

Ocean Law Memo

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Treaty Fishing Rights and the Salmon Resource

or

Why All Fishermen Should Support Treaty Rights

In 1970, when United States v. Washington was filed with Federal District Judge George Boldt, two arguments were presented on behalf of fourteen Indian tribes. First, the government argued that Indian fishermen were entitled to share equally in the salmon runs which traditionally migrated past the Indians' upriver fishing places. Second, the government argued that Indian treaty rights protected the runs from depletion caused by activities such as dam construction, stream dredging, and logging. Judge Boldt, anticipating the complexities of both contentions, wisely decided to split the case into two parts. Phase I would address the "equal share" argument and Phase II would address the "environmental" issue. Although the dust may not yet have settled on Phase I, the fundamental legal battle is over. In 1974, Judge Boldt announced that the Indians were entitled to their fair share of the fish. His decision was affirmed by the Ninth Circuit Court of Appeals in 1976 and the fair share doctrine was upheld by the United States Supreme Court in 1979. In the meantime, a timetable for Phase II, the "environmental" issue, was set in motion and the case is currently before the federal district court in western Washington. The battle over the environmental aspects of Indian fishing rights is just beginning.

THE PROBLEM

The vulnerability of salmon to environmental changes is well demonstrated in western Washington, the case area of United States v. Washington. The United States Fish and Wildlife Service and the Washington Department of Fisheries have concluded that the urban, residential, industrial, and agricultural development of western Washington have adversely affected all of the salmon's environmental needs. The effect of environmental degradation is reflected in an 80 per cent decline in salmon landings in the Puget Sound region

between 1913 and 1967 (from over 15 million fish to less than 3 million). Although overfishing has played a significant role in this decline, environmental degradation has been at least equally significant. The Washington Department of Fisheries concludes that the "main cause of salmon depletion can be traced directly to the environmental changes that have taken place since the advent of civilization in the Pacific Northwest."

Salmon have five basic environmental requirements: (1) free access to and from the sea; (2) an adequate supply of clean water; (3) a sufficient amount of spawning gravel; (4) an ample supply of food; and (5) sufficient shelter. Alteration of any one of these requirements will affect the production potential of the species. Consequently, a salmon's life cycle makes it vulnerable to a wide range of environmental change.

The pattern of economic development in western Washington has had severe impacts on each of the salmon's five environmental requirements. The salmon's access to and from the sea has been impeded or completely blocked by over 141 dams (without adequate fish passages). Water quality has been degraded by direct effluent discharge from agricultural, industrial, and sewage disposal sources to the point where it is deleterious to fish. Certain logging and irrigation practices have reduced streamside vegetation and withdrawn sufficient water such that summer water temperatures often become intolerable to salmon. Suitable spawning gravel has been adversely affected by both direct gravel removal operations and by logging practices which increase sedimentation levels in the river. The general aquatic ecosystem on which young salmon depend for food has been degraded by logging, poor road building practices, and industrial pollution. Finally, the pool-riffle character of



streambeds, which provides shelter and resting places to both immature and adult fish, has often been smoothed away by river channelization projects.

THE INDIANS' POSITION

The Indians maintain that for their fishing rights to retain significance, there must be fish in the rivers for them to catch. Correspondingly, as the salmon resource dwindles, their fishing rights lose much of their value. Consequently, the Indians argue that truly meaningful treaty rights should prevent any further environmental degradation of salmon habitat.

The Indians' position is intuitively sound. Although there may be varying arguments as to the scope of the treaties' environmental protection, it is difficult to deny that the treaties ought to provide at least some protection against environmental degradation. Otherwise, one would be forced to defend the proposition that non-Indians could completely destroy the northwest's salmon runs and yet maintain their long-standing treaty obligation to respect Indian fishing rights. A treaty right to hang empty nets in empty rivers was not the type of promise envisioned 125 years ago. Presumably, the government negotiators pledged the word of the nation for something more.

