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THE TROUBLED PACIFIC SALMON TREATY: WHY IT MUST BE RATIFIED

A full-fledged salmon war is shaping up in the Pacific Northwest, one in which there can be no winners. Unlike salmon skirmishes of the past between commercial fishermen and Indian tribes, between ocean trollers and river gill-netters, between recreational and commercial fishermen, this simmering and potentially volatile conflict is all the more alarming because there are no courts of law that have the power to compel the parties to resolve their differences. The parties are sovereign nations, the United States and Canada, and each stands to lose an important stake in a precious resource unless something can be done soon.

After some twenty years of off-and-on negotiations--intensive since 1970 yet progressing at a seemingly glacial pace--negotiators for the governments of the United States and Canada last December concluded and signed a treaty governing mutual harvest of United States and Canadian stocks of Pacific salmon. The proposed treaty, formally entitled the Bilateral Pacific Salmon Interception Agreement between the United States and Canada, requires ratification by both governments to take permanent effect. Because of opposition from certain United States fishing interests the proposed treaty is now stalled, and tempers are flaring on both sides. Rejection or delay of this agreement will have serious consequences on the salmon fishery of both nations, and time is running out.

WHY INTERNATIONAL COOPERATION IS ESSENTIAL IN SALMON MANAGEMENT

Pacific salmon are "anadromous," a term applied to fish that spend their adult lives in the ocean and return to freshwater to spawn. Some stocks of

Columbia River chinook (or king) salmon, after hatching hundreds of miles upriver from the ocean, may migrate thousands of miles further to feeding grounds in the Gulf of Alaska before returning to the home stream to spawn. Such a wide-ranging migratory instinct frustrates effective management, responsibility for which must be shared not only among a multitude of state and federal agencies and Indian tribes, but also between nations. Anadromous fish respect no man-made boundaries, and they can be effectively protected from overfishing only where management jurisdictions are integrated, or at least coordinated in their policies.

Without coordinated management, conservation gains in one jurisdiction may be easily lost as the benefits accrue not to the health of the resource itself, but rather to user groups in other management regimes where regulation is less strict. In such a situation, any management agency through whose jurisdiction a migratory fish passes has the power to negate conservation gains made at great cost in any of the others. Unless a single coast-wide framework for managing the conservation and allocation of Pacific salmon exists and is effectively and equitably implemented, the greatest economic benefits will accrue to those user groups that are least conscientious about conserving the resource. In addition, equitable apportionment of economic hardships caused by fishing restrictions cannot be made under fragmented management regimes. Such are the economic realities of a common property resource that is also highly migratory.

It has long been recognized that differential levels of protection of a fishery and the economic inequities thus

1. Mimeographed draft available from the Pacific Fishery Management Council, 526 S.W. Mill Street, Portland, OR 97201.



produced divide and infuriate the fishing public and exact an unacceptably high toll on the health of the resource. Accordingly, the United States Congress has taken important steps in recent years to consolidate balkanized and chaotic management control over Pacific Northwest anadromous fish. In 1976 Congress passed the Magnuson Fishery Conservation and Management Act (MFCMA),^{2/} which established regional fishery management councils and gave them authority to create and implement management plans for individual fisheries within the Act's "fishery conservation zone," which extends from the outer limit of state territorial waters to a distance of 200 nautical miles from the coastline. In the case of anadromous fish, protection extends even further, out to the limit of their migratory range.^{3/}

Similarly, in 1980 Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act),^{4/} which created a management council institutionally similar to the fishery management councils of the MFCMA. The Act gave the Northwest Power Planning Council authority to develop and adopt a fish and wildlife plan for the Columbia River Basin, with particular emphasis on anadromous fish, and to oversee its implementation.^{5/}

In addition to the federal legislation just mentioned, Article 66 of the Law of the Sea Convention (LOS), adopted last year by the Third United Nations Conference on the Law of the Sea, deals with the conservation and allocation of anadromous fish. It accords to a signatory nation where anadromous fish originate the dominant interest in conservation responsibilities and harvest benefits, even beyond the 200-mile limit of the exclusive economic zone that the treaty recognizes.^{6/} While the present Administration has chosen not to sign the LOS Convention, President Reagan issued a proclamation on March 10, 1983 claiming a 200-mile exclusive economic zone along the lines of the treaty provisions. That action essentially recognizes the fishery provisions of the LOS treaty, presumably including Article 66.^{7/}

Although many details of implementation and institutional refinement remain to be worked out, each of

these three events represents a potentially important advance in the conservation and management of anadromous fish on the west coast of the United States. Unfortunately, however, none of the management jurisdictions thus created has the power to develop or enforce a fishery plan which is truly "comprehensive," since no existing jurisdiction or alliance of jurisdictions has the ability to protect anadromous fish stocks over the entire range of their migrations. And since some species of Pacific salmon insist on roaming freely over much of the offshore region of the west coast of North America, failure to coordinate salmon management between the United States and Canada constitutes the biggest remaining gap in the protection of Pacific salmon.

