

THE IMPACT OF TREATY INDIAN FISHING
RIGHTS DECISIONS ON COMMERCIAL AND SPORT FISHING
AS PERCEIVED BY OREGON RESOURCE MANAGERS

by

ALICE MARIE HUTCHINSON

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TABLE OF CONTENTS

I. THE SETTING	1
Background	
Court Decisions	
Summary	
II. THE IMPACT	6
River Regulations and Effects	
Ocean Regulations and Effects	
Summary	
Conclusion	
FOOTNOTES	14
APPENDIX I	17
APPENDIX II	80

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ABSTRACT. Recent judicial decisions give the treaty Indians in Oregon the right to fifty percent of the fish destined to reach their fishing areas. Oregon fish resource managers are considering various regulation options designed to assure the Indians their share. Stricter ocean fishing regulations and more sophisticated management techniques will have a mixed impact on commercial and sport fisheries.

CHAPTER I

A series of Oregon judicial decisions led to the pronouncement, in 1975, that fifty percent of the allowable catch of fish destined to reach treaty Indian fishing areas should be reserved for the Indians. Commercial and sport fishermen in Oregon believe that compliance with this ruling will have an adverse effect on their fishing efforts, however resource managers

believe that equitable adjustments can be made through improved management regulations.

This research paper briefly traces the recent legal rulings and suggests some of the problems facing state fisheries managers as they strive to comply with the court orders.

Background

The controversy over fishing rights had its beginnings over a century ago when treaties were made, in 1855, with the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakima Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, and the Nez Perce Tribe of Idaho. These treaties all contained the same stipulation: reservation by the treaty Indians of the right to take fish at all their "usual and accustomed" sites in common with other citizens.¹ These treaties, according to the Constitution of the United States, are the ". . . Supreme Law of the Land; . . . anything in the Constitution or laws of any state to the contrary notwithstanding . . . "² Thus the treaty Indians have fishing rights, while non-Indians, subject to state laws and regulations, have fishing privileges.³ This is where the controversy arises--how much control can Oregon exercise over Indian fishing activities? If

there are not enough fish for all, then how can the fish resource be managed so all interests are satisfied?⁴

Court Decisions

The controversy between the State of Oregon and the treaty Indians has resolved itself into a continuing series of court cases. Following is a chronology of the cases with notes on the essence of the decisions. The entire text of each of these decisions may be found in Appendix I.

July 8, 1969

Judge Belloni, in the case Sohappy v. Smith, established that the tribes could harvest fish for both subsistence and commercial purposes, could be regulated strictly for conservation reasons, and were entitled to an equitable share of the harvestable catch destined to reach their usual and accustomed fishing areas.

May 10, 1974

Judge Belloni issued an order amending the 1969 decision to read that the Indians were entitled to the opportunity to harvest fifty percent of the allowable catch.

August 20, 1975

Judge Belloni enjoined the States of Washington and Oregon from allowing harvest of the 1975 fall chinook run until they could prove that the treaty Indians would be given the opportunity to harvest fifty percent of the catch allowed all users. In this order, the base for the fifty percent calculation was also extended to include fish in the ocean.

August 26, 1975

An amendment issued by Judge Belloni clarified his earlier ruling to mean that the Indians were only entitled to fifty percent of the allowable catch destined to reach their usual and accustomed fishing areas.

January 28, 1976

In an appeal brought by the States of Oregon and Washington, the court upheld the amendment of May 10, 1974 but also gave Oregon and Washington the opportunity to bring evidence to support an alteration in the fifty percent division.

June 15, 1976

An order by Judge Belloni enjoined Washington from

permitting ocean commercial troll fishing, but did not enjoin Oregon because its commercial troll fishery was closed.

June 22, 1976

A second injunction by Judge Belloni reiterated the order of June 15, 1976.

June 22, 1976

Judge Belloni issued an order implementing the injunction of the same date by prohibiting non-Indian citizens from commercial fishing for salmon in the ocean off the coast of Washington.

Summary

The legal controversy continues, but at present the decisions give the treaty Indians the right to the opportunity to harvest fifty percent of the allowable catch (fish in excess of spawning escapement needs) destined to reach their usual and accustomed fishing areas. To fulfill the requirements of these court orders, the State of Oregon is required to manage the entire fish resource under its jurisdiction in a manner that will provide the treaty Indians with the opportunity to take their share.

CHAPTER II

The Oregon fishery is composed of the commercial ocean troll fishery, the ocean sport fishery, the drift gill-net river commercial fishery, the river sport fishery, and the treaty Indian fishery (commercial, subsistence, and ceremonial). The river fishery is divided by Bonneville Dam. The drift gill-net commercial fishery is restricted to the area below the dam.⁵ All of the treaty Indians' usual and accustomed fishing sites are presently in the area above the dam (Fig. 1).⁶

The populations of fish, with origins above Bonneville Dam, destined for treaty Indian fishing areas are: spring, summer, and fall chinook salmon, sockeye salmon, coho salmon, and summer steelhead trout.⁷ The Indians' share is based on the total run size of each of these populations in the waters under Oregon's jurisdiction. It is calculated as fifty percent of the run less the number of fish needed for spawning (escapement needs) as determined by the resource managers.⁸ The Indians' share must also be increased to allow for attrition among fish attempting to pass the dam. The loss of adult chinook salmon is approximately twenty percent, but no documented figures are available for other species.⁹ The fish not allocated

