



Coastal Law Memo

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ANADROMOUS FISH RUNS AND INDIAN TREATY RIGHTS:

THE BOLDT II SAGA

Introduction

This Coastal Law Memo focuses on protracted litigation involving Northwest Indian treaty fishing rights. United States v. Washington, initiated in 1970, was divided into two separate parts or "phases." The first phase, called Boldt I after Judge George Boldt, the federal District Court judge who wrote the decision, addressed the issue of whether the Indians had an entitlement to a specific share of salmon and steelhead trout. (See Ocean Law Memo Issues 13, 15 and 18.) The second phase of the litigation, Boldt II, addresses the issues of whether artificially-propagated hatchery fish should be included in the allocable fish population, and whether the Indians' right to take fish includes the right to have the fishery protected from environmental degradation. It is this second phase, particularly the environmental issue, which is the primary focus of this memo.

In November 1982, a three-member panel of the U.S. Court of Appeals for the Ninth Circuit reviewed the District Court's 1980 Boldt II decision. U.S. v. Washington, 694 F.2d 1374 (1982). The opinion disagreed with the District Court on the environmental issue. However, in April 1983, the Ninth Circuit vacated that decision and decided to rehear the case before the entire fifteen-member court. 704 F.2d 1141 (1983). The rehearing is scheduled for oral argument October 12, 1983 with no decision expected before 1984. The differing interpretations of Indian treaty rights represented by the vacated 1982 Court of Appeals decision, and the decision of the District Court that preceded it, will be of central concern in the rehearing by the full court of the Ninth Circuit. The major differences in the opinions of the two courts are highlighted in this memo. To provide a meaningful context for the discussion of these Boldt II opinions,

the decision in the initial phase of the litigation, Boldt I, is first reviewed.

Boldt I

In 1970 the United States, on its own behalf and as trustee for seven Indian tribes, brought suit in the Federal District Court for the Western District of Washington to determine the extent of Indian treaty fishing rights in much of western Washington (west of the Cascades and north of the Columbia River drainage). The trial was divided into two parts or "phases." The first phase addressed the issue of whether treaties negotiated in 1854 and 1855 between the United States and the several tribes, entitled the tribes to a specific allocation of salmon and steelhead trout. Interpreting the express language of the treaties, Judge Boldt held that the Indians were entitled to one half of the harvestable fish that pass through recognized tribal fishing grounds. Further, Judge Boldt determined that fish caught by the Indians within their reservations or for ceremonial or subsistence purposes were not to be included in calculating the Indians' share.

This decision was affirmed by the Ninth Circuit. The United States Supreme Court addressed the Boldt I fishing share allocation in an appeal that consolidated several cases with similar issues. Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979) (reviewed in Anadromous Fish Law Memo Issue No. 2). The Supreme Court made some modifications, but essentially it agreed with the lower court decision. The Supreme Court objected to the exclusion of ceremonial, subsistence, and on-reservation catches from the Indians' allocation, and clarified that the language of the treaties entitled the tribes to a fifty percent share as a maximum portion of the harvestable fish. The Court further held that the

50/50 allocation was intended to secure a quantity of fish sufficient for the Indians' moderate living needs and not more than that amount.

Boldt II

The second phase of litigation was begun in 1976. Boldt II, as this phase is called, addresses two questions:

- 1) Are hatchery-bred fish part of the harvestable fish population?
- 2) Does the right to take fish include the right to have the fishery habitat protected from environmental degradation?

The District Court answered both questions affirmatively. On appeal, the three-member panel of the Ninth Circuit Court of Appeals agreed with the lower court's conclusion regarding the hatchery fish but on different grounds, and it disagreed about the right to protection from environmental degradation. Neither of these issues had been anticipated in 1854-1855 when the treaties were negotiated and fish were plentiful. Both courts had to look beyond the express language of the treaties to make their determinations on these issues.

It should be noted at this point that the Ninth Circuit Court of Appeals opinion referred to in the following discussion is that made by the three-member panel in 1982. That decision has been vacated and is now void. When the full court of the Ninth Circuit rehears Boldt II it will be looking at the same issues but it is free to render an entirely different opinion.