BACKGROUND TO THE PACIFIC SALMON TREATY

British Columbia vies with Alaska for the title of chief producer of salmon in North America. With a land area far exceeding that of Texas and a population of slightly more than two million, British Columbia has for the most part been spared the population and industrial pressures of its neighboring state of Washington to the south. Much of the province, with its 16,000 miles of rugged coastline, retains at least some of the characteristics of wilderness. As a result, protection of salmon habitat has been more successful in British Columbia than in its neighbors to the south, and the proportion of wild to hatchery fish in British Columbia waters is greater than 90 percent.

The Fraser River, which enters the Strait of Georgia just south of Vancouver, is the richest producer of salmon in Canada. Unlike the Columbia River--the other big salmon producer on the west coast of North America--the Fraser is undammed, with the result that some time in the 1960s the Fraser supplanted the Columbia as the dominant salmon river of North America.

Although the Fraser River lies entirely within Canada, management responsibility for some of its salmon stocks is shared with the United States, since some of the fish must pass from the Pacific Ocean through United States waters in order to reach their British Columbia spawning grounds. Thus, responsibility for the management of the

2. Pub. L. No. 94-265, 90 Stat. 331, codified at 16 U.S.C. §§ 1801-82.

3. 16 U.S.C. § 1812.

4. Pub. L. No. 96-501, 94 Stat. 2697, codified at 16 U.S.C. §§ 839-839h.

5. 16 U.S.C. § 839b(a).

6. 21 Int'l Legal Materials 1261, 1282-83 (1982).

7. 48 Fed. Reg. 10,605 (March 14, 1983). At the time of writing, implementing legislation has been introduced in both houses of Congress. S. 750; H.R. 2061.

Fraser River salmon fishery is divided between two agencies: one Canadian, one international. The Canadian Department of Fisheries and Oceans manages chinook, chum and coho salmon out to the 200-mile limit of Canada's exclusive fishery zone. On the other hand, sockeye and pink salmon from the Fraser River and nearby areas are managed by the International Pacific Salmon Fisheries Commission (IPSFC, popularly called the "Sockeye Commission") and allocated under the terms of the Fraser River Treaty of 1930.^{8/}

Ratified in 1937, the Fraser River Treaty was amended in 1957 to include provisions for the management of pink salmon in addition to sockeye, and was further amended in 1980 to establish a supplemental advisory committee. Attempts at drafting and ratifying such a treaty began in 1908. There has always been, it seems, a hard core of resistance among Puget Sound fishermen to ratification of any treaty draft that has been proposed, in part because United States salmon fishermen have been catching Fraser River fish since the late nineteenth century.^{9/} The treaty as ratified in 1937 contained three substantive provisions: (1) The Sockeye Commission would have no power to authorize fishing contrary to the laws of Canada or the State of Washington; (2) the Commission would not promulgate or enforce regulations until the scientific investigations provided for were completed, and in any event no sooner than eight years or two "sockeye cycles" from the time of ratification; and (3) the Commission would set up and include in their deliberations advisory committees on which industry representatives would sit. Implementation of the provisions of the treaty would be guided by two goals: (1) to restore the Fraser River sockeye runs (and after 1958 the pink salmon runs also) to their early twentieth century abundance; and (2) to provide an equal division of the catch between Canadian and United States fishermen, in return for United States financial and technical assistance in restoring the Fraser River runs that were seriously depleted by a 1913 rock slide that blocked the river.

The Commission consists of six members, three from each nation. Two commissioners from each country must agree on any Commission action for it to become effective. The United States and Canada share equally the costs of

management and the expenses of the professional staff. Although the Commission has no enforcement powers, its recommendations to the Washington Department of Fisheries and the Canadian Department of Fisheries and Oceans have been routinely adopted and enforced.

Despite initial misgivings in the fishing industries of both nations, it is widely perceived that the ailing Fraser River Treaty has been phenomenally successful in revitalizing the Fraser River sockeye salmon runs. In fact, one will search the west coast of North America in vain for a comparable success story in the physical rehabilitation of a moribund fishery. The Commission itself and its professional staff have been lauded by interests on both sides as competent and impartial, producing studies and data that are at once objective and easily obtainable. The Fraser River Treaty has worked, and has worked well: Neither nation has anything to be ashamed of in observing both the spirit and the letter of the law.