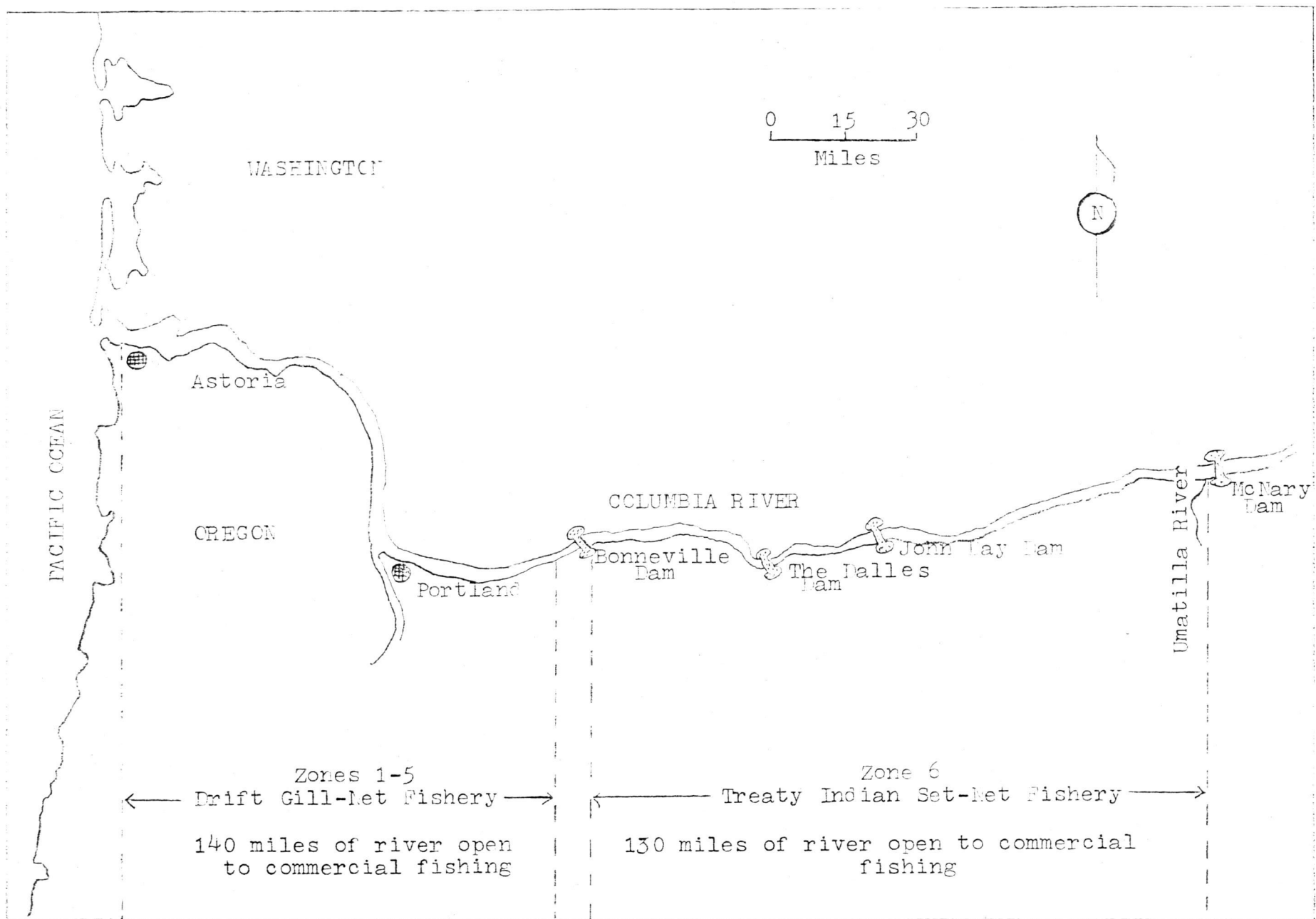


Figure 1. Map of the Columbia River below McNary Dam Showing Areas Open to Commercial Fishing. Source: Joint Staffs, op. cit., footnote 5, p. 3.

to the Indians may be harvested by sport and commercial fishermen.

To comply with the court orders, it is clear that there must be regulation of ocean and lower river fisheries to assure that sufficient fish proceed upriver to treaty Indian fishery areas above Bonneville Dam. Possible regulations include limiting open fishing areas (area and zone closures), limiting open fishing periods (delayed opening, accelerated closure), tightening gear restrictions, increasing minimum size limits, and reducing bag limits.¹⁰ There are, however, some technical as well as "political" problems in implementing such regulations.

River Regulations and Effects

There are problems with regulating the sport catch in the river. A reliable estimate of the sizes of the small runs of spring chinook and summer steelhead utilized by sportsmen can only be made at Bonneville Dam. This means that by the time the Indians' share is known, the fish have already passed the lower river sport fishing sites.¹¹ Above Bonneville Dam, tributaries with harvestable stocks and those without must be distinguished and sports regulations adjusted for each to insure equity.¹²

Reduction of the commercial river fisheries would

be an easier way to provide the Indians with more fish and interfere minimally with stocks not destined for upriver.¹³ But this could end the commercial gill-net fishery on the lower Columbia River as the following data suggest. The Indians' 1976 share was calculated as 131,700 fall chinook and 65,900 coho and their average catch as 45,500 fall chinook and 11,000 coho. Thus, to comply with the court orders, 86,200 additional fall chinook and 54,900 additional coho would be required. These numbers would have to be augmented to compensate for the twenty percent loss at Bonneville Dam, creating an actual requirement of about 107,750 fall chinook and more than 54,900 coho. The entire average commercial gill-net catch of 96,300 fall chinook and 14,800 coho would not be enough to meet these needs.¹⁴

Ocean Regulations and Effects

Since four fish from the major runs (fall chinook and coho) are caught in the ocean for every fish caught in the river, recommended options have concentrated primarily on regulation of ocean fisheries.¹⁵

Proposed ocean regulations for shorter seasons and increased minimum size for 1976 would, it is estimated, have the following impact in Oregon:

- 1) the ocean troll fishery would lose 20,000 chinook and 115,000 coho;

- 2) the ocean sport fishery would lose 5,000 chinook and gain 30,000 coho; and
- 3) the non-Indian gill-net fishery would lose 65,000 upriver fall chinook but gain 18,000 lower river fall chinook and lose 12,000 upriver coho but gain 38,000 lower river coho.¹⁶

The effect of delaying the opening of the troll fishery season would have widespread and mixed impact. The shaker loss (death of fish caught but released by fishermen) would be reduced, leaving more immature fish to continue growing. The mature fish to be harvested would grow larger so that a gain in weight per fish would help offset a loss of numbers of fish caught. Fishing efficiency would increase with more pounds of fish caught per unit of time. Spring and summer chinook, which can only be caught incidentally at present because their runs are not of a harvestable size, would receive more protection which would increase spawning escapement and thus increase the run sizes of the future.

Some of the impact, however, would be negative. Harvesting of immature stocks off the coast of other states and by fishermen with licenses from other states and Canada might be increased in areas out of Oregon's jurisdiction because of lack of competition and transfer of fishing effort. Many of the fish presently landed and taxed in Oregon would be landed in California because of

less restrictive regulations, causing Oregon a loss of revenue. Full-time fishermen who live by fishing would be hurt more than part-time fishermen.¹⁷

Various regulatory changes in the ocean fishery which would provide the Indians with their share have been fitted to a computer model and the probable impact computed. The model used combines Washington and Oregon fish because cooperation between the two states will be necessary for such regulation to provide optimum results. The model is based on the following assumptions:

- 1) both artificial production facilities and natural spawning areas above Bonneville Dam were included in determining the treaty Indians' fifty percent;
- 2) subsistence, ceremonial, and on-reservation catches by Indians were not included when calculating the fifty percent;
- 3) based on past experience, all chinook caught in the August season were considered upriver stocks and all chinook caught in the late fall season were considered lower river stocks;
- 4) numbers of sockeye salmon and summer steelhead caught in ocean fisheries were considered insignificant;
- 5) those portions of runs caught in the ocean were estimated from the results of studies done

on the contribution of various Columbia River stocks to ocean fisheries; and

- 6) losses at Bonneville Dam were taken into account in determining the Indians' fifty percent share.¹⁸

The probable changes in river runs resulting from various regulatory options using these assumptions are shown in Appendix II.

Summary

There are many problems involved with regulating the fisheries to provide for the Indians' share. At the present time, increased ocean restrictions are favored by the resource managers; but whatever regulations are ordered, the impact of the restrictions will be widespread and mixed.

