each stream appear normally in the River as successive waves of fish that comprise different segments of the different races as well as different species. It is essential to obtain as nearly as possible a proportional escapement of all parts or segments of each race and each run of each species. Hence the careful control of any fishery in a river is essential to prevent elimination of segments of runs. Such elimination of segments of runs or entirely of all of such runs is not only possible but in fact has been recorded in the case of unregulated, intensive, continuous gill net fishing.

I am well acquainted with gill net fisheries, having observed and studied in detail the salmon and shad gill net fisheries of the Sacramento River in California during the years of 1941 to 1946. In addition, I was in charge of the investigations of the sockeye salmon gill net fishery in the Fraser River in the years 1946 to 1948 and have observed the gill net and set net fisheries in Bristol Bay and Cook Inlet and the gill net fishery in Southeastern Alaska. I have also observed the gillnetting in the Strait of Juan de Fuca and through the San Juan Islands and Puget Sound.

While I have not personally observed the gill net fishery in the Puyallup River, I have read affidavits filed on behalf of the Washington Department of Fisheries and the Washington Department of Game, and studied the photographs of the gill net fishery presently in the River. Based on this and my experience with comparable fisheries, it is my opinion that the gill net fishery is comparable to the gill net fishery of the Fraser River. However, the Fraser River gill net fishery is carefully controlled. Also, it should be pointed out that the Fraser

River is much larger than the Puyallup and it is therefore much more difficult to block the passage of fish through the Fraser River, not only because of regulation of both size of mesh and time of fishing but also because of the inaccessible segments of the River which cannot be fished.

I, personally was in charge of inaugurating the regulations covering the sockeye gill net fishery in the Fraser River in 1946. I found that to provide adequate escapement of the sockeye run it was necessary to close the gill net fishery for from two days each week for runs which were not badly depleted, to complete closure of this fishery for seven days each week for extended periods of time to provide complete escapement of runs which had been badly depleted and which we wished to rebuild. My experience with the Fraser River gill net fishery indicates the unregulated netting operations, when fully operative, can take at least 98 percent and in some cases 100 percent, of all salmon moving through the river to the spawning grounds. In light of this experience it is my opinion that the defendants' unregulated gill net fishery in the Puyallup River has caused serious damage to the fish runs indigenous to that stream and will, if permitted to continue, cause irreparable harm in that the fishery resource will be unable to sustain itself, in accordance with the basic principles of conservation which I have stated above.

(S) RICHARD VAN CLEVE.

AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, ss:

I, Dale Ward, being first duly sworn, under oath, depose and say:

That I am Fisheries Statistics Supervisor of the Department of Fisheries of the State of Washington. My home address is 4811 Alpine Terrace, Olympia, Washington.

My employment with the Department of Fisheries began in June 1952. This employment was interrupted while I finished course work at the University of Washington School of Fisheries where in June of 1953 I received a degree of Batchelor of Science with a major in fisheries biology.

After graduation, I resumed my employment with the Department of Fisheries as a fisheries biologist. In March 1956 I was transferred to the Statistics Section of the Department of Fisheries. For nearly six of the past eight years I have been functioning as Supervisor or Acting Supervisor of that Section.

Among my duties are the collection, analysis and distribution of commercial and Indian catch statistics, commercial production statistics, the economics of the industry, and I also supervise the activities of the Tax Auditing Section of the Department.

Each year I prepare the catch and economic data which is published as the Fisheries Statistical Report of the Department and is also included with the Annual Report of the Department of Fisheries.

Four species of Pacific salmon utilize the Puyallup River and its tributaries for spawning purposes. These four are the chinook, silver, pink, and chum salmon. In addition, steelhead trout spawn in the system. These salmon are hatched in fresh water from eggs produced by their parent run of fish. In the case of the salmon, the adults die after spawning. Steelhead may survive the rigors of spawning, drop back to saltwater and return to spawn again another year. All of these species are known as anadromous fish—that is they are hatched in fresh water, remain in fresh water for varying lengths of time, eventually migrating to saltwater where they feed and grow to adulthood. With the approach of maturity, the salmon begin a reverse migration which will eventually return them to or near the stream of their origin. While still at sea, chinook, silver, and pink salmon are subject to the commercial and sport troll fisheries along the coasts of Alaska, British Columbia, Washington, Oregon, and California. When they enter into the sheltered waters of Puget Sound and other bays, harbors and river estuaries, all four salmon species plus a fifth, the sockeye salmon which does not spawn in the Puyallup system, become subject to further sport and commercial fisheries and once past these fisheries, the survivors enter the streams of their origin to spawn and then die. Steelhead trout are not subjected to ocean or saltwater commercial fisheries in Puget Sound but are the target of intensive sport and Indian fisheries from the estuaries through a major portion of the streams. The majority of the Indian steelhead catch eventually enters commercial channels in Oregon, California and

other states but it is unlawful to utilize steelhead commercially in the State of Washington.

My current function within the Department of Fisheries is the collection and analysis of commercial and Indian catch statistics. It is required that each commercial transaction involving transfer of fish from fisherman buyer be recorded on a form printed by the Department and submitted to the Department at regular intervals. The form, otherwise known as a fish receiving ticket, is then processed and tabulated by International Business Machine (IBM) accounting machinery, leased by the Department of Fisheries. From the tabulations the various historical and current catch records are prepared. By comparison of current catch records with runs of previous years—both historically good runs and bad runs, taking into consideration other factors such as size of fishing fleet, lateness or earliness of the run, number of days fishing and so forth—we have a picture of the strength of the salmon runs which is used for management of the fishery. Through October ninth, 1963, my records indicated a catch of 182,279 silver salmon landed to that date by the several purse seine, gill net, and Indian fisheries of Puget Sound. This was around the poorest catches for this species for which we have record, less than 30 percent of the strength of a typically good run such as 1952. To perpetuate a run of salmon it is absolutely essential that enough adults return to the river of their origin to reproduce their kind. It is my opinion that the extremely poor silver run of 1963, together with no evidence of late silvers entering the fishery from examination of coastal troll fisheries, required complete elimination of further commercial fisheries in order to prevent a possible complete destruction of or irreparable damage to this silver run. I was one of several staff members who recommended that the 1963 commercial salmon fishing season be closed until the peak of the silver salmon run has passed out of reach of the commercial fisheries. This recommendation was adopted and the season was suspended until October 28, 1963.

Attached is Appendix A showing catches of Puyallup fish as totaled from the records of the Washington Department of Fisheries.

It is my opinion that this fishery as it is currently being pursued in the Puyallup River and Commencement Bay is fully capable of inflecting irreparable damage to the salmon runs to the Puyallup River. The 1963 silver salmon runs to nearly all Puget Sound streams are among the poorest on record. A commercially oriented fishery in the vicinity of the Puyallup River would severely damage this Puyallup silver run.