But it has been apparent for years that the Fraser River Treaty, limited as it is in scope and in geographical coverage, is inadequate to meet the challenges of modern anadromous fish management. First, the terms of the Treaty cover only two species of salmon: No cooperative agreement on the management of chinook, coho or chum salmon now exists. Second, the Treaty grows ever more anachronistic in its geographical coverage. In 1946, the first year of joint management of sockeye salmon, nearly 95 percent of the sockeye catch was taken in "convention waters"--i.e., within the geographical area covered by the terms of the Treaty. But by 1981 the Commission controlled only 40 percent of the Fraser River sockeye run and also 40 percent of the pink salmon run. And in 1982, according to Canadian government estimates, 727,000 Fraser River sockeye were taken within convention waters, while as many as three million were caught outside.^{10/} Clearly the provisions of the Fraser River Treaty are becoming increasingly outdated, and the extent of its coverage diminishes every year. What should be most alarming to United States fishing interests is that the Canadian government has the ability to allow its fishermen to intercept even higher percentages of the Fraser River fish before they reach convention waters where they must be shared 50/50 with United States

8. Formally, the Convention for the Preservation, Protection and Extension of the Sockeye Salmon Fisheries in the Fraser River System, 8 U.S.T. 1057, T.I.A.S. No. 3857.

9. See generally, J. Crutchfield & G. Pontecorvo, The Pacific Salmon Fisheries: A Study of Irrational Conservation 140-46 (1969).

10. Fishermen's News, May 1983 (2d issue), at 17.

fishermen, without violating the letter of the Treaty.

Precarious as is the position of the United States with regard to Fraser River fish, without a comprehensive agreement the United States stands to lose even more of its chinook and coho stocks that originate in the Columbia River. These fish are caught in large quantities off the coast of British Columbia. The Columbia River Inter-Tribal Fish Commission estimates that Canadian fishermen harvested some 40 percent of the 1981 fall run of upper Columbia River wild chinook, while Alaskan trollers took 20 percent, Washington and Oregon trollers caught 4 percent, and in river fishermen--both Indians and non-Indians--caught 8 percent, leaving an escapement of 27 percent--far below what is needed to sustain the runs.^{11/} During the 1982 season British Columbia chinook trollers were the big winners. Some 1.5 million chinook salmon--five times the Alaska chinook catch--were taken in Canadian waters, and it has been estimated that between 600,000 and 800,000 of these fish were of United States origin.^{12/}

From the perspective of both the health of the salmon fishery and the interests of the United States fishing industry, the need for a comprehensive treaty governing all species of Pacific salmon throughout their oceanic range has never been more urgent.

PROVISIONS OF THE PROPOSED TREATY

Article II(1) of the proposed Pacific salmon treaty features two governing principles designed (1) to prevent overfishing that results in a level of escapement less than that needed to insure optimum sustainable yields; and (2) to set allotments so that each country receives benefits equivalent to the production of salmon in its own waters. In order to implement these principles, Article II of the proposed treaty establishes a new agency, to be called the Pacific Salmon Commission, as a forum for consultation and negotiation on harvest limits and other management questions. The Commission will be composed of no more than four members from each nation, and it will in turn establish three regional panels to conduct studies and offer recommendations concerning escapement objectives for various stocks that originate in their respective areas. Article II of the proposed treaty also establishes a technical dispute settlement board, with

unreviewable authority to make findings of fact.

Ratification of the proposed treaty will terminate the Fraser River Treaty of 1930. Some of the responsibilities of the Sockeye Commission will be transferred to the new Commission; others will revert to the Canadian Department of Fisheries and Oceans. Article X provides that in conducting joint research, each party will allow access by the other to its waters, subject to normal restrictions. Article XI provides that the terms of the treaty will be interpreted and applied so as not to interfere with existing Indian treaty rights or laws.

Governing principles are embodied in the articles of the treaty; technical matters are placed in annexes, some of which have expiration dates. Articles may be renegotiated at any time; annexes may be amended simply by an exchange of notes. Although the treaty is written to take effect in 1983, the annexes contain interim measures that have the effect of managing the 1983 and 1984 salmon seasons according to the terms of the treaty.

Under Article VII, Canada for the first time will be guaranteed benefits from salmon originating in "transboundary" rivers, which begin in Canada but flow to the sea through the United States (The Alsek, The Stikine, the Taku and the Yukon are the chief transboundary rivers with headwaters in Canada and mouths in Alaska; the Columbia River, which originates in British Columbia, is specifically excluded from the transboundary river provisions because dams preclude the passage of fish into its Canadian reaches.) Salmon that originate in the Alaskan parts of transboundary rivers are to be considered Alaskan stocks; those that hatch in Canadian portions of the river and migrate through Alaska are "shared" fish. In the latter case, enhancement programs are to be undertaken cooperatively. Negotiators have so far been unable to agree on what proportion of the catch on transboundary rivers is due to each country, but an appended "letter of understanding" allows for ratification of the treaty and for fishing to continue while future negotiations attempt to work out an equitable split.