Conclusion

It is the resource managers' opinion that in the long run no user group will be adversely affected by the recent court decisions allowing the treaty Indians a larger share of the fish resource. Through the use of more sophisticated management tools, such as improved methods of determining run size and better technology to reduce fish mortality at dam sites; better understanding

of fish behavior and associated better control of the fishery; and improved agreements with other states and Canada so that management policies can be better coordinated, the fisheries scientists believe that instead of reducing the commercial and sport fishing to supply the Indians the fish resource will be enlarged to provide for the Indians' share, and also to maintain present levels of sport and commercial fisheries.

FOOTNOTES

- 1 This stipulation may be found in almost identical words in all four treaties: Treaty with the Umatilla Tribe, June 9, 1855; Treaty with the Yakima Tribe, June 9, 1855; Treaty with the Nez Perce Tribe, June 11, 1855; and Treaty with the Tribes of Middle Oregon, June 25, 1855. U. S., Statutes at Large, vol. 12.
- 2 U. S. Constitution, art. VI, clause 2.
- 3 Office of the Special Assistant to the Secretary of the Interior, Pacific Northwest Region, "Background Information on Indian Fishing Rights in the Pacific Northwest," mimeographed (Portland, Oregon: U. S. Department of the Interior, May 22, 1974), p. 8.
- 4 Office of the Special Assistant, op. cit., footnote 3, p. 1.
- 5 Joint Staffs, Oregon Department of Fish and Wildlife and Washington Department of Fisheries, "Background Information Relating to the Commercial Harvest of Fall Chinook in the Columbia River in 1975," mimeographed (July 18, 1975), p. 2.

- 6 Staff, Washington Department of Fisheries and Oregon Department of Fish and Wildlife, "A Plan for Managing Oregon and Washington Fisheries in Compliance with Treaty Indian Fishing Rights in the Columbia River," mimeographed (January 1976), p. 5.
- 7 Staff, op. cit., footnote 6, p. 2.
- 8 Staff, op. cit., footnote 6, p. 16.
- 9 Staff, op. cit., footnote 6, pp. 16-18.
- 10 These potential regulations are discussed in more detail in Oregon Department of Fish and Wildlife and Washington Department of Fisheries, "Review of Management Alternatives for Columbia River Fall Chinook with Specific Consideration of Options for the 1975 Upriver Run," mimeographed (September 8, 1975), pp. 14-16; Joint Staffs, op. cit., footnote 5, p. 1; and Staff, op. cit., footnote 6, p. 19.
- 11 Staff, op. cit., footnote 6, pp. 28-29.
- 12 Staff, op. cit., footnote 6, p. 30.
- 13 Oregon and Washington, op. cit., footnote 10, p. 13.
- 14 Robert T. Gunsolus, "Staff Presentation," mimeographed (March 19, 1976), p. 2.
- 15 Staff, op. cit., footnote 6, p. 18.

- 16 Joint Staffs, op. cit., footnote 5, pp. 9-10.
- 17 Gunsolus, op. cit., footnote 14, pp. 4-5.
- 18 These assumptions are discussed in some detail in Staff, op. cit., footnote 6, pp. 2, 9, 18, and 19.

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RICHARD SOHAPPY, et al.,

Plaintiffs,

v.

McKEE A. SMITH, EDWARD G. HUFFSCHMIDT, J. B. EOFF,
Commissioners, Oregon Fish Commission; ROBERT W.
SCHONING, Director, Oregon Fish Commission, their
agents, servants, employees and those persons in
active concert or participation with them; JOHN W.
McKEAN, Director Oregon Game Commission, his agents,
servants, employees and those persons in active
concert or participation with him,

Defendants.

(Civil No. 68-409)

UNITED STATES OF AMERICA,

Plaintiff,

and

THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS
RESERVATION OF OREGON; CONFEDERATED TRIBES AND BANDS

OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF
THE UMATILLA INDIAN RESERVATION; and NEZ PERCE TRIBE
OF IDAHO,

Plaintiff-Intervenors,

v.

STATE OF OREGON,

Defendant,

and

STATE OF WASHINGTON,

Defendant-Intervenor.

(Civil No. 68-513)

OPINION

Fourteen individual members of the Confederated Tribes and Bands of the Yakima Indian Nation filed case No. 68-409 against the members and director of the Fish Commission of the State of Oregon and the Oregon State Game Commission. They seek a decree of this court defining their treaty right "of taking fish at all usual and accustomed places" on the Columbia River and its tributaries and the manner and extent of the State of Oregon may regulate Indian fishing.

Shortly thereafter the United States on its own behalf and on behalf of the Confederated Tribes and

Bands of the Yakima Reservation, the Confederated Tribes and Bands of the Umatilla Reservation composed of the Walla Walla, Cayuse and Umatilla Bands or Tribes, the Nez Perce Indian Tribe and "all other tribes similarly situated" filed case No. 68-513. Upon their individual motions the Warm Springs Tribe, the Yakimas, the Umatillas and the Nez Perce Tribe were permitted to intervene in their own behalf. Following the intervention of the Warm Springs Tribe and upon the inability of government counsel to identify any other tribes who were "similarly situated", the State's motion to strike the reference to such other tribes was granted.

Sohappy v. Smith is brought pursuant to 28 U.S.C. § 1331(a). United States v. Oregon is pursuant to 28 U.S.C. § 1345. In each case the matter in controversy exceeds \$10,000. Declaratory judgments are sought pursuant to 28 U.S.C. § 2201. By order of this court the proceedings were consolidated for pretrial procedures and for trial. Fed.R.Civ.P. 42(a).

In both actions the defendants moved that the cases be heard by a three-judge court pursuant to 28 U.S.C. § 2281 and that the actions be dismissed for failure to join the State of Washington as an indispensable party pursuant to Rule 19. Defendants also moved to dismiss No. 68-409 as being a suit against the state in contravention of the Eleventh Amendment of the United States Constitution,

and for lack of plaintiffs' standing to sue as individuals. All of the foregoing motions were denied. These cases challenge the validity of certain Oregon Statutes and regulations under the Supremacy Clause of the Constitution of the United States as being contrary to certain treaties of the United States. U.S.Const. Article VI, Clause 2. A three-judge court is not authorized in these cases. *Swift & Co. v. Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965); *Jehovah's Witnesses in State of Washington v. King County Hospital et al.*, 278 F.Supp. 488 (W.D.Wash. 1967), aff'd 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed. 2d 158 (1968); *Ness Produce Co. v. Short*, 263 F.Supp. 586 (D.Or.1966), aff'd 385 U.S. 537, 87 S.Ct. 742, 17 L.Ed.2d 591 (1967). Neither the State of Washington nor any official thereof is an indispensable party to these actions. Fed.R.Civ.P. 19; *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). No. 68-409 is not a suit against the State of Oregon and is not barred by the Eleventh Amendment of the United States Constitution. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *Georgia Railroad and Banking Co. v. Redwine*, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335 (1952). The individual plaintiffs in No. 68-409 have an interest in the controversy and have standing to maintain that

action to assert that interest.

By agreement of the parties, the cases were heard by the court without a jury and certain issues were segregated for separate hearings and determination. This opinion deals with those issues.