A thorough evaluation of the Indians' position, however, does not end with intuitive notions of fairness. Although such considerations are a vital part of any legal analysis, they must be squared with prior interpretations of the Indian treaties, established principles of treaty construction, and court-made doctrine concerning Indians and scarce natural resources. In this light, it is worth noting that no decisions of federal appellate courts (United States courts of appeals and the United States Supreme Court) have ever expressly held treaty fishermen entitled to a set amount of fish or held "treaty" fish entitled to a healthy environment. The reason, of course, may be that the courts have never before been clearly faced with these issues. Nonetheless, the courts' approach to these new questions will be guided by their past evaluation of Indian fishing rights. It is necessary to analyze the Indians' "environmental" position in terms of established law.

THE TREATIES AND THEIR INTERPRETATION IN THE COURTS

In 1853, Issac Stevens, the first governor of the Washington Territory, negotiated eight treaties with the Indian tribes of western Washington (the Stevens Treaties). To the tribes, salmon and steelhead fishing was the economic and cultural center around which their way of life

revolved. The Indians refused to sign the treaties, which ceded much of the land area of the Pacific Northwest to the United States government, unless they were assured that they could continue to fish at their usual sites. At one of the negotiating councils, a Makah Indian stood and proclaimed that he was willing to sell all his land, he only wanted the right to fish. As a result of the Indians' insistence, each of the Stevens Treaties contained a provision by which the tribes reserved their ancestral fishing rights. The treaties were signed, ratified by Congress in 1854 and 1855, and continue to be valid law today.

The Stevens Treaties have been interpreted by the United States Supreme Court on seven different occasions. One common theme that occurs throughout the Court's decisions is protection of the Indians' right to fish from interference by non-Indians. In 1905, in United States v. Winans, the Court held that a Yakima fisherman could not be deprived of access to his traditional fishing site by a non-Indian's use of a fish wheel. In 1942, in Tulee v. Washington, the Court held that the state could not charge treaty fishermen license fees for exercising "the very right which their ancestors intended to reserve." In 1973, in Puyallup Tribe v. Department of Game, the Court held that although treaty fishermen must abide by conservation regulations, they were otherwise entitled to a fair share of the harvestable resource. In 1979, in State of Washington v. Washington State Commercial Passenger Vessel Association (Passenger Vessel), the Court upheld the obligation of the state to insure that its regulation of the non-Indian trolling fleet protected the Indians' fair share of the fish.

It has been suggested that the Stevens Treaties merely provided for Indians and non-Indians to share traditional streamside fishing sites; that the treaty was not meant to apply to the modern-day problems of a scarce natural resource. Admittedly, it is safe to assume that neither the tribal nor government negotiators could have anticipated the vast changes that have since occurred in the Pacific Northwest. It is clear, however, that both parties intended to secure for the Indians meaningful fishing rights that would remain unaltered by the passage of time. Accordingly, the treaties have been interpreted to apply to a variety of "modern" situations: from the advent of fish wheels to the effects of a petroleum-powered offshore trolling fleet. It would be consistent with this pattern of interpretation for courts to protect treaty fishing rights from environmental degradation. Although environmental deterioration may be a subtle and indirect form of interference, its cumulative effects threaten the Indian fishery (and

the non-Indian fishery) more persistently than any other factor.

THE WINTERS DOCTRINE

The development of a separate body of court decisions concerning Indian reservations and natural resources has paralleled the court's interpretations of the Stevens treaties. In 1908, in Winters v. United States, the Supreme Court considered a complaint of the Gros Ventre and Assiniboine tribes of the Fort Belknap Indian Reservation in Montana. The Reservation had been established to provide the tribes with agricultural land. The Reservation, however, consisted of mostly barren, arid land that required irrigation for the tribe's agricultural projects. Non-Indian irrigators, outside the Reservation, had reduced the flow of the Milk River to the point where there was insufficient water for the Indians' needs. The Supreme Court found it impossible to believe that the Indians, in signing the treaty which led to the Reservation, had meant to give up their only means of irrigation. Consequently, the Court held the Indians entitled to enough water to satisfy their agricultural needs. The Winters doctrine stands for the proposition that Indians are entitled to sufficient water to satisfy the purpose for which they reserved their land. Since its inception in 1908, the Winters doctrine has been repeatedly applied to reserve water for the irrigation of Indian reservations.