Arguably the most urgent feature of the proposed treaty concerns the conservation of wild stocks of chinook salmon, whose numbers are everywhere depressed

11. CRITFC News, Vol. 5 No. 3 (July/Dec. 1982).

12. Sabella, *The Wild King Salmon*, Pacific Fishing, March, 1983, at 38.

from the Columbia River up to the rivers of southeast Alaska--some places critically so. Recent years have seen wild chinook stocks suffering from drastic and coastwide declines in escapement. In short, too many fish are being caught, and too few are reaching their home streams to spawn. In British Columbia, for example, chinook escapement has declined by 50 percent since 1950. In 1982 escapement of wild chinook fell 30 percent below optimum level in southeast Alaska and, depending on the stock involved, between 100 and 233 percent below optimum in British Columbia, as much as 173 percent below optimum along the coast of Washington, and between 38 and 222 percent below optimum in the Columbia River.¹³ Along the entire coastal range of the chinook fishery, escapement was judged adequate only along the Oregon coast and along the coast of western Alaska.

The terms of the treaty provide for a badly needed 25 percent cut by both Alaska and British Columbia in the 1983 chinook catch, using the 1978-1981 seasons as a base period. The combined chinook catch for all of Alaska will be limited to 263,000 fish for 1983, up from 255,000 in 1982. (The 1983 Alaska catch rises because cuts previously made as conservation measures in the Alaska chinook fishery are set off against future cuts.) The British Columbia catch is not to exceed 868,000 fish in 1983, down from 1.5 million taken in 1982. (The catch limit excludes the west coast of Vancouver Island, where hatchery fish predominate.) Further reductions are planned for the 1984 season after the effectiveness of the 1983 regulations has been determined.

An essential provision of Annex IV ch. 3(4) controls the harvest of catch reductions made in one nation's chinook fishery by fishermen of the other nation. Thus, extra fish resulting from a 25 percent reduction in the Canadian chinook catch will not, for example, lead to a windfall for Washington trollers. For conservation measures to work, catch transfers must be minimized and escapement savings must be passed along to the spawning grounds.

The proposed treaty also requires joint development of a coastwide conservation program for wild chinook stocks. Annex IV ch. 3(7) commits both nations to undertake chinook enhancement projects and rehabilitation plans, with a view toward phased decrease in fishing pressure on wild stocks and gradual increase in the production and harvest of hatchery fish.

THE NATURE OF THE OPPOSITION

At this time of writing, the proposed treaty is under review by the State Department and its Canadian counterpart, preparatory to a decision on whether to submit it to the Senate and the Canadian Parliament for ratification, or to withdraw it pending further negotiations. (The Senate cannot act unless the Administration submits the proposed treaty for ratification.) Secretary of State George Shultz has conferred with Canadian Minister of External Affairs Alan McEachern on the draft treaty, but the Secretary has yet to issue a statement or to deliver a formal reply to a letter of objection from Alaska Governor Bill Sheffield, who in a press release of February 21 declared the treaty unacceptable and called for further negotiations. In the March 28 letter to Secretary Shultz, Governor Sheffield listed seven objections to the treaty. In a May meeting with Alaska fishery officials the Canadian government accepted some changes proposed by Governor Sheffield, but later high-level meetings in Ottawa failed to resolve two of the objections made by the Alaska Governor, who sent another letter of opposition to Secretary Schultz on June 3. A June 21 meeting in Washington, D.C. between representatives of Alaska and the government of Canada, with both Alaska Senators and a State Department representative in attendance, produced no results. Subsequent talks between Secretary Schultz and Minister McEachern have failed to break the impasse. A State Department spokesman has reported that the treaty is "in hibernation" for the rest of 1983.

On June 13, Canada opened a net sockeye fishing season on the Taku River contrary to treaty provisions, and on June 24 Alaska formally bypassed the provisions of the treaty by unilaterally promulgating its own management plan for salmon interceptions. As of August 1983, neither nation is implementing the treaty provisions. Because of abnormal ocean conditions during 1983, salmon fishing off the coast of British Columbia has been unusually poor, and the British Columbia catch is unlikely to reach the 868,000 fish limit set by the treaty. In contrast, fishing for chinook has been good in southeast Alaska, putting Alaskans at a temporary advantage in the incipient salmon war.

Predictably, opponents and supporters of the proposed treaty have aligned themselves in accordance with perceived losses or benefits. Those who believe that they stand to lose the most from

13. *Id.* at 34.

conservative, long-term management policies are in general opposed to ratification. Although opponents are probably far fewer in number than supporters, they have been louder in their opposition, and at the moment support is lagging behind opposition. Environmental interests, perhaps still uncertain of the consequences of treaty ratification or rejection, have been surprisingly silent.

It is not hard to understand the nature of the opposition and the reasons for it. Salmon fishermen share with their prey an understandable instinct for self-preservation, and nobody wants to be shortchanged when ticklish deals are being made.