In 1855 the United States negotiated separate treaties with each of the above named Indian tribes. These treaties were ratified and proclaimed by the United States in 1859. Treaty of June 9, 1855, with the Yakima Tribe (12 Stat. 951); Treaty of June 25, 1855 with the Tribes of Middle Oregon (12 Stat. 963); Treaty of June 9, 1855, with the Umatilla Tribe (12 Stat. 945); Treaty of June 11, 1855, with the Nez Perce Tribe (12 Stat. 957). Each of these treaties contained a substantially identical provision securing to the tribes "the right of taking fish at all usual and accustomed places in common with citizens of the Territory."

Most of the argument has centered around the state's interpretation of that provision. It believes that it gives the treaty Indians only the same rights as given to all other citizens. Such a reading would not seem unreasonable if all history, anthropology, biology, prior case law and the intention of the parties to the treaty were to be ignored.

I will review some of these factors and declare the rights of the parties.

Subsequent to the execution of the treaties and in reliance thereon the members of said four tribes have continued to fish for subsistence and commercial purposes at their usual and accustomed fishing places. Such fishing provided and still provides an important part of their subsistence and livelihood. Both prior to and subsequent to the treaties, the Indians used a variety of means to take fish, including various types of nets, weirs and gaff hooks.

The policy of the United States to extinguish Indian rights in the Oregon Territory by negotiation rather than by conquest was firmly established in the Act of August 14, 1848 (9 Stat. 323) which established the Oregon Territory. That act declared that nothing in it "shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." The act also extended to the Oregon Territory the provisions of the Northwest Ordinance of 1787 which provided, among other things, that "good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent." (1 Stat. 51, Note a)

The treaties with which we are here concerned are parts of the result of that policy. They are not treaties

of conquest but were negotiated at arm's length. The word of the United States was pledged. Today, some 114 years later, all of the parties to those treaties are in essential agreement as to their meaning and they have joined in asking this court to confirm that construction. Only the State of Oregon, successor to many of the rights of the United States, disagrees with the interpretation which the parties to the treaties assert here.

It hardly needs restatement that Indian treaties, like international treaties, entered into by the United States are part of the supreme law of the land which the states and their officials are bound to observe. *United States v. 43 Gallons of Whiskey* (*United States v. Jarviere et al.*), 93 U.S. (3 Otto) 188, 23 L.Ed. 846 (1876); *Worcester v. Georgia*, 31 U.S. (6 Peters) 515, 8 L.Ed. 483 (1832). The Supreme Court has on numerous occasions noted that while the courts cannot vary the plain language of an Indian treaty, such treaties are to be construed:

as "that unlettered people" understood it, and, "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules," *Choctaw Nation v. United States*, 119 U.S. 1, 7 Sup.Ct. 75, 30 L.Ed. 306; *Jones v. Meehan*, 175 U.S. 1, 20 Sup.Ct. 1, 44 L.Ed. 49. *United States v. Winans*, *supra*. [198 U.S. 371, 49 L.Ed. 1089, 25 Sup.Ct.Rep. 662] *Northern Pacific Railway Co. v. United States*,

227 U.S. 355, 366, 33 S.Ct. 368, 57 L.Ed. 544 (1913).

It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people. *Tulee v. Washington*, 315 U.S. 681, 684, 62 S.Ct. 862, 86 L.Ed. 1115 (1942).

The Columbia River has long been one of the world's major producers of salmonid fish. Several species of salmon and steelhead trout inhabit the river and its tributaries. They are spawned in the tributaries, headwaters and mainstem, migrate to the Pacific Ocean where they spend the bulk of their adult life, return generally to the river or stream of their origin, spawn, and, in case of salmon, die. From aboriginal times these salmon and steelhead have been a highly prized source of food. They are also a major recreational attraction to sports fishermen.

From the earliest known times, up to and beyond the time of the treaties, the Indians comprising each of the intervenor tribes were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture. They were heavily dependent upon such fish for their subsistence and for trade with other tribes and later with the settlers. They cured and dried large quantities for

year around use. With the advent of canning technology in the latter half of the 19th Century the commercial exploitation of the salmonid resource by non-Indians increased tremendously. Indians, fishing under their treaty-secured rights, also participated in this expanded commercial fishery and sold many fish to non-Indian packers and dealers.

During the negotiations which led to the signing of the treaties the tribal leaders expressed great concern over their right to continue to resort to their fishing places and hunting grounds. They were reluctant to sign the treaties until given assurances¹ that they could continue to go to such places and take fish and game there. The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the assurances given to the Indians on this point as inducement for their acceptance of the treaties.

The Supreme Court has recently restated the nature of the non-exclusive off-reservation fishing rights secured by these Indian treaties. In *Puyallup Tribe et al. v. Department of Game et al.*, 391 U.S. 392, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968), it declared:

The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States.
* * * But the manner of fishing, the size of the take, the restriction of commercial fishing, and

the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

The Court referred to its earlier decisions in *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942), and *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905) and affirmed the view that to the extent "necessary for the conservation of the fish" the state could exercise its police power to impose appropriate restrictions on the time and manner of fishing that did not discriminate against the Indians.

It will facilitate an understanding of the issues involved in these cases if we note briefly certain points that are not here in issue. None of the plaintiffs or intervenor tribes denies the jurisdiction of the State of Oregon to regulate Indian exercise of these off-reservation fishing rights. Nor do they deny the need for regulation of Indian commercial fishing on the Columbia River to protect fish stocks. As the issue is stated in the Government's brief, "The concept of necessary regulation we accept, and we accept the states as being one class of agents of the public to determine and administer such regulations--provided they act with due regard to their responsibilities under the laws of this land, including these treaties."

The issue in these cases concerns the limitation

on the state's power to regulate the exercise of the Indians' federal treaty right. At least three such limitations are indicated by the Supreme Court in its Puyallup decision. First, the regulation must be "necessary for the conservation of the fish." Second, the state restrictions on Indian treaty fishing must "not discriminate against the Indians." And third, they must meet "appropriate standards."

The regulations and policies heretofore applied by the state's regulatory and enforcement agencies have been premised upon the belief that, except for a right of access over private lands and exemption from the payment of license fees, the treaties afforded the Indians no rights beyond those accorded under the Fourteenth Amendment of the United States Constitution and under Article 1, Section 20, of the Oregon Constitution. The state argues that its regulatory scheme complies with the treaty requirements so long as the specific regulations applicable at any particular time or place impose no greater restriction on Indians fishing at such time or place than are imposed upon others fishing there. The state contends that the Indians' right to take fish at their usual and accustomed places is not a right that must be given any separate recognition or protection or be separately dealt with in the state's regulatory scheme. It argues that it may, in the

interest of conservation, impose any restriction on treaty Indians fishing at their usual and accustomed places which it may impose upon non-Indians fishing at those same locations, even to the point of completely closing certain such areas to all forms of commercial fishing. It further argues, on the basis of its reading of a number of federal court decisions, including *Puyallup Tribe et al. v. Department of Game*, *supra*, that it may not allow Indians to fish at their usual and accustomed places in any manner or at any time that it does not similarly allow non-Indians to fish at those same locations. There is no support in any of these federal cases for any such narrow interpretation of the state's authority to distinguish between the regulation of Indian treaty-protected fishing and that of fishing by others.