(S) DALE WARD.

APPENDIX A

Puyallup Indians—Puyallup River, numbers of fish taken by gill nets and set nets

Year	Chinook	Chum	Pink	Silver	Steelhead
1953		2		104	104
1954	439	262		2,509	487
1955	372	7	143	1,116	452
1956	824	8		5,172	1,200
1957	2,965	141	2,001	7,310	1,060
1958	2,058	799		12,044	1,217
1959	2,562	311	6,028	8,103	1,461
1960	5,229	217		10,294	3,552
1961	10,659	490	19,097	16,532	2,310
1962	5,813	580		27,283	1,840

AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, ss:

I, C. H. Ellis, being duly sworn, under oath, depose and say:

That I reside at 323 West V Street, Tumwater, Washington.

My educational background includes a degree of Bachelor of Science in Fisheries from the University of Washington (1932).

I am employed by the Department of Fisheries of the State of Washington and hold the position of Supervisor of Hatcheries. I have been employed by the Department for thirty years and have held my present position for twenty-two years.

Based on the files and records under my immediate control, it is my opinion that the unrestricted gill net fishery of the defendants has virtually eliminated escapement of silver salmon (coho) in the Puyallup River.

Escapement of silver salmon to the Puyallup Salmon Hatchery racks during 1963 has been the lowest in the twenty-six year period from 1938 to 1963. As of November 26, 1963, only 112 silver salmon had reached the Puyallup Hatchery racks and such number represents practically the entire year's escapement. In preceding years an average of over 90 percent of the silver salmon escapement to the Puyallup racks has occurred by November 26, and in the parent year of 1960, 100 percent of the run had reached the racks as of that date (November 26, 1960).

In the twenty-six year period of 1938 to 1963, yearly runs of silver salmon as great as 13,000 fish have arrived at the Puyallup Hatchery. The previous low run for the twenty-six year period occurred in 1960, when 361 silver salmon arrived at the racks; even this low figure was three times the figure for 1963.

In my opinion, comparable results may be expected in the future on other species of anadromous fish in the Puyallup River if the defendants' unrestricted gill net fishery is allowed to continue.

(S) C. H. Ellis.

Affidavit

State of Washington,
County of Thurston, ss:

I, Edward M. Mains, being first duly sworn on oath, deposes and says:

That he is a graduate of the University of Washington in Fisheries and he has been with the Washington State Department of Fisheries for 13 years in several capacities; that he is presently Assistant Director in charge of Department Policy;

That during the past 28 years the commercial and sport salt water-fresh water food fisheries have been regulated under a broad fisheries code authorizing the Department of Fisheries to set seasons and gear restrictions. Such seasons and gear restrictions are promulgated after staff recommendations are reviewed at public hearings attended by members of the fishing industry and related interests. The Department also has the responsibility to construct necessary facilities and to regulate water use in conjunction with other agencies;

That these duties are achieved through the adoption of regulations for escapement and spawning and using the most reproductive segments of the spawning stock for perpetuation of future runs, and through the use of fish farming, hatchery, stream improvement, research, engineering and administrative techniques;

That the state's first salmon hatchery was built in 1895. Since then, the hatchery system has changed into a combined hatching-rearing program capable of releasing 100,000,000 fry, fingerlings, and salmon reared for periods of 30 days, 60 days, 90 days, and one year, depending on the species, into natural environment fish farms, brood streams, and suitable production areas;

That fifteen hatching and rearing stations are located in Puget Sound tributary waters, Willapa and Grays Harbor waters and seven are located on the Columbia River tributaries.

That spawning and stream rearing areas have been opened up or made accessible to salmon through a program of stream clearing, fish facility and fishway construction. A major fishway was constructed on the Deschutes River at Olympia. Here the migrating salmon ascend from Capitol Lake above the falls at Tumwater. A predetermined number of salmon are allowed to continue up river to spawn and the balance are taken to holding ponds at Simpson hatchery and stripped of eggs. Unfed fry from these eggs go back into Capital Lake for rearing. The returns to the area multiply each year and fish leaving the rearing area contribute heavily to sport and commercial fisheries. The lake rearing is the key to the success of this introduced run;

That salmon comprise about 25 percent of the total poundage production of all commercial fish and shellfish in the State of Washington and nearly 40 percent of the total monetary value to the commercial fisherman. In addition, the rapidly growing sport fishery on salmon has tremendous value to the state as a recreational resource. Because of this, it is essential that the major effort of the Department of Fisheries be expended on the conservation and propagation of the various species of salmon that are indigenous to its waters. At the present time and for some time in the forseeable future, a major portion of the salmon

produced in the State of Washington is still contributed to the fishery by Mother Nature from her spawning and rearing areas in our rivers and streams. For this reason, it is imperative that the Department of Fisheries exert every effort to regulate its fisheries wisely and maintain these streams in productive condition so that they will continue to yield at a maximum level;

That the Department of Fisheries is expending major effort in the scientific management of its fisheries. This approach involves the determination by the Department's staff of 50 scientists of specific facts concerning the life history of the fish involved, their migration routes and timing, and something about the magnitude of the stocks at various times in their life. With proper facts available making it possible to predict stock sizees in advance and, by knowing details of the times and routes of migration and expected fishing intensity, regulatory measures are formulated that will allow for a maximum harvest by the fishermen and yet allow an optimum seeding of the natural spawning grounds;

That to enhance and improve or supplement nature's productivity, the Department of Fisheries is engaged in an active program of artificial propagation. At the present time, the Department has twenty-two hatcheries in operation throughout the state liberating primarily chinook and silver salmon into our watersheds each year;

That the Hatchery Division of the Department has a continuing research program to improve the efficiency of hatcheries through the creation of better diets, better stock selection, better planting procedures and better handling facilities. In addition to the Hatchery Division, the Department is also engaged in an active program of developing new and, as yet, unproved means of artificially propagating fish. One such program currently underway on a large scale is that of controlled natural rearing, or "fish farming". The principle involved here is one of utilizing already existing natural fresh or saltwater impoundments or creating relatively large areas of fresh or saltwater impoundments. Within these areas, it is possible to control predation and, through fertilization, achieve maximum survival of young salmon at a relatively low level of expense. Early indications are that controlled natural rearing can be a real supplementation for our ever-growing demands for salmon resources in the State of Washington. A continuing program is underway in this field to develop such areas and determine methods of achieving maximum production of salmon from such areas. At the present time, a large saltwater area at Whitemans Cove on Case Inlet is under construction and more areas such as this are budgeted for and will be constructed during the current biennium;

That to enforce the regulations that are formulated from scientific information, the Department of Fisheries has a compact but highly mobile and efficient patrol force. It is the responsibility of this force to see that the regulations are observed and to report to the Director on any field condition that may have an impact on the salmon resources;

That the Department of Fisheries goal as far as salmon are concerned is to rebuild the stocks of salmon to maximum levels consistent with available natural areas and budgetary limitations for the construction of artificial propagation facilities; and that the Department of Fisheries, for this biennium, will spend approximately $8,500,000.00 for these programs.