The fishing industry is Alaska's largest employer, and it is not surprising that Alaskan fishing interests are loudest in opposing ratification. (Salmon fishing interests of Puget Sound are also generally opposed to ratification, but for different reasons, related to their favored position under the 1930 Fraser River Treaty). Opponents of ratification include Alaska Governor Sheffield and Alaska Senators Ted Stevens and Frank Murkowski. Supporters of ratification include Washington Governor John Spellman, Oregon Governor Victor Atiyeh, Idaho Governor John Evans, Washington Senators Henry Jackson and Slade Gorton, and Oregon Senators Mark Hatfield and Bob Packwood. Also in support of ratification are about twenty of the twenty-four treaty Indian tribes with interests in the salmon harvest guaranteed by federal courts, as well as the Oregon Fish and Wildlife Commission, the Pacific Fishery Management Council, the National Marine Fisheries Service, the Northwest Power Planning Council and, in general, fishing interests of the Washington and Oregon coasts and of the Columbia River Basin. Even those Canadian fishing interests that vigorously opposed the treaty are now opposed to renegotiation and are adamant that no changes be made.

The major objections of the United States fishing interests fall into five categories: Particular provisions of the treaty are alleged to be (1) indefinite, (2) institutionally unsound, (3) disruptive of historic fisheries, (4) incapable of fair enforcement and monitoring, and (5) inequitable.

First, it is alleged that the proposed treaty fails to specify any long-term share formulas for fish from the transboundary rivers or the Fraser. The complaint is essentially correct. The negotiators have been unable to agree on share formulas, and have cautioned that more data are needed before interception shares can be determined with

precision. Methods of evaluating benefits accruing within each country, they warn, may differ. On such matters the proposed treaty is only an "agreement to agree," and it is expected that the Commission will phase out inequities over a period of time. The treaty thus represents a pragmatic solution to the urgency of enacting cooperative conservation standards, even as details remain to be worked out. This "indefiniteness," then, is a necessary consequence of a difficult negotiating process. A treaty that attempts to anticipate all future problems and requires specific detailed solutions is not practical. "Indefiniteness" should not be an obstacle to ratification of a treaty that must by its very nature remain flexible.

Second, some United States fishing interests have objected to the institutional structure of the Pacific Salmon Commission destined to replace the existing Sockeye Commission if the treaty is ratified. Many Puget Sound fishermen who now participate in the Fraser River sockeye and pink salmon fisheries prefer to keep the existing Commission, arguing that its sterling record of competence and impartiality should be sufficient to perpetuate it. Instead, the Puget Sound fishermen would like to see the 1930 Treaty expanded beyond the present convention waters to include all areas in Canadian waters where Fraser River sockeye and pink salmon are currently harvested. Indeed, the proposed treaty transfers five out of the six organizational divisions of the Sockeye Commission staff to the Canadian Department of Fisheries and Oceans, and Puget Sound fishermen fear that adequate representation of their interests will thus be lost. Moreover, it is argued that it is unsound politics for an international resource management body to place primary reliance on data developed and provided by only one of the partners. That argument is not necessarily correct, as the achievements of the Sockeye Commission and the Pacific Halibut Commission have demonstrated.

Such objections, however, are not simply the result of a wistful clinging to the familiar. There may be validity in some of the arguments, but in any event they are likely to be moot. United States rejection of the treaty will not resolve these problems, but will more probably have the opposite effect. Canadian officials have hinted that within a few years they will terminate the Fraser River Treaty, with or without a replacement. And even if they do not, they will certainly not agree to expansion of the original convention waters. Instead, they will most likely attempt to outmaneuver Puget Sound salmon fishermen by permitting increased

Canadian catches of Fraser River salmon outside the convention area, perhaps even reducing the United States share to the point of unprofitability. Under the proposed treaty, the United States share of the Fraser River harvest will probably be phased out over a period of decades; without the treaty, Canada may abruptly, traumatically and legally take steps to terminate it.

Third, it is alleged that the proposed treaty will dislocate historic fisheries, contrary to the express commitment of Article III to "the desirability in most cases of avoiding undue disruption of existing fisheries." (Emphasis added.) The complaint is correct: The wording of the "commitment" is so qualified as to be virtually meaningless. The terms of the proposed treaty, for example, ensure a continued annual allotment to United States fishermen of Fraser River sockeye and pink salmon for a number of years yet to be determined. The 50/50 split of the Fraser River Treaty is, however, eliminated. As mentioned above, ratification of the proposed treaty will probably result in increased Canadian share of the Fraser River runs. The United States share will probably be phased out over a long period of time, or reduced far below the historic 50/50 split.

It is a certainty that some existing fisheries will be dislocated if the treaty is ratified. But it is also a certainty that they will be disrupted if the treaty is not ratified, and probably to a much greater extent.

Fourth, United States fishermen have complained about monitoring difficulties. Because Canada delayed issuing its fishing regulations for 1983, it had until recently not been possible to determine whether Canadians were intending to keep their end of the bargain struck for the 1983 and 1984 seasons. There is substance in this charge. It is true that the Department of Fisheries and Oceans has in the past been much slower to develop and publish its data than have United States fisheries agencies. That may be a result of Canada's federalized control of its marine fisheries: Centralized evaluation of large bodies of data may cause greater delay. It may also be that Canada had been purposely delaying the implementation of the interim terms of the proposed treaty until officials could size up the nature and strength of the opposition in the United States. At any rate, the data have since been forthcoming,

and Alaska's Governor has professed satisfaction on that point.