The plaintiffs and intervenor tribes contend that before Oregon may regulate the taking and disposition of fish by treaty Indians at their usual and accustomed fishing places:

(a) It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the necessary escapement of fish for conservation purposes; the burden of establishing such facts is on the state.

(b) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others.

As one method of accomplishing conservation objectives it may lawfully restrict or prohibit non-Indians fishing at the Indians' usual and accustomed fishing places without imposing similar restrictions on treaty Indians.

(c) It must so regulate the taking of fish that the treaty tribes and their members will be accorded an opportunity to take, at their usual and accustomed fishing places, by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run.

They also contend that ORS 511.106(1), 506.006(4), and certain orders of the Fish Commission establishing closed areas or seasons above Bonneville Dam may not be applied so as to prevent Indians from taking fish at their usual and accustomed places east of the confluence of the Columbia and Deschutes Rivers under their treaty rights because such application is not reasonable and necessary for conservation and constitutes an arbitrary and unreasonable total prohibition against the exercise of such treaty rights. In addition, they contend that such application of the regulations violates ORS 506.045.

As is discussed more fully below, I believe that these contentions of the plaintiffs and the tribes correctly state the law applicable to state regulation of the Indians' federal treaty right.

Under Oregon law responsibility for the management of the fish resources of the state is divided between the Fish Commission and the Game Commission, with the former having exclusive jurisdiction over all fish

other than game fish. ORS 506.040. The Game Commission has jurisdiction over game fish. ORS 496.160. Salmon and steelhead are food fish except when taken by angling, in which case they are classified as game fish. Subject to certain statutory limitations, the Fish Commission and Game Commission are each given broad authority to regulate the times, places and manner of taking fish and the possession and disposition of fish in waters or areas under the state's jurisdiction. One such statutory limitation, dating back to 1901 and presently contained in ORS 511.106(1) permanently closes the area east of the confluence of the Columbia and Deschutes Rivers to any fishing by any means other than angling.

The defendants' narrow interpretation of the Indians' rights under the treaties has been consistently rejected by the higher federal courts. *Puyallup Tribe et al. v. Washington*, supra; *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, 9 Cir., 382 F.2d 1013 (1967); *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), cert. denied 375 U.S. 829, 84 S.Ct. 73, 11 L.Ed.2d 60 (1963); *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). The question was most recently examined by the Supreme Court in *Puyallup Tribe et al. v. Department of Game et al.*, supra, where as previously noted, certain

limitations on the state's regulatory authority over this federal right were mentioned. We turn now to a discussion of those limitations.

The parties place differing interpretations on the limitations on state authority inherent in the requirement that the state restriction on treaty-referenced fishing must be "necessary for the conservation of the fish."

By this reference the Supreme Court was undoubtedly speaking of conservation in the sense of perpetuation or improvement of the size and reliability of the fish runs. It was not endorsing any particular state management program which is based not only upon that factor but also upon allocation of fish among particular user groups or harvest areas, or classification of fish to particular uses or modes of taking.

The state may regulate fishing by non-Indians to achieve a wide variety of management or "conservation" objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the

federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource. The measure of the legal propriety of a regulation concerning the time and manner of exercising this "federal right" is, therefore, "distinct from the federal constitutional standard concerning the scope of the police power of the State." *Puyallup Tribe et al. v. Department of Game et al.*, supra, footnote 14, 391 U.S., p. 402, 88 S.Ct., p. 1730. To prove necessity, the state must show there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation. This applies to regulations restricting the type of gear which Indians may use as much as it does to restrictions on the time at which Indians may fish.

Oregon's conservation policies are concerned with allocation and use of the state's fish resource as well as with their perpetuation. It has divided the regulatory and promotional control between two agencies--one concerned with the protection and promotion of fisheries for sportsmen (ORS 496.160) and the other concerned with protection and promotion of commercial

fisheries (ORS 506.036). The regulations of these agencies, as well as their extensive propagation efforts, are designed not just to preserve the fish but to perpetuate and enhance the supply for their respective user interests. This is shown not only in the documentary evidence in this case but in the deposition testimony of Fish Commission personnel.

The Director of the Fish Commission testified as follows:

Q. Now, isn't it true that in fixing seasons, establishing gear limitations and the like below the escapement goal point, wherever it is, what the Fish Commission is doing really is only deciding where the harvestable portion of the run is to be caught?

A. That is one of the things we are doing. We are also more accurately assuring that we might get the escapement.

* * *

Q. Paraphrasing from what you said a moment ago, would it not be best to have one regulatory agency regulate both the offshore landing, sports control and also the in-river landings, both commercial, gill and Indian and sports?

A. It's been our stated position that a single resource such as anadromous fish could best be managed by a single entity.

Q. Correct. Now, if a single entity has that authority and that responsibility, is it not true that that single entity must make some determination between the various user groups or taking groups as to what percentage or what use or what landing of the resource that this particular user group may make of it?

A. In some way, deliberately or inadvertently, this decision must be made. (Schoning Dep. Ex.

45 Vol. III, pp. 44, 90-91) (Emphasis supplied)

The research biologist and project leader for the Commission's Columbia River investigations testified:

Q. Now, these people that fish in the lower river, if you open up an area above Bonneville Dam, and consequently have to reduce the fishing that is done below Bonneville Dam and still maintain the escapement goal, a run that will reach your escapement goal, by setting the length of season at various places along the river, in effect, you are determining who catches the fish, aren't you?

A. To some extent, I am sure we are. Every regulation we set for fishermen below Bonneville, someone objects to it; because they feel they are being discriminated against because there are more fish going out of Astoria, and they have to fish up at Portland. So, many fish up at Astoria and some fish up around Corbett.

* * *

Q. Isn't it your experience at these meetings with the Washington Department of Fisheries and the Oregon Fish Commission, that they try in some manner to come up with a regulation that is not unpopular?

A. I think as much as possible if you could still achieve the escapement goal. They try to accommodate as many people as possible just within the authority and within their responsibility as they see it and maintain the resource. They try to do it. I think it is a fair statement.

* * *

Q. You also have to take into consideration those compromises among those different people that are dissatisfied that you mentioned earlier?

A. I don't personally. The Commission does. (Oakley Dep., Ex. A-46, pp. 58-59, 60-61, 62) (Emphasis supplied)

There is no evidence in this case that the defendants have given any consideration to the treaty rights of

Indians as an interest to be recognized or a fishery to be promoted in the state's regulatory and developmental program. This same discriminatory aspect of the state's conservation policy was recognized earlier by the court of appeals in *Haison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d at 173.