That the conservation and management of the salmon resources of the State of Washington is the responsibility of the Department of Fisheries. In meeting this obligation, the Department carries out a broad program of management on the streams, in the sounds and bays and in the ocean. The international aspects of the high seas migrations of our salmon demand that this program go beyond the boundaries of our State and into the coordinated laws and studies with other States and nations;

That one essential part of the broad management program is the regulation of the harvest of salmon in the salt and fresh water areas. It is these regulations that provide the escapement necessary to seed the streams in order to maintain a perpetual supply of salmon for harvest by all the people. If proper regulations are applied, a maximum number of fish can be harvested and the run maintained from year to year to insure a continuous supply for limits on the take by sport gear protect them as well as restrictions on the use of small mesh in nets designed to capture the adult forms. Finally, their mature size achieved, they are protected all along their route of return to their home streams. In the open ocean, the commercial hook and line fishery is limited by season and the amount of gear that can be used and there is a complete ban on the use of any form of net. The ocean sport fishery is curtailed by season, bag, and possession limits. As the

37-688—64——16

salmon leave the broad expanse of the ocean and enter the passages that lead them directly to their home stream, the harvest is further restricted by limited days of fishing per week, special complete closures during the peaks of the runs, and by the existence of large preserve areas off the mouths of the streams to provide an undisturbed area for them to delay and orient themselves before moving upstream;

That once in the fresh water stream, the adult fish are further protected by laws that either prevent fishing entirely or drastically limit fishing in time, place, and manner. It is most essential that regulations be designed to give the salmon proctection all along their normal paths of movement from the time of egg deposition to spawning. If any one portion of the life cycle is left unprotected, fishing restrictions on other portions will ultimately be rendered useless;

That the regulations imposed on a fishery by the Department of Fisheries are based on the premise that satisfactory escapement is paramount and are based upon the framework of past years' regulations and their results, taking into account the escapement in parent brood years and the predictable fishing effort. Any new or increased effort over and above that which was in effect when the basic framework of the regulations was established must be compensated for;

Sudden, unexpected increases in the fishing effort can make carefully designed regulations meaningless and unless proper measures are taken in time, can have disastrous effects on a fish run. It is for this reason that the Fisheries Department must know the amount of effort that will be expended to harvest a particular run and then set controls to insure proper escapement;

That in the case of the Indian fisheries of the State, this has been impossible to accomplish. The State of Washington contains eighteen Reservations and thirty-three separate tribes and bands of Indians. The total State Indian population approximately 20,000 Indians, of whom 2,500 exercise their rights to fish. The Indian population and fishermen are on the increase. Virtually all important salmon producing rivers in the State are subject to Indian fisheries. Uncontrolled fisheries on these streams render all conservation measures completely useless in that they possess the capability of cutting deeply into the seed stock or destroying it completely. In that they are uncontrolled, these fisheries cannot be compensated for by restrictions elsewhere. Compensation has been suggested in the form of restricting further the non-Indian fishermen's take to achieve added escapement. It has been our experience, however, that added regulation of non-Indian gear only results in proportional increase in the effort and catch of Indian gear;

That it has been demonstrated in a number of places on the Columbia River, the Fraser River and the Puyallup River, for instance, where the regulation of one form of gear has not in reality saved any fish for spawning purposes but instead has merely provided additional catch to the next fishery on the route of migration. In such a case, nothing has been accomplished for the purpose of conservation or enhancement of the fish stocks. Dollars have merely been taken from one pocket and put in another;

That some of our salmon runs are now dangerously low and in many cases are even to the point of facing extinction in the very near future. Uncontrolled fisheries on salmon seed stocks plainly cannot exist if the citizens of Washington are to enjoy these fish runs for perpetuity;

That simply stated, the production and harvest of salmon is cyclical in pattern and might be compared to an endless chain. The chain is only as strong as its weakest link, and in the case of the salmon chain unregulated Indian fisheries are the weak link. All of the efforts of the Department of Fisheries financed with public funds in its program of salmon management are aimed at providing salmon for harvest for all our citizens. If uncontrolled salmon fisheries are going to occur in the rivers and bays so that few or no fish reach their spawning grounds, there is little need for the extensive management program we have today. If the catch by all fishermen, both Indian and non-Indian, is not regulated to prevent unrestricted fishing, soon there will be no salmon runs to harvest. On the other hand, if proper controls are observed on our fisheries so that a strong rehabilitation program can be justified and maintained, we will have bigger spawning runs and hence more fish for all of our citizens.

That a Puyallup River commercial fishery had not been in existence for 50 years prior to 1953 in which year several drift and set gill nets were fished catching 104 silver salmon.

That by 1959 some 38 drift gill nets, 5 long set nets and 3 traps were fished in and near the mouth of the Puyallup River by the Defendants catching 2,562 chinook salmon, 8,103 silver salmon, and 311 chum salmon.

That this fishery has continued to increase in efficiency operating 24 hours per day, seven days a week throughout the fish runs so that in 1962 the defendants caught *5,800* chinook, and *27,283* silver salmon.

That during this same period, the spawning escapements in the Puyallup River for the purpose of reproducing and perpetuating this public resource has declined steadily and drastically as indicated by index counts at an upstream dam on the Puyallup River which were in excess of 14,000 in 1953 but have dropped to about 2,400 in 1962.

That the silver salmon run now in Puget Sound and in the Puyallup River is the smallest in many years and that the Department of Fisheries in an attempt to preserve this run has curtailed commercial fishing from a scheduled 3-day fishing per week to no fishery during the entire peak of the silver salmon run extending from October 10 to October 28, a period of 18 days.

That immediate action to curtail the fishery of the defendants on the Puyallup River is imperative. Careful management and propagation practices over many years resulted in high sustained yields of salmon being produced by natural spawning in the Pulyallup River and its tributaries and by operation of the Department of Fisheries hatchery on Voights Creek. The fish produced have been enjoyed by the citizens of Washington and are an important contribution to the State's economy.

