

Ocean Law Memo

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U.S. Supreme Court to Rule on Northwest Indian Fishing Rights

The controversy over fishing rights in the Northwest has been a classic example of the "tragedy of the commons." Thus it is not surprising to discover that there are now too many fishermen chasing the depleted salmon resource in the Northwest, with each group (commercial, recreational, etc.) claiming a "right" to a substantial portion of the fish. This Ocean Law Memo focuses upon the claims of one of the groups: treaty Indians.

In September of 1970 the United States, as trustee for several Indian tribes of the State of Washington, brought suit in the federal District Court claiming the Indians were not receiving the off-reservation fishing rights guaranteed to them by nineteenth-century treaties. Judge George Boldt conducted an extensive pretrial hearing to determine the facts. He then made four important findings of fact which became the ultimate basis of his holding.

First, the tribes, in negotiating the treaties, had been willing to give up large areas of land, but they had insisted that they would continue the right to fish. The Indians' intent was reflected by the treaty language "right to fish at usual and accustomed grounds and stations in common with all citizens".

Second, at the time of the treaty neither the Indians nor the white settlers contemplated that either would interfere with the other in uses of the fishery.

Third, Judge Boldt found that enforcement of Washington state fishing laws and regulations against Indians fishing at their usual and accustomed places has been partially responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians.

Finally, Judge Boldt found that enforcement of the Washington Department of Fisheries regulations allowed a large proportion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reached the tribes' usual and accustomed places.

Having made these findings of fact, Judge

Boldt declared in 1974 that Indian fishermen should be given the opportunity to harvest up to fifty percent of the resource which normally would return to tribal fishing grounds. He directed the State of Washington to reduce non-Indian fishing on runs that normally pass through the usual and accustomed off-reservation fishing areas of the tribes so that the Indians would be provided with their treaty opportunity.

The Boldt decision has generated a number of legal issues concerning allocation and management of the salmon resource. Three related cases have recently been brought before the U.S. Supreme Court. The Court heard oral arguments on February 28, 1979. The final disposition of these cases will guide the resolution of the Northwest salmon fishing rights controversy.

Two of the cases now under consideration by the Supreme Court directly place the allocation of the resource scheme before the Court. They are Puget Sound Gillnetters v. Moos and Washington State Commercial Passenger Fishing Vessel Association v. Tollefson, both 1977 decisions of the Washington State Supreme Court.

In the Moos case, the gillnetters asked the state supreme court to prohibit the Washington Department of Fisheries from issuing any regulations designed to implement the Boldt decision's resource-allocation percentages, claiming that this action was beyond the Department's statutory authority. Further, they asked the court to declare that the Department must have only one set of regulations that applies to both Indians and non-Indian fishermen. The court determined that the Department had no power to regulate fishing except for conservation purposes and therefore the Department could not issue any regulations designed to allocate the resource among competing groups. Further, the court decided that constitutional equal protection concepts require the Department regulations to apply equally to Indian and non-Indian fishermen. Finally, the state court held that the federal court could not require the Department to act beyond its statutory authority and thus that the federal District Court had no power to require the Department to implement its decision.



A few months later in the Tollefson case the Commercial Fishing Association asked the state supreme court to declare invalid the Department of Fisheries regulations which reduced from three to two the daily limit of salmon for sports fishermen. The court reaffirmed that the director of the Department of Fisheries did not have the authority to apportion fish to conform to the federal court decision and that the federal District Court could not compel a state officer to act beyond his statutory authority. Finally, it held that the granting of fifty percent of the harvestable fish to .028 percent of the population (treaty Indians) and fifty percent to 99 percent (non-Indian population) violated the Equal Protection Clause of the U.S. Constitution.

During the same period, a similar suit raising similar issues was decided by the federal Ninth Circuit Court of Appeals in San Francisco. Puget Sound Gillnetters Association v. United States District Court (actually a group of consolidated cases) involves the Gillnetters' appeal of Judge Boldt's decision interpreting the Treaty of Medicine Creek and other similar treaties. The Court of Appeals labeled the State of Washington's and the non-Indian fishermen's continued violation of the treaty and the regulations designed to implement the treaty as "the most concerted official and private effort to frustrate a decree of a federal court witnessed in this century other than desegregation." The Court of Appeals decided that (1) the order apportioning the right to take fish did not deny equal protection to non-Indians; (2) the state was bound to enforce the treaties; and (3) the District Court's orders were binding upon individual fishermen and their associations. This case is the third one now before the Supreme Court.