Recently, the Winters doctrine has been applied to require suitable stream conditions for the protection of fish and wildlife resources. In 1979, in United States v. Anderson, a federal district court held that trout fishing in Chamokane Creek was one of the purposes for which the Spokane Reservation in eastern Washington had been established. Accordingly, the court prohibited non-Indian irrigators, upstream from the Reservation, from reducing the flow of Chamokane Creek below an amount necessary for fish survival. In another 1979 decision, United States v. Adair, a federal district court in Oregon held that when preservation of hunting and fishing rights was one of the purposes for a Reservation's creation, sufficient stream flow was reserved to maintain fish and wildlife habitat.

The Winters doctrine bears significantly on the plight of the salmon and the Indian fisheries in the northwest. Underlying the Winters doctrine is the assumption that Indian treaty negotiators did not intend to reserve worthless rights and lands for their tribes. By the same assumption, the Northwest tribes were no more likely to have reserved fishing places near barren salmon streams than were the Montana tribes in Winters to have reserved barren, nonirrigable land for

agriculture. The broad, equitable Winters principles offer strong support for the Indians' claims to suitable stream conditions for the salmon. The recent Anderson and Adair decisions reflect the possibility that courts have already recognized the strength of the Indians' argument.

PRINCIPLES OF TREATY INTERPRETATION

The courts' interpretation of the Stevens Treaties and the development of the Winters doctrine have both been influenced by the general principle that Indian treaties should be liberally construed. The doctrine of liberal construction has been stated in three ways: ambiguous terms must be resolved in favor of the Indians; Indian treaties must be interpreted as the Indians themselves would have understood them; and treaty language should be interpreted in terms of the overall tenor of the treaty. These principles are all based on judicial recognition that Indian treaties were negotiated by government diplomats, skilled in the subtleties of legal language, with tribal representatives who were completely unfamiliar with legal expression and whose only understanding of the treaty came through an interpreter.

The general principles of treaty interpretation are particularly applicable to the Stevens Treaties. Governor Stevens conducted the treaty negotiations in Chinook, a trade jargon of 300 words, roughly analogous to pidgin-English. George Gibbs, a lawyer who assisted Governor Stevens, compiled a dictionary of the Chinook jargon which contains no words or expressions that the Indians could have understood to limit their right of taking fish in any way. The Indians would not have understood the treaty to allow non-Indians the right to destroy salmon runs, runs on which the tribes were staking their future. The Supreme Court, in Passenger Vessel, found it "inconceivable" that the Indians would have "agreed to authorize future settlers to crowd them out of any meaningful use" of their fishing rights.

The doctrine of liberal construction requires that treaties be interpreted to give effect to the rights the Indians believed they had secured. At one point during treaty negotiations, Governor Stevens had held up the treaty and explained to the Indians, "This paper secures you fish." It would be consistent with the Indians' understanding for the treaties to protect the fish that Governor Stevens had promised.

RECENT DEVELOPMENTS

Phase II of United States v. Washington is not the only situation in which Indians are asserting an environmental dimension of their fishing rights. The Yurok tribe

of northern California is seeking to enjoin clear cutting and related activities within the Klamath River watershed that will impair the spawning habitat of salmon and steelhead. For similar reasons, the Nez-Perce and Shoshone-Bannock Tribes have appealed a U.S. Forest Service decision to log parts of the Payette and Boise National Forests in Idaho. In 1978, three Washington tribes argued to the Atomic Safety and Licensing Board that two proposed nuclear power projects would increase water temperatures and damage the Skagit River salmon stocks. In 1979, in Puyallup Tribe v. Sortini, a federal district court in Washington issued a preliminary injunction which prohibited Pierce County employees from removing streamside vegetation which was important to Puyallup River salmon and to the Puyallup Tribe's treaty fishing rights.