That because of the low level of the silver salmon run in Puget Sound, the demonstration of efficiency of the defendants' nets and traps in and near the mouth of the Puyallup fishery and the recorded drastic drop in spawning salmon stock availability in the Puyallup River in recent years, continued operation of this commercial fishery by the defendants in this established salmon preserve will seriously damage the salmon runs in question.

That in consideration of the effectiveness of the type of gear being used and the water conditions prevailing throughout most of the salmon runs, the continuation of such a fishery will result in the reduction of the anadromous fish runs in the Puyallup River to a point where they are no longer of any practical or economic value to the citizens of Washington.

That if cessation of the Defendants' fishery in the Puyallup River does not occur, then it may well be necessary to abandon the large investments of public tax dollars in salmon facilities and management programs.

(S) EDWARD M. MAINS.

AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, ss:

I, William Rees, being first duly sworn upon oath, depose and say:

That I am a fisheries biologist employed by the Washington State Department of Fisheries as Senior Biologist in charge of fresh water research;

That I graduated from the University of Washington in 1950 with a B.S. in Fisheries; that I have worked for the U.S. Fish and Wildlife Service in Alaska on fresh water research on Bristol Bay Sockeye; that in 1952 I began working for the Washington State Department of Fisheries and since then have been so employed; that my duties have concerned all phases of the fresh water life cycle of various species of salmon including environmental studies, watershed evaluation and control; escapement indices work including tagging and recovery, power dam construction and its effects upon the salmon and its habitat, controlled natural rearing of salmon in fresh and saltwater areas as supplemental means to produce fish, and others;

I further state the the Nisqually River and its tributaries is an important natural salmon producing watershed in the Puget Sound area. Significant runs of chinook, silver, and chum salmon utilize the Nisqually River during the fresh water part of their life cycle;

That chinook salmon produced in the Nisqually River are called kings, falls, or blackmouth, depending on where they may be caught. The adults migrate into the Nisqually River during September to November to spawn;

That these fish at maturity ascend the Nisqually River, the males and females distributing themselves over the gravel bars of the main river, pair off and dig depressions in the gravel and deposit their eggs;

That the adults, their spawning completed, by the end of November, have now ended their life span and die;

That the eggs deposited in the gravel beds develop and by January have emerged into small fry that swim free in the river, frequenting the side eddies and quieter water until they are strong enough to venture further. By late spring and early summer when they are 2–3 inches long, they migrate to the ocean where they live, continuously growing, until they return to their stream of origin. Although usually 4 years old when they mature and return, the chinook may be three, four or five years old; and the period of growing in the ocean may find them traveling as far north as Alaska and as far south as California;

That silver salmon ascend the Nisqually River between September and January and spawn in the small tributary streams during November, December, and January. The fry emerge from the gravel in March through May and remain in the stream environment for one year migrating to sea in their second year. They mature and return to their stream as three-year-old fish;

That chum salmon ascend the Nisqually River from November through January and spawn in the main stream and tributaries during November, December, and January. Chum fry remain in fresh water only a short time, migrating to the ocean during their first spring. They remain in the ocean from 3 to 5 years before returning to their parent stream;

That pink salmon ascend the Nisqually River during September, October, and November and spawn in the main stream during October and November. Pink fry remain in fresh water only a short time, migrating to the ocean during their first spring. They mature and return to their parent stream as two-year-old fish.

That all five species of the Pacific salmon as well as the steelhead trout are anadromous species; that is, they require that a part of their life cycle be spent in the fresh water environment and that a part of their life cycle be in the marine environment. All species of salmon return to their parent stream to lay their eggs and thus complete their life cycle. Therefore, sufficient escapement of adult fish to the spawning grounds must be maintained to assure that the race may be perpetuated. Light escapements to the spawning areas in one year because of heavy catches or unfavorable natural conditions decreases the abundance of the returning run. As a general rule, poor escapements produce poor runs and large escapements produce larger runs. When the catch on any specific run of fish is uncontrolled, the resulting escapement may be so light as to destroy the value or potential of the run;

That the monetary value placed upon a potential pair of spawning salmon is incalculable. This is a renewable resource just as our forests are, with the exception that with salmon the progeny of a parent can be harvested every third or fourth year instead of waiting 50 to 100 years as in the case of a tree;

That this Department is extremely aware of the effectiveness of gill nets and set nets in capturing moving salmon in a river, as example, in past years catch data from such types of gear up and down the Pacific coast. That at present the Nisqually Reservation Fishery is observing closed fishing periods to allow for escapement and that the chum run in particular has indicated by catch statistics from the reservation fishery has been maintaining itself at a commercially feasible level for the reservation fishery.

That it has been conclusively demonstrated by this Department as well as other Conservation Agencies in the Northwest that unrestricted fisheries have the capability of effectively destroying a given run.

That it is my expert opinion that an unrestricted off-reservation fishery on the Nisqually River, if continued, has the capability of effectively destroying the Nisqually River as an important natural producer of salmon to the State of Washington and further this damage could be so extensive and complete as to rule out rehabilitation of the natural run into this watershed in spite of any drastic regulatory measures that might be prescribed.

WILLIAM REES.

AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, ss:

I, C. H. Ellis, being first duly sworn upon oath, depose and say:

That I reside at 323 West V Street, Tumwater, Washington.

My educational background includes a degree of Bachelor of Science in Fisheries from the University of Washington (1932).

I am employed by the Department of Fisheries of the State of Washington and hold the position of Supervisor of Hatcheries. I have been employed by the Department for thirty years and have held my present position for twenty-two years.

The Department has, for the past fourteen years, maintained a program of planting large numbers of anadromous fish in the Nisqually River. The attached table, marked Exhibit A and by this reference made a part hereof, contains a true record, to the best of my knowledge, of the plantings of salmon into the Nisqually River watershed for the past fourteen years.

All plantings of salmon into the Nisqually watershed, excepting chum salmon, have been donations from stocks of other rivers. The Nisqually runs of salmon, excepting the chums, have not contributed to the hatchery liberations into that system.

Even though the liberations, for the most part, have been donations, the Department of Fisheries has continued the planting program in a continued effort to maintain runs of fish in the Nisqually River. The 1963 plants of the river were the second largest in the fourteen-year period for yearling silvers and fall chinook fingerlings.

The stocks that have been utilized in the donation planting program on the Nisqually have been of the proper character so that their survivals and contributions to the various fisheries should be of good magnitude.

In 1961 and 1962 the chum salmon fry planted by the Department were chum salmon that resulted from eggs taken by Indians on the Nisqually River Reservation. These eggs were, by a cooperative agreement between the Indians and the Department, hatched at Department facilities and returned to the Nisqually River with Department of Fisheries planting equipment.