Taken together these cases raise three important issues, each affecting the three principal parties involved: the United States Government as trustee for the Indian tribes, the State of Washington, and the Indian tribes themselves.

Question 1: Does the treaty language, "right to fish at usual and accustomed grounds and stations in common with all citizens," require an apportionment of the salmon resource between treaty and non-treaty fishermen?

The U.S. argues that apportionment is required in order to fulfill treaty obligations. To discover whether the Indian treaty rights are in jeopardy the federal government feels the Court must consider historic and current circumstances.

The U.S. argues that historically the treaty Indians were using the fish not only as a staple in their diet but also for commerce with other Indians and non-Indians. The white settlers were not fishing extensively, and it was the federal government's objective in negotiating the treaties to acquire rights to the land and not the fish. The U.S. argues that none of the treaty negotiators anticipated the need for restrictive regulations and thus it is artificial to construe

the words "in common" as importing domestic law of the time as the body of law to resolve future problems not envisioned by either party.

As for modern circumstances, the U.S. argues that the Court cannot permit unrestricted competition between treaty Indians and non-Indians due to the latter's greater numbers, superior technology, and more developed habits of ocean fishing. The U.S. feels that tribal rights cannot be destroyed just because other fishing places remain more or less available to treaty Indians. It contends that the state, under current law, can restrict treaty fishing rights only in the name of conservation. It argues that the Indians did not agree in their treaties to be "crowded out" by white fishermen.

The State of Washington argues under two alternative theories that the treaties do not permit apportionment. The state's first theory is that the treaties created only a property interest in certain lands for the Indians and not a right to the fish. They feel that this interpretation is correct under historical and current interpretations.

The state argues that, historically, the purpose of the treaties was to prevent conflict between Indians and the incoming white settlers by minimizing contacts between the two groups. This was accomplished by creating reservations. It argues that Governor Stevens in negotiating the treaties saw that the treaty right of leaving the reservation might not by itself be sufficient to assure Indians access to the salmon fishery. Thus, to prevent the settlers from excluding Indians from the fishery, Governor Stevens placed the "in common" provision in the treaty. Specifically, the state argues that Governor Stevens was most concerned with providing Indians a right of general access to obtain food for personal consumption. It follows from this reasoning that the treaty provision was not intended to insure a special commercial fishery for the Indians, especially one that would interfere with the fishing industry of the incoming settlers. The state also argues that the historical meaning of the treaty should be interpreted in light of Governor Stevens' intentions as evidenced by the existing law at the time of the treaty negotiations. At that time, the state contends, there was in general freedom of fishing for all. But this general freedom was constrained as settlers acquired property rights along rivers, since the law permitted riparian owners to exclude the public. Thus, the meaning of the treaties is not an interest in or right to the fish but rather a right not to be excluded from fishing in certain places.

The state submits that two modern cases uphold this interpretation of the treaties. Each of these cases holds that (under the particular facts) Indians could not be excluded from land near rivers when the Indians were attempting to fish.

In the alternative, the state argues that the treaties create rights for individuals and not tribes. Since the right is an individual right and not a tribal right, the state claims that there can be no apportionment between fishermen on the basis of membership in group or in

other words on the basis of whether a fisherman is a member of the treaty Indian category or non-treaty category.

The state claims that it was necessary for the treaties to create individual rights for the Indians, since without the treaty the Indians would not have had individual rights equal to the rights of the incoming white settlers. Historically, the state says, white settlers could fish as a claim of right because of their U.S. citizenship. The Indians, however, had no right to fish off the reservation, according to the state's argument. Thus without these treaty provisions Indians could not have left the reservation to fish and the purpose of the treaties was to assure Indians access to the fishery on an equal basis with the white settlers.

The state claims that this historical right of access plus today's affirmative action programs for Indians mean that no allocation is necessary. It feels that as the Indians acquire the gear and experience necessary for fishing in deeper Puget Sound water and the ocean all parties will be receiving a fair share of the resource.

Finally, the Indians argue that allocation is necessary when one considers historical evidence and the present circumstances of the case.

Historically, the Indians feel that it is proper under the law to look at the Indians' intentions, and not Governor Stevens', during treaty negotiations. The Indians claim that their ancestors had a dependence on fish for cultural, religious, dietary, and commercial purposes. They argue that the meaning of the treaties is that Indians would continue to fish as they had before the settlers' arrival without being regulated and without surrendering any of their ownership rights to the fish. By treaty, however, their ancestors were willing to extend use rights to non-Indians and thus share the fishery.