Whenever a treaty is concluded, questions are likely to arise among non-participants in the negotiating process about the good faith of each party and about the willingness of each to enforce treaty provisions and to open records for public monitoring. Although mutual suspicion seems to dominate at the moment, such fears will diminish once the treaty is in place. The laudable record of the Sockeye Commission should help to allay suspicions about the good faith of either side.

Fifth, and perhaps most important, United States fishing interests have challenged the fairness of the interim apportionment standards.^{14/} Allowing Canada to share in the harvest on trans-boundary rivers is hard to justify from the point of view of Alaska, for Alaska fisheries have flourished on transboundary rivers like the Stikine and the Taku for decades, while no significant Canadian fishery existed on these rivers before 1979. Alaska salmon fishermen feel that Canada has introduced a fishery on these rivers only as a negotiating wedge with regard to the treaty. Similarly, Alaska salmon fishermen believe that the chinook catch reductions that the proposed treaty mandates unduly penalize Alaska trollers by setting future allotments on a base period when Alaska had unilaterally imposed a conservation program on its salmon fishery, while Canada as a matter of policy was permitting its chinook trollers to overfish the stocks in order to enhance its bargaining position. Thus, the effect of ratification will be to freeze future allotments at the allegedly inequitable proportions of recent years, and Alaska's conservation efforts will go unrewarded while recent Canadian overfishing becomes institutionalized. Alaskans feel that since they were not responsible for the bargaining scramble that has depleted British Columbia chinook runs, they should not have to be responsible partners in rebuilding those runs.

There is some justification for each of the charges outlined above. Particularly disturbing are the complaints about Canadian overexploitation, whatever Canada's motives might be. For British Columbia fishermen have in recent years been catching 91 percent or more of the chinook salmon available for harvest in Canadian waters. (The general rule is that the harvest rate of wild salmon stocks must not exceed 67 percent

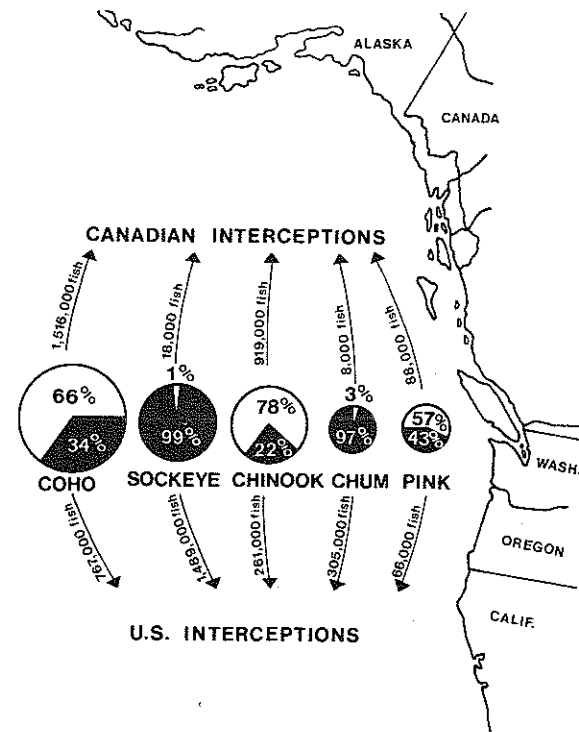
14. For a detailed quantitative analysis of equity considerations, see Washington Department of Fisheries, Recent History of U.S. and Canada Chinook Salmon Harvests as They Relate to the Proposed U.S./Canada Agreement (Jan. 1983).

for the stock to remain viable, even though hatchery salmon can safely be harvested at a rate of 95 percent or more.)^{15/} Although it is in dispute whether the greater proportion of the British Columbia chinook catch consists of hatchery or wild fish, the indications are that Canadian fishermen take a high percentage of upper Columbia River wild chinook, some runs of which are critically depressed and were once proposed for inclusion on the endangered species list.^{16/}

But Canadian salmon fishermen also have valid complaints. They are fond of asking their United States counterparts how they would like having Canadians as management partners on the Columbia River. The Canadian response to the charge of deliberate overfishing charge is compelling in its simplicity and economic reasoning, and it illustrates well the argument that a treaty is desperately needed, however imperfect. In the absence of an interception agreement Canada has slight incentive to reduce its chinook catch, since in so doing there would be no assurance that conserved fish would not simply be passed on to enrich the Alaska salmon fishermen who are already intercepting them. Canadian officials are correct when they point out that Alaska has relatively few native chinook stocks and that more than 80 percent of the chinook salmon harvested in Alaska waters originates elsewhere--about half from Canadian rivers and streams, and another half from those of Oregon and Washington.