C. H. ELLIS.

Nisqually watershed planting from State hatcheries, 1950–63

Year of plant	Species	Brood year	Fry	Fingerling	Yearling
1950	Fall Chinook	1949		220,000	
	Silver	1948			65,000
	do	1949	810,000		
1951	do	1949			41,023
	do	1950	426,128	55,250	
1952	do	1950			59,853
	do	1951	50,000		
1953	do	1951			189,504
	do	1952	951,060	40,768	116,344
1954	do	1952			41,508
	do	1953			49,760
1955	do	1953			116,805
1956	Fall Chinook	1955		500	
	Silver	1954			80,880
	do	1955		5,000	74,640
1957	Fall Chinook	1956		150,000	
	Silver	1955			128,691
	do	1956		195,938	
1958	Fall Chinook	1957		249,800	
	Silver	1956			91,303
	do	1957			35,416
1959	Fall Chinook	1958		282,132	
	Silver	1957			141,240
1960	Fall Chinook	1959		823,821	
1961	Silver	1959			149,356
	do	1960	454,570		
	Chum	1960	107,680		
1962	Fall Chinook	1961	499,380		
	Silver	1960			105,583
	Chum	1961	154,840		
1963	Silver	1961			178,413
	Fall Chinook	1962		726,160	
14-year total			3,453,658	2,749,369	1,165,319

AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, ss:

I, Robert S. Robison, first being duly sworn, under oath, and say:

That I am presently chief Administrative Officer for the Department of Fisheries of the State of Washington. I have been with the Department for eighteen

years and for fifteen years I served in various positions including that of junior biologist, senior fisheries biologist, fisheries biostatistics supervisor, and administrator. Under these duties, I was assigned the job of ducumenting Indian fisheries of this state, their historical background, and the collection of salmon statistics pertinent to these fisheries.

The duties assigned to me in the field of Indian salmon fisheries has included the collection and summarization of annual catch statistics, monthly and daily catch breakdowns, number and types of gears fishing each day, areas of catch, and analysis of condition of the salmon runs fished by Indians in each area of the state.

I received a bachelor of science degree in fisheries from the College of Fisheries, University of Washington, 1940. I have done postgraduate work in mathematics and science at Notre Dame University, and Columbia University.

I am a member of the Pacific Fisheries Biologists' Society and the American Fisheries' Society.

I reside at 5011 Laura Lane, Olympia.

The development of the salmon fisheries of the coastal and Puget Sound areas is similar in many respects to those of the Columbia River. These fisheries generally started in the late 1800's and were primarily commercial in nature. As the years progressed, certain types of gear were eliminated in favor of others and in recent times sport fishery began to take a prominent role. At the present time, the commercial fishery gear in use include the troll fishery, purse seine fishery, gill net fishery, reef net fishery, the Indian fisheries, and sport fisheries itself that finally makes up the six types of gear.

In the State of Washington there are eighteen Indian Reservations; some thirty-three separate tribes of bands of Indians. The total state population approximates 22,000 Indians of which 3,000 exercised their rights to fish. The Indian populations and the number of Indian fishermen are on the increase. The total salmon catches from reservation areas and established recognized fishing grounds range from 300,000 to 550,000 fish annually.

The number of Indian fishermen and the amount of Indian gear fishing the Nisqually River has increased greatly during the last 7 years. The Department of Fisheries, under my jurisdiction, has maintained catch records of the take of fish from the Nisqually River since 1935. The fishing gear and catch is now rising to a point quite similar to that of a period existing during 1939 to 1945 after which period the catch and total run of salmon were greatly reduced in numbers for 12 straight years. The runs of salmon were almost reduced to the point of extinction. During this period, from 1939 through 1945, there was a great influx of Quinaielt fishermen, Puyallup fishermen, and other Indians from the lower Sound. At the available fishing grounds off the reservation on the Nisqually River, the effort increased from normal 16, 19, and 20 nets to a high of 45 and 50 nets. The catch during this period had increased from 9,000 chum salmon to a high of 58,000 chum salmon for an average of 45,000 chum salmon during this period. For 12 years following 1945. the chum salmon catch dropped to 9,000 and 8,000 and lows of 2,000 and less than 1,000 fish. The effort dropped accordingly back to the normal 20, 23, and 26 nets as the availability of salmon. The entire increase in gear and catches was due to the off-reservation fishery on the Nisqually River. The same trend again is in evidence, beginning in 1957 when an off-reservation fishery began to develop, and was prosecuted by non-Nisqually Indians. The catch during this period, from 1957 through the present time, has been from 18,000 to 25,000 chum salmon, and averaged around 22,000 fish. The effort again has increased to 40 nets and 45 nets, from the normal 20 to 26 nets in existence for the 12 years previously. This increase is entirely attributable to off-reservation fishing by other Indians.

That an uncontrolled Indian fishery off the reservation will increase to such proportions as to render all conservation measures completely useless has been well established on the Green River and Puyallup River in that such a fishery possesses the capability of cutting deeply into seed stock that has been allowed to escape from other areas. In view of these similar happenings in other Indian fishing areas of the State it is my opinion that the effort would increase on the off-reservation areas of the Nisqually River to such a point that every available fishing spot on the river and out into the Nisqually Reach area of lower Puget Sound would be utilized and that such an effort would eventually destroy the spawning stock of salmon completely.

That on the basis of my detailed knowledge and with the experience gained in working with the Indian salmon and steelhead fisheries of the State it is my opinion that the Nisqually Indian fishery, if allowed to continue in its present

off-reservation form, would deplete the Nisqually River salmon and steelhead points to a point where there would be no significant sport or commercial return.

That it is my opinion as a fisheries biologist, the activities of the defendants using set nets, drift gill nets will endanger and reduce the numbers of migrating salmon to a point where the return runs from this spawning will be lowered and depressed. Should this depression of run strength occur over a period of spawning cycles, the salmon runs would be destroyed for all effective purposes as no significant sport or commercial value would then be attached to these runs. An irreparable injury would thus occur to this great natural resource.

That there are Indian fisheries in the State that have begun in recent times in much the same manner as is now being emphasized on the Nisqually River.

That one of these fisheries is in the Puyallup River that began in 1953 and where no record of any previous Indian fisheries existed between 1900 and 1953.

That in 1953 the three Indian gill nets were placed on the Nisqually River below the main Highway 99 bridge during the fall run of chinook and silver salmon. The catch was 104 silver salmon and 2 chum salmon this first year. This effort rapidly expanded year by year, until at the present time, 45 to 50 drift gill nets, 15 to 20 set nets and a complex of traps involving 5 to 6 impoundments are in operation between the Highway 99 bridge, downstream to Commencement Bay, and on out to Point Defiance and Dash Point.