Under present circumstances the Indians argue that the Supreme Court has already recognized allocation as being appropriate under the treaties in a recent decision. Further they feel that allocation of the resource is necessary to prevent preemption and destruction of their treaty fishing right due to (1) the nature of the anadromous fish runs, (2) the location of Indian treaty-protected fishing grounds in terminal areas of those runs, and (3) state regulations which authorize harvest of the runs before they reach Indian fishing grounds. It is the Indians' contention that any regulation which places a limit on the fishing effort or prohibits fishing entirely has the "effect" of allocating the fish catch to fishermen whose effort occurs at another place or time in the migration. Thus, the Indians claim the state is already allocating the resource with its conservation laws and the state must allocate in such a manner so that the Indians receive the share provided for them by the treaties.

Question 2: If an allocation is required, what should the apportionment be?

The U.S. argues that the apportionment must treat Indians as a group and that the actual number of tribal fishermen is irrelevant. The U.S. states that the analogy to international law is especially relevant. One should view the tribes as one country or sovereign and the U.S. as the other sovereign entity. Thus when the two sovereigns negotiated they created sovereign rights and not individual rights. Further, the U.S. claims that if the apportionment was done on an individual basis the treaty right would be worthless in practice.

Since "in common" is the language, the U.S. argues that there should be an even division between Indian and non-Indian fishermen. The U.S. claims that the tribal right extends only to those runs destined for the tribal fishing grounds protected by the treaties. As for the issue of hatchery production, the government feels that the issue is not now before the Court and should be reserved for a later time.

The state argues that if apportionment is required, it is a matter of discretion for the Court and not a matter of law to be decided by interpreting the treaties. Thus it argues that the Court must consider the equities of the individual fishermen who will be affected by the decision. The state feels that the Court should consider such factors as (1) the number of fish (2) the types of gear used and (3) the dependency of the different groups upon the fish including the possible economic disruption that would occur by allocating the resource. It argues that the Equal Protection Clause overrides the treaty and that there should be a non-discriminatory apportionment based upon the number of Indian and non-Indian individuals. Further, it argues that the Pacific Fishery Management Council (which manages ocean fisheries beyond state waters) must also apportion in the offshore area so that fishermen from all states are affected. As for the issue of hatchery production, the state contends that this issue is before the Court and this factor must be taken into consideration, with the effect being to grant non-Indians a larger percentage of the fish runs.

The Indians claim that the treaties secure to the tribes sufficient fish to meet their fair needs for food, ceremonial, and commercial purposes. They feel that the intent behind the treaties was that the tribes would continue to support themselves by fishing since the Indians did not receive very large reservations to farm. This need factor could mean that virtually the entire runs would be allocated to the Indians, and this indeed is their maximum claim. At a minimum, however, the Indians argue with the U.S. that the right is a tribal right and thus that the co-sovereigns should each receive a fifty percent share. Finally, the Indians point to statements made by the Indians' leading negotiators at the time the treaties were negotiated. These statements, the Indians claim, show that the Indians thought they were receiving one half of the fish runs.

Question 3: How should the resource allocation decision be enforced?

The U.S. argues that the Court can mandate state officials to take action inconsistent with state law because state obstacles to enforcement are irrelevant when enforcing the command of a federal treaty. Thus it claims that the state official with responsibility over the subject area has an obligation to enforce federal law. The U.S. reasons that since the Supreme Court has already ordered the state to allocate the steelhead fishery, the same allocation order can be given here.

The state claims that if the treaties create an obligation to allocate, the state has the authority to implement an allocation. This authority has three sources. First, the state by virtue of its sovereignty has traditional management authority over fisheries within its waters. Second, recent cases hold that the state has power to regulate not only off-reservation Indian fishing but on-reservation fishing as well. Third, the federal government has not preempted the state's traditional authority in the recent "two hundred mile" act.

The Indians feel that the state is to remain the principal management authority if the state fulfills the treaty obligations. If the state fails to carry out the treaty obligations, the Indians feel it is necessary for the federal government to manage the resource in order to guarantee the Indians their treaty rights.

The decisions on these issues should lend some guidance in changing the current scheme of managing the salmon resource. After the decision, we will know if an allocation of the resource is required by the treaties, and, if so, we might know what percentage allocation each group is entitled to. We will also know who has the responsibility to implement the decision. With these legal issues answered, a rational, comprehensive, and just management scheme will be easier to accomplish.

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