The parties also place widely differing interpretations upon the Supreme Court's criteria that the state's restriction on the time and manner of fishing by treaty Indians must not discriminate against the Indians. The state believes that this means only that each law or regulation must be equally applicable to Indian and non-Indian. The United States, on the other hand, contends that the state's over-all regulation of the fishery must not discriminate against the Indians' exercise of their treaty rights in favor of the taking of fish by others at other locations--that it is the treaty right which must be given equal protection with other interests in the state's regulations on the entire run as it proceeds through the area of the state's jurisdiction must be considered; that a nondiscriminatory set of regulations requires that treaty Indians be given an opportunity to catch fish at their usual and accustomed places equal to that of other users to catch fish at locations preferred by them or by the state.

In considering the problem of salmon and steelhead

conservation in the Columbia River and its tributaries, it is necessary to consider the entire Columbia River system. The off-shore fishery in the Pacific Ocean has some effect on the numbers of fish that enter the river. The salmon and steelhead that enter the Columbia River are anadromous fish and spend much of their adult life in the Pacific Ocean. Therefore, they must pass as fingerlings down the Columbia River to the sea; and as adults they must pass up the Columbia River into the particular tributary or area where they spawn.

One of the principal tools which the states of Oregon and Washington use for managing most runs of the anadromous fish resources of the Columbia River system is the "escapement goal." This goal is set by the Fish Commission, generally in conjunction with the Washington Department of Fisheries, as being the estimated numbers of fish which must escape above all commercial fishing in order that, considering all factors which influence the matter above that point, the greatest aggregate numbers of fish from such fish run will be produced and return down the Columbia to the Pacific Ocean. In establishing the escapement goal for a particular run the Fish Commission and its biological staff consider the losses which will occur above the escapement goal point from all causes, including natural causes, losses at dams and the sports catch

on the upstream and tributaries in Oregon, Washington and Idaho. All the estimated numbers of fish in a given run in excess of the escapement goal are regarded by the Fish Commission as harvestable.

The state regulates fishing within its borders from the Continental Shelf to the upper limits of the river and its tributaries. It manages its resources to allow the harvest to be taken on whatever portions of the river it desires. It must manage the over-all fish run in a way that does not discriminate against the treaty Indians as it has heretofore been doing. Oregon recognizes sports fishermen and commercial fishermen and seems to attempt to make an equitable division between the two. But the state seems to have ignored the rights of the Indians who acquired a treaty right to fish at their historic off-reservation fishing stations. If Oregon intends to maintain a separate status of commercial and sports fisheries, it is obvious a third must be added, the Indian fishery. The treaty Indians, having an absolute right to that fishery, are entitled to a fair share of the fish produced by the Columbia River system.

The Supreme Court has said that the right to fish at all usual and accustomed places may not be qualified by the state. *Puyallup Tribe et al. v. Department of Game, et al.*, supra, 391 U.S., p. 398, 88 S.Ct. 1725, 20 L.Ed.2d 689. I interpret this to mean that the state

cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located.

It is clear that the state has the full and complete power to regulate all kinds of fishing, including the Indian fishery, to the end that the resource is preserved. There is no reason to believe that a ruling which grants the Indians their full treaty rights will affect the necessary escapement of fish in the least. The only effect will be that some of the fish now taken by sportsmen and commercial fishermen must be shared with the treaty Indians, as our forefathers promised over a hundred years ago.

In prescribing restrictions upon the exercise of Indian treaty rights the state may adopt regulations permitting the treaty Indians to fish at their usual and accustomed places by means which it prohibits to non-Indians. *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, supra. While the treaties do not give the Indians the right to insist that the state restrict non-Indians to a greater degree than it restricts Indians, neither do they limit the state's authority to restrict non-Indian fishing.

In determining what is an "appropriate" regulation one must consider the interests to be protected or

objective to be served. In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indians' usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users. The restrictions on the exercise of the treaty right must be expressed with such particularity that the Indian can know in advance of his actions precisely the extent of the restriction which the state has found to be necessary for conservation. Cf. *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 92 L.Ed. 840 (1948); *Cline v. Frink Dairy Company*, 274 U.S. 445, 465, 47 S.Ct. 681, 71 L.Ed. 1146 (1927); *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1875).

This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery, nor do the plaintiffs ask it to. As the Government itself acknowledges, "proper anadromous fishery management in a changing environment is not susceptible of rigid pre-determination. * * * the variables that must be weighed in each given instance make judicial review of state action, through retention of continuing jurisdiction, more appropriate than overly-detailed judicial predetermination." The requirements of fishery regulation are such that many of the

specific restrictions, particularly as to timing and length of seasons, cannot be made until the fish are actually passing through the fishing areas or shortly before such time. Continuing the jurisdiction of this court in the present cases may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such restrictions should such review become necessary.

I also do not believe that this court should at this time and on this record attempt to prescribe the specific procedures which the state must follow in adopting regulations applicable to the Indian fishery. The state must recognize that the federal right which the Indians have is distinct from the fishing rights of others over which the state has a broader latitude of regulatory control and that the tribal entities are interested parties to any regulation affecting the treaty fishing right. They, as well as their members to whom the regulations will be directly applicable, are entitled to be heard on the subject and, consistent with the need for dealing with emergency or changing situations on short notice, to be given appropriate notice and opportunity to participate meaningfully in the rule-making process.

This does not mean that tribal consent is required for restrictions on the exercise of the treaty rights.

As the Supreme Court has stated on several occasions, the state's police power gives it adequate authority to regulate the exercise of the treaty-secured Indian off-reservation fishing rights, provided its regulations meet the standards which that court has prescribed.

It is not necessary at this time, and it would be inappropriate on this record, to determine the extent, if any, of the authority of the Federal Government or of the intervenor tribes to prescribe regulations that would govern Indians in the exercise of the treaty-secured fishing rights. It is sufficient to say that the state's authority to prescribe restrictions within the limitations imposed by the treaties and directly binding upon the Indians is not dependent upon assent of the tribes or of the Secretary of the Interior. But certainly agreements with the tribes or deference to tribal preference or regulation on specific aspects pertaining to the exercise of treaty fishing rights are means which the state may adopt in the exercise of its jurisdiction over such fishing rights. Both the state and the tribes should be encouraged to pursue such a cooperative approach. See *Makah Indian Tribe v. Schoettler*, *supra*.

Two other contentions of defendant can be disposed of very briefly. Defendant urges that the treaty provisions were in some manner altered or affected by Oregon's admission to the Union on an "equal footing"

basis subsequent to the time the treaties were negotiated and signed and prior to the time they were ratified and became effective as the law of the land. There is no merit in this contention. Statehood does not deprive the Federal Government of the power to enter into treaties affecting fish and game within a state, especially migratory species. *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1924).