In fact, the situation is a great deal more complicated than the above discussion suggests. Although chinook salmon is the species of greatest concern in terms of conservation, other species figure prominently when allocation problems are considered. Differential benefits arise from each nation's catch of different species, as can be seen from the accompanying figure, which represents graphically the balance of benefits each nation received from all species of Pacific salmon of United States origin in 1976. The chart shows, for example, that Canadian fishermen have a decided advantage in intercepting chinook of United States origin, but that the situation is reversed for sockeye. In a situation like this it can readily be seen that achieving an equitable balance of benefits between nations will be a Sisyphean task.

1976 division of catch of all species of Pacific salmon of U.S. origin between U.S. and Canadian fishermen.



Source: Oregon Department of Fish and Wildlife, Oregon Wildlife, March, 1983, at 13.

Thus, it can easily be seen that there are a host of equities to be considered on both sides. There will be winners and losers in different fisheries and in different locations if the treaty is ratified, just as there will be other winners and losers if the treaty is not ratified. As is customary in the realm of law where there is justice to be found in the claims of both sides, the solution must be sought in a balancing of the equities.

CONSEQUENCES OF DELAY OR FAILURE TO RATIFY

Since the states exercise a great share of fishery management authority under United States law, Alaska's consent is considered essential for

15. D. Poon & J. Garcia, A Comparative Analysis of Anadromous Salmonid Stocks and Possible Cause[s] for their Population Decline 9 (Report submitted to the Northwest Power Planning Council, June 1982).
 16. 43 Fed. Reg. 48,628 (Oct. 3, 1978).

ratification, and Alaska officials are under intense pressure from fishing interests to demand further negotiations. But Canadian user groups are almost unanimously pressuring Canadian officials not to renegotiate, and the government of Canada can hardly be expected to relent when its own fishing interests are so nearly unanimous and United States interests are so divided. The possibilities are therefore only two: Either the treaty will be ratified over the protests of Alaskan and Puget Sound salmon fishing interests, or the opposition will succeed in delaying the treaty or even scuttling it entirely. What will be Canada's response in the event of the latter?

In the absence of a comprehensive treaty, Canada will either unilaterally abrogate the longstanding Fraser River Treaty after the 1984 season, or it will legally subvert the intent of that Treaty by issuing regulations designed to maximize the Canadian catch of Fraser River fish. The fishery outside the "convention waters" will be expanded to the point that there may be few fish left inside of convention waters for United States fishermen to catch. As one Canadian official is alleged to have said, "If we don't have a treaty, we're going ^{to} catch everything that swims."^{17/}

Second, Canada may be expected to curtail or change the enhancement activities in which it is currently engaged. It is unlikely that either Alaska or Canada will undertake further rehabilitation efforts without an agreement to protect their investment, effectively blocking an increase in the size of the pie because neither nation can agree on how to slice it. The chinook hatcheries on the west coast of Vancouver Island would probably be converted to coho production in order to minimize Alaskan interception of the hatchery stocks. (Coho salmon are less vulnerable to interception than chinook because they stay closer to the place of hatching and because their migration routes are more variable.) In general, enhancement efforts will be deflected geographically toward stocks on interior rivers less likely to be intercepted by United States fishermen.

And third, Canada will vigorously increase fishing pressure on transboundary rivers to dull the competitive edge that United States fishermen have there. Canadian fisheries on these rivers are new; if they cannot be made immediately profitable the Canadian

government probably will subsidize them.

All of these tactics are biologically unsound, will further strain relationships between United States and Canadian fishermen, and will adversely affect many United States salmon fisheries, especially the chinook fishery. Such a strategy will eventually prove harmful to the Canadian fisheries as well. But in the absence of a treaty, however unwise these actions may be, they will be legal.

Clearly, this would be an intolerable state of affairs. Yet it seems the most likely alternative to ratification. If the treaty is withdrawn, there will be no status quo to which the parties can return. Instead there will exist a state of "mutual poaching"--each nation sniping at the other's salmon stocks to the detriment of all.

Objectors to the proposed treaty, however valid some of their objections may be, have not fully evaluated the alternatives. There will be losers under the treaty, primarily among the Puget Sound sockeye and pink salmon fishermen. Their apprehension is understandable. But Puget Sound salmon fishermen will be losers in any event, since under the Fraser River Treaty regime they have occupied a privileged position relative to salmon fishermen elsewhere in Washington and Oregon. To those affected, loss of a privilege is nearly always seen as loss of a right, and the proposed treaty removes that privileged position, placing Puget Sound salmon fishermen in roughly the same position as their colleagues on the coast.