Hatchery Fish

The State of Washington seeks to exclude the "first generation" of hatchery-produced fish from the population of allocable fish. Hatchery-bred fish represent a large and increasing proportion of the total fish population in the treaty area. (In 1950, 10% of all steelhead trout were hatchery-bred and in 1980 the proportion had reached 60%.) Exclusion of hatchery fish would result in a significantly smaller population from which the Indians' 50% share would be calculated. While both the District Court and the Court of Appeals rejected the state's argument regarding the hatchery fish issue, the underlying bases for their decisions were different.

The District Court relied upon its interpretation of the Supreme Court's Fishing Vessel decision in its resolution of the hatchery fish issue. The

District Court looked at Fishing Vessel as confirming that the treaties were designed to guarantee the tribes an adequate supply of fish. In that decision the Supreme Court held that it was "inconceivable" that either the government or the Indians would have "deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish." 443 U.S. at 676. The District Court reasoned that excluding hatchery fish from the allocation could effectively jeopardize this treaty-secured right to an adequate supply of fish. The tribes' share of fish would steadily decrease, subverting the paramount purpose of the treaties and ultimately "crowd the Indians out," contrary to what the Supreme Court had held to be the intent of the parties when the treaties were negotiated.

The Court of Appeals read the Supreme Court's Fishing Vessel decision differently. It found no treaty-secured right to an adequate supply of fish. For the Court of Appeals, the Supreme Court's opinion mandated a fifty percent allocation to the Indians, subject to a downward revision if moderate living needs can be satisfied with less. The fifty percent share is the maximum allocation and "moderate living needs" is interpreted as a ceiling, not a floor. The Court of Appeals did not find that the Supreme Court settled the hatchery fish question via its interpretation of the intentions of the parties and based its conclusion regarding the hatchery fish on other factors.

The Ninth Circuit looked at three factors in holding that hatchery fish must be included in the allocable fish population. First, the court rejected the theory that the state has greater regulatory authority over hatchery fish than over natural fish. It found no legal basis for distinguishing between natural fish and hatchery fish.

Second, the court considered the practical aspects of the fishery. Hatchery and natural fish resemble each other and although sophisticated techniques are being developed to differentiate between them, separating out the hatchery contribution would be problematic.

Third, the court viewed the mitigating function of the hatchery programs as persuasive. The programs were established to replace fish lost due to non-Indian activities. Considering such replacements as subject to treaty allocation was held to be a just result under the circumstances.

The Environmental Right*

In the second part of its Boldt II opinion, the District Court found environmental protection for the fishery resource to be included in the Indians' treaty right to take fish. Noting that at the time the treaties were negotiated fishing was of overriding importance to the Indians, the court determined that the Indians must have believed that the treaties retained an unqualified right to continue fishing in perpetuity. Fundamental to exercising this right to take fish is that there exist fish to be taken. Without protection from environmental degradation, the treaty-secured right to take fish could become "the right to dip one's net into the water . . . and bring it out empty." This result would render meaningless the treaties' purpose--to reserve to the Indian tribes the right to continue fishing as an economic and cultural way of life. Without environmental protection there would be no fish, and without fish the Indians' rights bargained for in the treaties would become valueless.

This implied environmental right placed a duty on the state (and an equivalent duty on Federal agencies) to exercise regulatory powers in a manner which would not impair the environmental conditions necessary for the survival of the treaty fish. The Indians had argued for a "no significant deterioration" standard which could preclude developments which would appreciably reduce the environmental quality of the habitat, but the District Court rejected this approach. Instead, the court returned to the "moderate living needs" standard. Under this view, the state's duty is to refrain from conducting or permitting activities which would degrade the fish habitat to an extent that would deprive the Indians of sufficient fish for their moderate living needs.