Nor did subsequent statehood diminish the treaty-secured fishing right. *Payallup Tribe et al. v. Department of Game et al.*, supra; *Holcomb v. Confederated Tribes of the Umatilla Indian Reservation*, supra. Defendant also argues that the treaty provisions were modified or superseded by the subsequent congressional action approving the 1918 Columbia Interstate Compact. Nothing in the Compact (ORS 507.010) or in the Act of Congress thereto (40 Stat. 515) impaired the Indian treaty right in any way. *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); *United States v. Payne*, 264 U.S. 446, 44 S.Ct. 352, 68 L.Ed. 782 (1924); *United States v. Lee Yen Tai*, 185 U.S. 213, 22 S.Ct. 629, 46 L.Ed. 878 (1902); *P. J. McGowan & Sons v. Van Winkle*, D.C., 21 F.2d 76, aff'd 227 U.S. 574, 48 S.Ct. 435, 72 L.Ed. 995 (1928); *Olin v. Kitzmiller*, 9 Cir., 268 F. 348, aff'd 259 U.S. 260, 42 S.Ct. 510, 66 L.Ed. 930 (1922); *Anthony v. Veatch*, 189 Or. 462,

220 P.2d 493, appeal dismissed 340 U.S. 923, 71 S.Ct. 499, 95 L.Ed. 667 (1950); Union Fishermen's Co. v. Shoemaker, 98 Cr. 569, 193 P. 476 (1921); State v. James, 72 Wash.2d 746, 435 P.2d 521 (1967); State ex rel. Gile v. Huse, 183 Wash. 560, 561, 49 P.2d 25 (1935).

This opinion shall constitute findings of fact and conclusions of law in accordance with Rule 52(a) Fed.R.Civ.P.

Dated this 8th day of July, 1969.

ROBERT C. BELLONI

United States District Judge

1. At the time of presenting the treaty to the Cayuse, Walla Walla and Nez Perce for signing, Governor Stevens prompting a reluctant Nez Perce Chief stated: "Looking Glass knows that he can * * * catch fish at any of the fishing stations." Record of Proceedings Walla Walla Valley Treaty Council June 9th, 1855, p. 145.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RICHARD SCHAPPY, et al.,

Plaintiffs,

v.

McKEE A. SMITH, EDWARD G. HUFFSCHMIDT, J. I. EOFF,
Commissioners, Oregon Fish Commission; ROBERT W.
SCHONING, Director, Oregon Fish Commission, their
agents, servants, employees and those persons in active
concert or participation with them; JOHN W. McKEAN,
Director, Oregon Game Commission, his agents, servants,
employees and those persons in active concert or
participation with him.

Defendants.

(Civil No. 68-409)

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF OREGON,

Defendant,

and

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION
OF OREGON; CONFEDERATED TRIBES & BANDS OF THE YAKIMA
INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA
INDIAN RESERVATION; and NEZ PERCE TRIBE OF IDAHO,

Intervenors.

(Civil No. 68-513)

ORDER AMENDING JUDGMENT OF OCTOBER 10, 1969

The Indian treaty fishermen are entitled to have
the opportunity to take up to 50% of the harvest of
the spring Chinook Salmon run destined to reach the
tribes' usual and accustomed grounds and stations.
Except insofar as amended here, the 1969 judgment remains
in full force and effect.

IT IS SO ORDERED.

DATED this 10th day of May, 1974.

ROBERT C. BELLONI

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RICHARD SOHAPPY, et al.,

Plaintiffs,

v.

McKEE A. SMITH, EDWARD G. HUFFSCHMIDT, J. B. EOFF,
Commissioners, Oregon Fish Commission; ROBERT W.
SCHONING, Director, Oregon Fish Commission, their
agents, servants, employees and those persons in
active concert or participation with them; JOHN W.
McKEAN, Director Oregon Game Commission, his agents,
servants, employees and those persons in active
concert or participation with him,

Defendants.

(Civil No. 68-409)

UNITED STATES OF AMERICA,

Plaintiff,

and

THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS
RESERVATION OF OREGON; CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF

THE UMATILLA INDIAN RESERVATION; and NEZ PERCE TRIBE
OF IDAHO,

Plaintiff-Intervenors,

v.

STATE OF OREGON,

Defendant,

and

STATE OF WASHINGTON,

Defendant-Intervenor.

(CIVIL NO. 68-513)

ORDER

The Yakima Nation has moved for a Preliminary
Injunction requesting this Court to:

- 1) enjoin the State of Oregon from implementing
and enforcing OAR 630-30-100;
- 2) enjoin the States of Oregon and Washington
from enforcing a $7\frac{1}{2}$ inch mesh net restriction
on Treaty Indian fisheries; and,
- 3) enjoin the States of Oregon and Washington
from opening or allowing the continuation
of a non-Indian commercial and sport fishery
on the Columbia River to harvest fall chinook
salmon.

All four intervening tribes have requested a

Preliminary Injunction which would enjoin all non-Indian fishing, both marine and non-marine, until the Indians have an opportunity to harvest up to 50% of the fall chinook salmon run in the Columbia River.

The development of the law of this case:

Six years ago at the request of the tribes, the United States and the State of Oregon, I interpreted the treaties of 1855 as they applied to the Indian fishing in the Columbia River. By those treaties the tribes exchanged their lands in the northwest for certain designated reservations but they reserved to themselves "the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory".

I ruled that this meant a right to catch fish commercially because the Columbia River Indians had been commercial fishermen since time immemorial and that they would not have signed the treaties without reserving this right to themselves.

I ruled that the treaty tribes must "be accorded an opportunity to attempt to take, at their usual and accustomed places by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run". In other words the State should be allowed to decide how many fish should be taken from a given run. This will

presumably be all the fish remaining in the run after an adequate number have escaped all fishermen to spawn and to perpetuate the resource. The remainder after escapement goals were reached were to be divided equitably.

I did not define an equitable distribution. The issue had not been before me and I had hoped that the State and the Indians would agree upon its definition.

The State of Oregon accepted my ruling and even though it had been vigorously opposed and even though it was diametrically contrary to a policy of the State which had existed for 114 years it did not appeal the ruling.

The State of Washington refused to remain a party to the original proceedings and it was not bound by my decision.

Last year, however, Washington petitioned to intervene in this case and that privilege was granted. It is now a party to and bound by the decision and subsequent orders of this Court.

Before the State of Washington became a party to this case, the United States on behalf of these and other tribes, brought a similar action in the United States District Court for the Western District of Washington. Judge Boldt, in a historic decision,

came to the same conclusion that I had reached. He then further defined the treaty rights in terms of the amount of fish to be allocated between the Indians and the non-Indians. He said that treaty Indians are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds. United States vs. Washington, 384 F. Supp. 312 (1974).

The Court of Appeals for the Ninth Circuit has now affirmed. United States vs. Washington, No. 74-2414 (June 4, 1975 - 9th Cir.)

Rulings of this Court:

1- OAR 630-30-100 regulates the sale of steelhead in Oregon in that it prohibits all transfer by sale, gift or barter of lawfully caught steelhead by Indians to non-Indians within the State of Oregon except for sale to licensed wholesale fish dealers, canners and buyers for ultimate marketing outside the State of Oregon. The defendant contends that this regulation is necessary for accurate record keeping of the steelhead harvest.

This regulation will almost certainly not survive close review. It has the potential for eliminating the commercial harvest of steelhead by the Indians and it is obviously not the least restrictive alternative

to accomplish the State's goal. Plaintiffs, however, have shown no emergency or irreparable harm which would justify the granting of injunctive relief. The defendants should re-examine the rule at their next meeting.