The silver salmon catch increased from 104 silvers in 1953 to 12,000, 10,000, 16,000, and 27,000 fish in 1958, 1960, 1961, and 1962, respectively. To date in 1963, 6,000 silver salmon have been taken, and the total catch, which will result from the 1960 escapement, will be the lowest since the Indians began fishing the river in 1953.

The chinook salmon increased from zero in 1953 to 439 in 1954, and then to 2,500, 5,200, 10,600, 5,800, and 8,250 in 1959, 1960, 1961, 1962, and 1963, respectively.

The odd year pink salmon run was untouched until 1955 and from the 143 fish taken that year, the catch rose to 2,000 fish in 1957, 6,000 fish in 1959, 19,000 fish in 1961 and 32,300 fish in 1963. Obviously, escapement has been on the decline.

The Puyallup River catch has yet to reach the point where all the cycles of chinook, silver, and pink salmon begin to decline sharply in both catch and escapement, but the 1963 silver catch to date is setting a trend toward what could be the poorest silver catch since the Indians began fishing here.

The 1962 silver fishery in the Puyallup is giving the first indication that the brood year escapement was below the level required to sustain such a heavily exploited fishery.

The Mud Mountain Dam salmon counts give us the final main stem Puyallup escapement figures. The Mud Mountain Dam is located on the White River, upstream from the Puyallup and Stuck Rivers. The runs have declined from 8,000 silver salmon and 11,000 silver salmon in 1952 and 1953 to 3,473 silver salmon in 1959, 1,300 silver salmon in 1960 and 1,000 silver salmon in 1961. In 1962, Mud Mountain Dam silver salmon count was 1,966 fish.

The Department of Fisheries maintains a hatchery on Voights Creek, a Puyallup River tributary. Since 1953, when the defendants began fishing the Puyallup River, the hatchery has been experiencing steadily decreasing returns of adult silver and chinook salmon to the hatchery racks. The hatchery has, in the past, taken one-half of the males and females of each species returning and allowed the other one-half to proceed upstream to spawn naturally. On this basis the full egg capacity of the hatchery was utilized and the stream itself was seeded to optimum for natural reproduction.

Since the inception of the Puyallup River Indian fishery, the impact on the returning adults has been so great, the hatchery must now take 85 to 90 percent for artificial spawning and allow only 10 to 15 percent for natural reproduction. On this basis the Voights Creek Hatchery's egg capacity is only partially filled and the natural egg seeding is far from satisfactory so that natural spawning areas are not utilized.

The escapement of silver salmon to the hatchery racks on Voights Creek has been as follows since 1953:

	Fish		*Fish*		*Fish*
1953	1, 637	1957	1, 265	1961	529
1954	3, 388	1958	973	1962	702
1955	3,832	1959	1, 219		
1956	970	1960	361		

The level of escapement of silver salmon maintained prior to the Indian fishery averaged 7,500 fish in the period 1938–52 with low returns of 2,400 fish and highs of 10,000 and 13,000 fish in some years.

The Department of Fisheries has estimated the Indian catch of silver salmon, on the Puyallup system, to be 85 percent of the run into the River during the past few years. With the low abundance of silver salmon this year already apparent in the Pulyallup River, and elsewhere on Puget Sound, the Indian catch will be close to 90 percent of the run.

That one other Indian fishery that has begun in recent times is the Hoko River Indian fishery prosecuted by the Makah Indian tribe of Neah Bay. The Hoko River was opened to unrestricted Indian fishing through court action carried by the Makah tribe to the Circuit Court of Appeals in San Francisco. In various court actions lasting from October 1940, Makah v. Brennan, Makah v. Moore, and Makah v. Schoettler, to 1951, the Department of Fisheries constantly maintained that this stream could not stand a set net and gill net fishery even if the number of nets and time fishing were regulated. The stream itself is such that escapement can occur only on freshets and a rise in the riverflow. Fish cannot leave this estuarial area until the river rises in late fall and early winter.

That the Hoko River Indian fishery is mainly for silver salmon with chinook salmon being caught incidental to this fishery. When fishing first began in the fall of 1952, 23 set net locations were authorized by the tribe. Gear was staked or set along the bank in eddies and back sloughs. The year of 1952 was the driest fall on record, no measurable rain fell in the Hoko area until the first week of November. The silver salmon run to the Hoko was large and entered the estuary and tidal back sloughs on flood tides. Fish could not ascend the stream because of low flows. Extensive milling occurred in the breakwater and estuarial areas and 9,500 silver salmon were caught in this first season.

That in 1952 biologists counted less than 100 pairs of silver salmon spawning in the entire Hoko system. In 1955, 2,050 silver salmon were caught, spawning observations were made, but river condiitons did not permit an accurate count. The return catch, however, three years later from this brood year spawning totaled 1,718 silvers and the return catch from that year's brood year spawning was 1,058 silver salmon. This decline is true for all other cycles of silvers in the Hoko River. Each return catch is less than that of the brood year, and the total catch in all years have dropped tremendously from 9,000 fish in the first year's fishing to less than 1,000 in subsequent years. Total closure to all net fishing is the only regulation that can be effective. The fishery may go on for years but each catch will be smaller than its parent. So it will go, until fishing is no longer profitable here and the run is of no significant value.

That the Indian fisheries of the Nisqually and of all the river systems of the state form a part of a complex management problem and these fisheries must be regulated as a part of the overall salmon and steelhead management needs. That regulations imposed on a fishery by the Department of Fisheries are based on the premise that satisfactory escapement of various salmon races and runs are paramount. The Department of Fisheries is vitally concerned will all the salmon runs in the Nisqually system—the chinook salmon, chum salmon, pink salmon, and silver salmon. The regulations governing these fish in all areas through which they migrate is complex and each part of this regulatory system is dependent on the escapement gained through each of the migratory areas.

That the Nisqually Indian treaty fishermen already enjoy a privileged fishery on their reservation and do adequately crop the salmon runs in this area. Further expansion of fishing effort in off-the-reservation areas places an added burden on the salmon stocks that cannot be predicted. The regulations of the Department of Fisheries are based upon the framework of past years' management practices and their results. Any new and increased effort over and above that in effect at the time the basic framework was established, must be compensated for. Sudden unexpected increases in fishing effort anywhere on the migratory route of a returning run can make carefully designed regulations meaningless, and have a disastrous effect on the total salmon population.

That there are sudden unpredictable increases in the silver salmon fishery during certain years on the Nisqually River and that such increase in unpredictable effort and catch was made at the expense of regulatory measures imposed elsewhere on the migration route of the Nisqually River salmon has been established.