In rejecting the District Court's implied environmental right, the now-vacated Court of Appeals opinion cited four major objections: the absence of precedent, the lack of necessity for the implied right, the unworkability of the lower court's standard of liability, and the potential for disproportionately disrupting economic development. In reviewing Fishing Vessel and other Supreme Court decisions concerning Indian treaty fishing rights, the Court of Appeals found no precedential basis for the District Court's implied environmental right. Previous Supreme Court decisions did not expressly

recognize a right to have fish stocks maintained, and no assurance was found in the treaties that there would not be a decline in the amount of fish available to be taken. The Court of Appeals panel concluded that when losses arise from the adverse effects of development, everyone would have to share in that loss. In other words, the tribes were entitled to a share of the available fish, not to protection from activities which would reduce the amount of fish available.

The second factor upon which the Court of Appeals based its decision was its finding that an implied environmental right was not necessary. The court held that there was no theoretical or practical need for the District Court's implied environmental right. A number of state and federal statutes were cited as being adequate to restrain the state from disregarding adverse effects on the anadromous fish runs. The court concluded that Indian fishing rights would be protected in fact because the state would not allow environmental degradation that would cause a drastic decline in the fish runs because of the powerful constituency of non-Indian commercial and sport fishermen who also rely on the fishery.

The record of the catches for the five salmon species in the State of Washington was noted as evidence supporting a finding that the fish continue to be comparatively abundant. The catch information was for the 1935-1970 period. The court suggested that those records indicated that there is no need for an implied environmental right or servitude to protect treaty fishing rights because sufficient fish continue to be available without it.

The Court's third objection was that the standard of liability inherent in the District Court's implied environmental right was too complex to be workable. The Court of Appeals explained that to establish a violation of the environmental right would require a complex two step process: (1) establishing that state (or federal) action, including private actions authorized or permitted, was the cause of degradation of the fishery habitat; and, (2) that the degradation would impair the Indians' ability to satisfy their moderate living needs. The court saw substantial difficulty in determining the potential degradation of the habitat and assessing the effect of the degradation in terms of decline in the fish runs.

*For other expositions of the issue of environmental protection and Indian treaty rights see Comment, Indian Fishing Rights Return to Spawn: Toward Environmental Protection of Treaty Fisheries, 61 Or. L. Rev. 93 (No. 1 1982); Anadromous Fish Law Memo Issue No. 12.

These difficulties would be further complicated by the necessity to define the Indians' "moderate living needs" and gauge what effect the degradation would have relative to that standard. The Court of Appeals warned that the standard might require some type of subsidy to compensate for adverse effects on the Indians' "moderate living needs" and represented a burden on the state not required by the treaties.

The court's fourth objection was that recognizing the implied environmental right would cause unacceptable disruption to the state's permit process. By requiring the state to make avoidance or mitigation of habitat degradation a top priority, the already complex balancing of interests which the process involved could be thrown out of kilter. The potential for denial of development based on habitat damage or insufficient mitigation was found unacceptable. Given that the treaties were designed to settle land disputes between Indians and non-Indians, it would be ironic that an interpretation of those treaties could lead to continuing disputes over land development. The Court of Appeals concluded that these results must be avoided and any environmental "right" tempered with reasonableness.

In rejecting the District Court's implied environmental right, the Court of Appeals did not hold that the state and the Indians are without obligations respecting the fishery resource. The court held that both the state and the Indians have a duty to preserve and enhance the fishery when their projects threaten existing harvest levels. This duty is focused upon whether the compensatory steps taken to protect and enhance the fishery habitat are reasonable. What mitigation measures would be "reasonable" was not determined by the Court of Appeals.

CONCLUSION

The decision on rehearing in Boldt II could have a significant impact on the Pacific Northwest salmon and steelhead trout fisheries. The manner in which state and federal agencies permit future developments which impact the fisheries could be altered by the court's decision. The operation and new development of hydroelectric power facilities could also be influenced by the direction taken by the court. The requirements of the Pacific Northwest Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839-893h, call for making power production compatible with Northwest anadromous fisheries. A finding of an implied environmental right within the Western Washington tribes' treaty rights could bolster these requirements and aid the rehabilitation

of the fisheries adversely effected by hydroelectric projects, especially if it were extended to Columbia River basin treaties. (See Anadromous Fish Law Memo Issue 21 at 6 n.39; Sanders, The Northwest Power Act and Reserved Tribal Rights, 58 Wash. L. Rev. 357 (No. 2 1983).)