Furthermore, in the absence of a treaty losses from Canadian interceptions of United States fish will have to be made up out of further cuts in the salmon harvest over which United States fishery agencies have control. And if Canada, instead of making cuts for which the treaty provides, escalates its fishing pressure, that too must be balanced by still further cuts in the United States harvest. Objectors seriously underestimate the degree of United States commitment to salmon conservation under the Magnuson Fishery Conservation and Management Act, the Northwest Power Act, and the Salmon and Steelhead Conservation Act of 1980.^{18/} Whatever Canada may choose to do about its salmon, the United States simply does not have the luxury of relaxing its conservation standards to indulge in a fish war. The burden of increased cuts necessitated by the absence of Canadian

17. Fishermen's News, March 1983 (2d issue), at 32.

18. 16 U.S.C. §§ 3301-3345.

cooperation would therefore fall most heavily on the chinook fishermen of Alaska. Without a treaty, Alaska fishermen will have to bear almost the entire conservation burden. Failure to ratify the treaty will cut far more deeply into the pockets of salmon fishermen there than ratification will. Perhaps with these consequences in mind, the Director of the Alaska Department of Fish and Game has been quoted as promising, "In the event of a fish war, we will not fire the first fish."

CONCLUSION

The proposed treaty satisfies no one fully and represents an economic threat to some. That is often the nature of contracts between nations concerning scarce resources. But it is probably the most reasonable compromise that can be achieved at the present time. There is perhaps 90 percent agreement between all parties on the treaty framework; remaining arguments are mostly about details of allocation. Whatever inequities exist lie not in the Articles of the treaty, but rather in the Annexes, which may be renegotiated by mutual consent at any time, and must in any event be reviewed annually. The provisions of the treaty that have aroused the strongest objections are in force for only two years, and concern a difference of only 10,000 fish out of an annual harvest of more than 250,000. After the 1984 fishing season, terms of the treaty allow a wide latitude for fine-tuning. Seen in this light, the strongest objections of the Alaska fishing interests vanish into mere quibbles.

A reasonable approach to the controversy would be to see it from the point of view of the resource itself. Salmon mean a lot to Canada and the United States, but the two countries mean nothing to the fish. It is not in dispute that the treaty will be of immense benefit to the restoration of severely depleted wild chinook stocks, and that it will mean that more fish will be returning to spawn in their rivers of origin. Neither is it in serious dispute that conservation measures are desperately needed for many salmon stocks. Seen from this prospective, the treaty should be ratified as it stands, and quickly. With uncontrolled interception, a legal regime of prior appropriation will come to be applied to a resource for which that doctrine is entirely unsuitable, and competitive overfishing will increase.

If the opposition now forces withdrawal of the treaty, it is highly unlikely that United States negotiating leverage will improve in the future. It will instead deteriorate if Canada, as it has threatened, relaxes its conservation standards and unleashes its salmon fishermen with an abandon that will take a large toll of United States fish. Rejection now may well preclude any comprehensive bilateral interception agreement for the rest of the century, and it may doom upper Columbia River wild stocks of chinook salmon to a prominent place on the endangered species list. Once the new treaty is in place, there is every reason to hope that the Pacific Salmon Commission will be as successful in rehabilitating and fairly allocating the salmon resource as was its more limited predecessor, the Sockeye Commission. Instead of the protracted and bitter negotiations to which Canadian fishery biologist Peter Larkin awarded a "silver anniversary Bronx cheer" a few years ago, the new treaty will provide an historic precedent for accomplishing integrated management of a migratory species over its entire range.^{19/} It is in both the long- and short-term interests of all parties--Alaskans, Canadians, Puget Sound trollers, Columbia River gill netters and Indian treaty tribes--to support its speedy ratification.

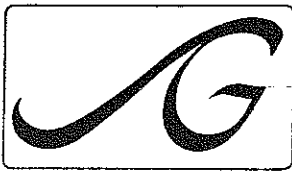
Daniel Conner
August 15 1983

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For further information on subjects covered in the Ocean Law Memo, contact Professors Jon Jacobson and Richard Hildreth, Co-Directors, Ocean & Coastal Law Center, University of Oregon School of Law, Eugene, Oregon 97403. (503) 686-3845.

19. P. Larkin, Pacific Salmon: Scenarios for the Future 7, (Washington Sea Grant Pub. No. 80-3, 1980).



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-ABSTRACT-

The Fishery Conservation and Management Act of 1976 (FCMA) has turned out to be one of the most controversial and confusing pieces of federal legislation in recent memory. The controversy is inevitable, but in this handbook the authors try to clear up the confusion.

The book speaks to a broad range of readers, but especially to those who are most affected by the workings of the bureaucratic machine created by the FCMA. Its purpose is to provide useful information and analysis to seafood processors, fisheries managers, legislators, and the interested public. Specifically, the authors address two hypothetical readers. One is a commercial fisherman, a person whose livelihood is directly regulated by the FCMA. The other is a lawyer with no special training in fisheries law but who may be confronted with fisheries management problems through his clients.

The handbook might well be termed a "Northwest Edition"--two of its chapters are concerned with the organizations and activities of the two regional fishery management councils governing the waters off the Pacific Coast and off Alaska, with no similar treatment of the other six regional councils.

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