That from my studies and knowledge of Indian fisheries and my understanding of what can happen once an off-reservation Indian fishery commences through the use of today's modern gear, it is my opinion that the Nisqually River salmon and steelhead runs would cease to be of any importance once this off-reservation Indian fishery had expanded to its limit.

ROBERT S. ROBISON.

AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, ss:

I, Cliff Millenbach, being first duly sworn, under oath, depose and say:

I am employed as a fishery Biologist in the position of Assistant Chief, Fisheries Management Division, State of Washington, Department of Game. My home address is 2552 John Luhr Road, Olympia, Washington. Following graduation from the University of Washington with a Bachelor of Science degree in Fisheries, I obtained employment with the Department of Game in November 1940. During continuous employment since then, except for 3½ years in the Air Force, my assignments have included both office staff and field work. For 10 years prior to my present position, I was general Hatchery Superintendent. During this period I was directly responsible for establishing a highly successful hatchery program for steelhead. This involved many fish marking experiments to establish a sound knowledge of the life history of steelhead from which the present management program was developed. This program has reestablished several runs of steelhead which had been depleted almost to extinction.

On one special study stream overfishing and inadequate protective regulations had reduced the annual escapement of steelhead to less than 300 fish, as compared to recorded runs of over 3,000. Protective regulations based on life history information and supplemental hatchery plants have restored the steelhead runs in this stream.

The use of gill nets in an unregulated and unrestricted fishery for steelhead in the Nisqually River would, in my opinion, soon deplete the runs of steelhead in that river. Nylon gill nets are known to be extremely efficient and capable of catching 98 percent of a run of anadromous fish. The efficiency of gill nets in the Nisqually River is enhanced by the long periods of muddy water and the absence of many extreme fluctuations in flow resulting from storage reservoirs. An escapement of approximately 50 percent of a run of steelhead for spawning purposes is regarded as necessary to maintain runs if no plants of hatchery fish are made to supplement the natural reproduction. Regulations as now established for sports fishing on the Nisqually River assure an adequate escapement through that fishery. River gill net fisheries for steelhead are known to be capable of catching several times the catch on sports gear.

Based on my experience in steelhead management work for fifteen years, I can only conclude that control of the time, place and manner of the take of steelhead in the Nisqually River is an absolute requirement if the steelhead run in the Nisqually River is to be preserved.

/s/ CLIFF MILLENBACH.

AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, ss:

Ralph W. Larson, Having been first duly sworn, deposes and says:

My name is Ralph W. Larson. I reside at 2610 Hewitt Drive, Olympia, Washington. I am presently employed by the State of Washington Department of Game as a Power Dam Coordinator. I have been employed by the Department since May of 1947.

I graduated from the University of Washington in 1944 with a Bachelor of Science degree in Fisheries. I took graduate work in fisheries and mathematics for nearly a year in 1946–47. During this period, I was a laboratory instructor in basic fisheries courses and was employed part-time by the Fisheries Research Institute doing basic life history work on Alaskan Salmon.

In May of 1947 I was employed by the Washington Department of Game as a District Fisheries Biologist. From 1947–50, I was responsible for the management of all game fish in five counties in the State of Washington. This work included lake rehabilitation, fish stocking, disease studies, fish hatchery programming for two hatcheries in my district biological studies on fish problems and making recommendations as to regulations. From 1952 to 1957, after re-

turning from active duty with the U.S. Marine Corps, I was assigned the same general area as a steelhead trout biologist. My work in this capacity involved life history studies of steelhead, management and regulation work on steelhead in six counties, and the management of all game fish within two of these counties. In 1957, I became a Fisheries Management Coordinator. This position involved work relating to the problems arising from water uses and their effect on fish life. It was my duty to prescribe fish protective measures and fish passage facilities for various hydraulic projects, water diversion and hydroelectric projects. I represented the Department on various technical committees concerned with water uses.

In October of 1962 I became Power Dam Coordinator. This work involves the fish and wildlife problems arising from water development projects. I am responsible for developing and coordinating all fish and wildlife studies connected with water development projects and for coordinating all negotiations for mitigation of damages caused by these various projects. I still am responsible for prescribing fish protective measures and fish passage facilities for hydroelectric projects.

I am a member of Sigma Xi, science honorary, the Pacific Fisheries Biologists, the American Fisheries Society and several technical groups dealing with fisheries problems and hydroelectric projects in the Columbia Basin and the State of Washington.

Washington is noted for being the greatest producer of steelhead trout in the West. Our State has attained this distinction by the developument of a successful management and artificial propagation program. The steelhead has been under the jurisdiction of the Washington Department of Game, since it was declared a game fish by law in 1925 and we have worked most diligently since that time to improve the populations of these fish.

The increase in fishing pressure for steelhead trout since World War II has required the Department of Game to undertake an extensive and expensive program. Since the fishery for steelhead occurs exclusively in the rivers of the State during the spawning migration, regulations must be very precise to insure an adequate escapement of fish to the spawning grounds. Every segment of the fishery must be regulated to prevent over-fishing and the decimation of the run. We have been able to accomplish this on rivers that we completely control.

Licensed steelhead fishermen are stringently regulated as to fishing seasons, daily, weekly, and season limits, types of gear and methods of fishing. These regulations are enforced by a well-trained Enforcement Division of the Department of Game.

Our Department further protects and conserves the steelhead by screening of diversions, stream clearance projects, controlling of all hydraulic projects, assisting in the planning and supervision of operation of fish passage facilities at dams, and by artificial propagation.

Although our artificial propagation program for steelhead trout is a successful one, it is necessarily an expensive means by which the catch of steelhead in a river can be increased or even maintained in the face of an overfishing problem. This program is paid for by licensed sport fishermen of our state and we do not feel that these sportsman-financed fish should necessarily be relied upon to maintain a commercial Indian fishery. Therefore, we have not relied upon a consistent artificial propagation program to attempt to maintain or increase the catch of steelhead in the Nisqually River. We must rely then, solely upon regulation of the fisheries on this river to maintain the steelhead runs.

An unregulated and unrestricted gill net fishery on this river could and I feel would seriously deplete the steelhead populations of this river even with more stringent sport fishing regulations or elimination of the sport fishery and irregardless of an artificial stocking program.

It has been shown in at least one instance where, in the Fraser River, a gill net fishery for salmon took 98 percent of the run that entered the river. If this can happen on a river the size of the Fraser, then it can more readily be accomplished on a river the size of the Nisqually.

(Signed) RALPH W. LARSON.