When it rehears Boldt II, the entire panel of the Ninth Circuit could agree with the District Court and find that the treaties embody absolute protection against degradation of the fishery habitat. The effect of such a decision would be greater scrutiny of developments impacting the fishery and imposition of requirements for mitigation to reduce anticipated adverse impacts. Some developments which would have unavoidable adverse impacts might have to be foregone in order to preserve and enhance the fishery. Or, the Ninth Circuit could reaffirm the approach of the three-member panel and impose a reasonableness standard to determine the nature and extent of protection guaranteed by the treaties. Under this approach other interests could outweigh the Indians' fishing rights, and costly or difficult mitigation measures would not be required if they were found to be excessive (*i.e.*, not within the "reasonable" standard). Given this approach, it would not be likely that the environmental health of the fishery would be considered of greater importance than large-scale or expensive developments which served other goals.

This balancing approach misses an important legal and historical point. Indian tribes are not just groups of individuals living within the state whose interests are to be balanced and weighed against the social and economic goals of other individuals. Indian tribes are political entities. Their interests are embodied in promises made in treaties negotiated with the federal government. Moreover, the canons of interpretation for Indian treaties require that those treaties be interpreted so as to promote their central purposes and be read in a manner consistent with the Indians' common-sense understanding at the time the treaties were created. Clearly the central purpose and the Indians' contemporaneous understanding was that the treaties assured them the continued right to take fish. In this modern world of increasing scarcity and wide-spread pollution, the failure to give paramount consideration to maintaining and enhancing the environmental health of the fishery habitat could remove all substance from the treaties by leaving the tribes a right to fifty percent of nothing.

Judge Reinhardt's concurrence to the now vacated Court of Appeals

decision provides an approach which recognizes the importance of environmental concerns to the maintenance of the treaty rights. Although he does not recognize an absolute protection for the fishery, he reasoned that the treaties could not mean that the Indians rights to an equal share of fish are to be subrogated to other state goals. Judge Reinhardt finds it inconceivable that the Indians would have agreed to allow the state (or federal government) to permit the fishery to be destroyed. Neither the central purpose nor the Indians' common sense understanding of the treaties supports a view which would impose upon the state an obligation less than that which would preserve for the Indians an adequate supply of fish.

Thus, Judge Reinhardt concludes, the treaties guarantee that "all reasonable measures" be used to safeguard the Indians' supply of fish. The effect of this approach would be to give serious consideration to the Indians' rights throughout the entire process of deciding whether to grant a permit for a project which could have serious environmental consequences. This would mean affording the Indians' opportunity for full participation in the decision-making process. The state would have to consider the necessity for the project in light of its potential for adverse impact on the Indians' fish supply. Evaluation of alternate locations and the imposition of mitigation measures which would reduce adverse impacts would be required. Further, as a last resort where reasonable means failed to protect the fish supply, the state could require the project proponent to pay the Indians to compensate for the adverse impacts.

If the Court of Appeals finds upon rehearing that the treaties embody an absolute environmental right, or that the process must ensure the Indians' protection for an adequate supply of fish, the result could be a more

abundant fish supply. An interpretation of the treaties which gives protection for the health of the fishery habitat would benefit all those who fish for salmon and steelhead trout. With such an interpretation, the treaties could form the basis for protection of the resource which has otherwise not been possible. Non-treaty fishermen have lacked the legal basis to accomplish meaningful protection for the fish runs. Recognition of an environmental servitude within the treaty rights could provide an effective handle for maintaining and improving the quality of the fishery habitat. The benefits of this environmental protection would flow to non-treaty fishermen as well as Indians with treaty rights because the harmful effects of inadequately regulated dam building, water diversions, logging activities, and streamside development imperil the resource for everyone.

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