These developments raise the question, how much environmental protection is required to protect treaty fishing rights? The law is not yet clear on this point, perhaps because courts are only now beginning to consider the issue. It seems likely, however, that courts will consider a variety of factors: Indian needs, the state of the resource, and, possibly, the off-setting effects of rehabilitation and enhancement programs. The touchstone for future court decisions, however, would seem clear: the environment must retain sufficient integrity to insure that Indian fishing rights remain meaningful.

WHY ALL FISHERMEN SHOULD SUPPORT TREATY FISHING RIGHTS

All fishermen have a stake in a healthy resource. The environmental deterioration that can decimate salmon and steelhead stocks threatens not only the fish but the survival of both Indian and non-Indian fisheries. In spite of a variety of environmental laws, stream loss is occurring at an accelerating pace. The Washington Department of Fisheries has warned that if this trend continues, "natural salmon populations will decline faster than they can be replaced by hatchery fish."

Treaty fishing rights can be a potent weapon in the battle for salmon habitat. Non-treaty fishermen can attest to the earnestness with which courts view infringement of Indian fishing rights. Much of the judicial respect given Indian treaties is required by the United States Constitution. Under the supremacy clause, treaties are the "supreme law of the land" and take precedence over conflicting state laws. Consequently, if state legislation authorized or licensed activities which adversely affected salmon, such as ill-considered logging or road-building practices, a strong argument could be made that the states' action must accommodate preservation of the federally-protected fish resource.

Treaty rights also offer some protection against federal actions. In particular, federal projects which impair Indian fishing rights require specific Congressional authorization; authorization which a politically-sensitive Congress may not be inclined to grant. In 1977, in Confederated Tribes of the Umatilla Reservation v. Alexander, Federal District Judge Robert Belloni prohibited the United States Army Corps of Engineers from damming Catherine Creek in central Oregon until Congress had specifically authorized the project, with knowledge that the dam would destroy upstream Indian fishing rights. Except for its conflict with treaty rights, the proposed dam would have been well within the scope of the Corps' general project authorization. The Corps dropped the project rather than seek express Congressional permission to destroy Indian rights.

CONCLUSION

On a number of occasions, Indian fishermen have asserted their treaty rights to protect the salmon resource. In Tribes of the Umatilla Reservation, they stopped a dam; in Puyallup Tribe v. Sortini, they protected streamside vegetation; in Adair, they insured adequate stream flow. In United States v. Washington, Phase II, they are asserting the general proposition that salmon habitat should be protected against further degradation of any type.

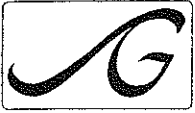
In all of these cases, the tribes are focusing their energy and attention on the real threat to the salmon resource: the steady environmental deterioration of the Northwest's salmon streams. On two occasions, Indian fishermen have been joined in their efforts by non-Indian commercial and recreational fishermen. It would seem wise that all fishermen should stop the infighting over who gets what of the dwindling salmon runs and, instead, refocus their efforts on legal mechanisms to preserve and rebuild the salmon stocks that were once the pride of the Northwest.

The task of preserving the salmon in an era of pollution, watershed degradation, and hydroelectric power will not be an easy one. For fishermen, as for salmon, the fight will be an uphill battle. All fishermen, however, should benefit from the leverage which Indian treaty rights may offer. It would be a measure of poetic justice, as well as legal justice, for the salmon upon which the Indians depend to be preserved by the treaties upon which the Indians staked their future.

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