AFFIDAVIT

STATE OF WASHINGTON,
County of Thurston, ss:

I, Robert Robison, being first duly sworn, under oath, depose and say:

That I am presently Fishery Administration Officer for the Department of Fisheries for the State of Washington. I have been with the Department for 17½ years and for 15 years I served in various positions including that of

Senior Fishery Biologist, Fisheries Statistician and Administrator and my various jobs have been primarily concerned with the Indian fishery of this state. My duties have included collection of catch records, data on unit of efforts, area of catch, gear used and other related data concerned with the Indian fishery. I received a Bachelor of Science Degree in Fisheries from the School of Fisheries, University of Washington in 1940. I have done post-graduate work in mathematics and science at Notre Dame University and Columbia University.

I am a member of the Pacific Biologists Society and the American Fisheries Society.

I reside at 5011 Laura Lane, Olympia, Washington.

The development of the salmon fisheries of the coastal and Puget Sound areas is similar in respect to those of the Columbia River. These fisheries generally started in the late 1800's and were primarily commercial in nature. As the years progressed, certain types of gear were eliminated in favor of others, and in recent times the sport fishery began to take a prominent role. At the present time, the commercial fisheries gear in use includes the troll fishery, or hook and line gear, purse seines, gill nets, and reef nets. The sport fishery itself makes up a fifth type of gear.

In the State of Washington there are 18 Indian Reservations and 33 separate tribes and bands of Indians. The total state Indian population approximates 20,000 Indians of which 2,500 exercise their rights to fish. The Indian population and the number of Indian fishermen are on the increase. Total salmon catches from these reservation areas and Indian fishing grounds range from 300,000 to 550,000 fish annually.

The number of fishermen and the amount of Indian gear fishing the Puyallup River has increased tremendously since the inception of this fishery in 1953. So great is the amount of fishing gear and fishing effort in the Puyallup River, that the continued existence of this cycle of Puyallup River silver salmon is in jeopardy.

The timing of the entrance of the silver salmon into the Puyallup River is such that the peak of their seasonal distribution is now (late October-early November). The run strength is low, following the low abundance of the silver salmon run generally in Puget Sound.

On the basis of my detailed knowledge and the experience gained in working with the Indian salmon and steelhead fisheries of the state, it is my opinion that the Puyallup River Indian fishery, if allowed to continue, would deplete the Puyallup River salmon and steelhead runs to a point where there would be no significant sport or commercial value or return in all the fresh and marine water areas where the Puyallup River salmon and steelhead runs range and rear. This year's silver salmon run to the Puyallup River will be depleted by the Indians to the point that the cycle will be destroyed.

The Puyallup River Indian fishery began in 1953 and there is no record of any previous Indian fisheries existing here between 1900 and 1953.

In 1953, three Indian gill nets were placed on the Puyallup River, below the main Highway 99 bridge during the fall run of chinook and silver salmon. The catch was 104 silver salmon and 2 chum salmon this first year. This effort rapidly expanded year by year, until at the present time, 45 to 50 drift gill nets, 15 to 20 set nets and a complex of traps involving 5 to 6 impoundments are in operation between the Highway 99 bridge, downstream to Commencement Bay, and on out to Point Defiance and Dash Point.

The silver salmon catch increased from 104 silvers in 1953 to 12,000, 10,000, 16,000 and 27,000 fish in 1958, 1960, 1961, and 1962 respectively. To date in 1963, 6,000 silver salmon have been taken, and the total catch, which will result from the 1960 escapement, will be the lowest since the Indians began fishing the river in 1953.

The chinook salmon catch increased from zero in 1953 to 439 in 1954, and then to 2,500, 5,200, 10,600, 5,800 and 8,250 in 1959, 1960, 1961, 1962, and 1963 respectively.

The odd year pink salmon run was untouched until 1955 and from the 143 fish taken that year, the catch rose to 2,000 fish in 1957, 6,000 fish in 1959, 19,000 fish in 1961 and 32,300 fish in 1963. Obviously, escapement has been on the decline.

The Puyallup River catch has yet to reach the point where all the cycles of chinook, silver and pink salmon begin to decline sharply in both catch and escapement, but the 1963 silver catch to date is setting a trend toward what could be the poorest silver catch since the Indians began fishing here.

The 1962 silver fishery in the Puyallup is giving the first indication that the brood year escapement was below the level required to sustain such a heavily exploited fishery.

The Mud Mountain Dam salmon counts give us the final main stem Puyallup escapement figures. The Mud Mountain Dam is located on the White River, upstream from the Puyallup and Stuck Rivers. The runs have declined from 8,000 silver salmon and 11,000 silver salmon in 1952 and 1953 to 3,473 silver salmon in 1959, 1,300 silver salmon in 1960 and 1,000 silver salmon in 1961. In 1962, the Mud Mountain Dam silver salmon count was 1,966 fish.

The Department of Fisheries maintains a hatchery on Voights Creek, a Puyallup River, the hatchery has been experiencing steadily decreasing returns Puyallup River, the hatchery has been experiencing steadily decreasing returns of adult silver and chinook salmon to the hatchery racks. The hatchery has, in the past, taken one-half of the males and females of each species returning and allowed the other one-half to proceed upstream to spawn naturally. On this basis the full egg capacity of the hatchery was utilized and the stream itself was seeded to optimum for natural reproduction.

Since the inception of the Puyallup River Indian fishery, the impact on the returning adults has been so great, the hatchery must now take 85 to 90 percent for artificial spawning and allow only 10 to 15 percent for natural reproduction. On this basis the Voights Creek Hatchery's egg capacity is only partially filled and the natural egg seeding is far from satisfactory so that natural spawning areas are not utilized.

The escapement of silver salmon to the hatchery racks on Voights Creek has been as follows since 1953:

	Fish		*Fish*		*Fish*
1953	1,637	1957	1,265	1961	529
1954	3,388	1958	973	1962	702
1955	3,832	1959	1,219		
1956	970	1960	361		

The level of escapement of silver salmon maintained prior to the Indian fishery averaged 7,500 fish in the period 1938 to 1952 with low returns of 2,400 fish and highs of 10,000 and 13,000 fish in some years.

The Department of Fisheries has estimated the Indian catch of silver salmon, on the Puyallup system, to be 85 percent of the run into the River during the past few years. With the low abundance of silver salmon this year already apparent in the Puyallup River, and elsewhere on Puget Sound, the Indian catch will be close to 90 percent of the run.

The Puyallpp River Indian catch has been made at the expense of stringent silver salmon escapement closures in the Puget Sound migratory areas since 1957. Closures of the entire silver salmon season in some years and the best part of the season in other years has been the rule on Puget Sound since 1957. These closures have been in effect along the entire returning migratory route of the Puyallup River silver salmon, and the result has only been to fill the nets of an increasing, intensive Indian fishery on the Puyallup River.

/s/ ROBERT S. ROBISON.

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