The motion for a Preliminary Injunction is denied.

2- Originally, the mesh net limit proposal for the treaty Indian Fishery was 8 inches. This was changed to $7\frac{1}{2}$ inches at the request of counsel for the Yakima Nation. After further investigation counsel discovered that most Indian fishing gear had a $7\frac{1}{4}$ inch mesh and that a $7\frac{1}{2}$ inch limit would effectively prevent them from fishing at all. By this motion they request the mesh limit be lowered to $7\frac{1}{4}$ inches. Unless this small reduction has a determinably adverse affect on conserving the resource, this limit should be amended as requested. This issue is remanded to the Washington-Oregon Columbia River Fisheries Compact for its review.

The Motion for a Preliminary Injunction is denied.

3- The third request of the Yakima Nation as well as the one request of all the intervening tribes will both be covered by this finding.

The first two motions are rather typical of the kind of problems which frequently come before this Court's continuing jurisdiction in this case. The problems are usually presented as emergency problems

because they involve a current run of one of the species of Columbia River fish. The runs sometimes last only a few days. The motions are always the result of the two states' agency action taken only a few days earlier. The process results in hasty decisions in which neither party has the opportunity for a full briefing and argument on some of the most important principles of law.

For six years I have attempted to persuade the state to adopt a comprehensive plan to assure a fair share to all the parties but that plan has not been forthcoming.

The tribes contend that U. S. v. Washington (Supra) requires an equal division of the fish between Indians and non-Indians and that the non-Indians' catch must be restricted in both marine and non-marine waters (in the ocean and in the river). The Washington-Oregon Columbia River Fishery Compact, as a policy matter, has been allocating the non-marine catch on a 50/50 basis but has allocated no part of the marine fishery to the Indians.

The states contend that U. S. v. Washington, (Supra) specifically excluded the Columbia River from its ruling and, therefore, the principles enunciated therein are not binding on either Oregon or Washington. Oregon further argues that it is not bound by that decision

since it was not a party to that action.

But whether that case determined the rights of Columbia River Indians or whether a trial is required, one of the classical considerations in granting or denying a Preliminary Injunction is the likelihood of the moving party ultimately winning on the law and the facts. Here, the likelihood is strong that the Indians will win unless the states present some argument not yet made to persuade the Court not to follow Judge Boldt's decision in U. S. v. Washington, 384 F. Supp. 312 (1974).¹

IT IS ORDERED that the states of Oregon and Washington are enjoined from permitting the harvest from the 1975 Columbia River fall chinook salmon run, either in non-marine or marine areas subject to their jurisdiction, by non-Indians of fish which are destined to reach the intervenor tribes' usual and accustomed fishing grounds and stations until the states have established by hearing prior to regulation: 1) that sufficient fish escape all fishermen so that the resource shall be preserved; and, 2) assurance that the intervenor tribes shall have the opportunity to take up to 50% of the harvest of Columbia River fall chinook salmon which the defendant -states permit to be taken by all user groups, in all areas subject to the jurisdiction of the states.

The effective date and enforcement of this Preliminary

Injunction shall be stayed 30 days from the date of this order to allow the states, in cooperation with the Indians, to promulgate comprehensive rules. This Court stands ready to rule upon any basic legal principle upon motion by any party which will facilitate the rule making process. The failure of the intervenor tribes to fully cooperate in this effort will be grounds for dissolving this injunction.

The foregoing shall constitute Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a).

DATED this 20th day of August, 1975.

ROBERT C. BELLONI

United States District Judge

- 1/ The standard elements for a court to examine when considering a Motion for a Preliminary Injunction are:
- 1- the threat of irreparable harm to the plaintiff and the significance of that threat;
 - 2- plaintiff's likelihood of success on the merits;
 - 3- the balance of the harm to the plaintiff if the Preliminary Injunction is not granted and the harm to the defendant if the Preliminary Injunction is granted; and,
 - 4- public interest.

King v. Saddleback Junior College District, et al. 425 F. 2d 426 (1970-9th Cir.), cert.denied 92 S.Ct. 342, 404 U. S. 979, 30 L. Ed. 2d 294 and 92 S.Ct. 703, 404 U.S. 1042, 30 L.Ed. 2d 735.; 11 Wright & Miller, Federal Practice and Procedure pp. 430 et seq. 2948; Fed. R. Civ. P. 65.

Element 2 has been discussed above. The remaining three elements have been fully examined and resolved in favor of the plaintiffs.

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

RICHARD SCHAPPY, et al.,

Plaintiffs,

v.

McKEE A. SMITH, et al.,

Defendants.

(Civil No. 68-409)

UNITED STATES OF AMERICA,

Plaintiff,

and

THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS
RESERVATION OF OREGON, et al.,

Plaintiff-Intervenors,

v.

STATE OF OREGON,

Defendant,

and

STATE OF WASHINGTON,

Defendant-Intervenor.

(Civil No. 68-513)

ORDER AMENDING INJUNCTION

Apparently some question has arisen about the court's intention regarding section 2 beginning on line 22, page 6, of the order dated August 20, 1975.

Obviously the only fish which the Treaty Indians can claim is 50% of those fish which are destined to reach the intervenor tribes' usual and accustomed fishing grounds and stations.

That part of the order on page 6, beginning on line 13 and ending on line 26 is amended to read as follows:
2) assurance that the intervenor tribes shall have the opportunity to take up to 50% of the harvest, from the Columbia River fall chinook salmon run which the defendant -states permit to be taken by all user groups, of fish which are destined to reach the intervenor tribes' usual and accustomed fishing grounds and stations.

SO ORDERED.

DATED: August 26, 1975.

ROBERT C. BELLONI

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD SCHAPPY, et al.,

Appellees,

v.

McKEE A. SMITH, et al.,

Appellants.

UNITED STATES OF AMERICA

Appellees,

v.

STATE OF OREGON, et al.,

Appellant.

RICHARD SCHAPPY, et al.,

Appellees,

v.

STATE OF WASHINGTON,

Appellant.

UNITED STATES OF AMERICA,

Appellees,

v.

STATE OF WASHINGTON,

Appellant.

RICHARD SOHAPPY, et al.,

Plaintiffs-Appellees,

v.

McKEE A. SMITH, et al.,

Defendants-Appellants.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF OREGON, et al.,

Defendants-Appellants.

(Civil Nos. 74-2409, 74-2376, 74-2617)

OPINION

Appeal from the United States District Court

for the District of Oregon

Before: HUFSTEDLER and WRIGHT, Circuit Judges, and

LINDBERG,* District Judge

PER CURIAM:

On July 8, 1969, the district court filed its opinion and decree defining the treaty rights of the Confederated Tribes and Bands of the Umatilla Reservation (the Walla Walla, Cayuse, Umatilla and the Nez Perce Bands or Tribes), the Confederated Tribes and Bands of the Yakima

Indian Nation and the Warm Springs Tribe. It construed the treaty right "of taking fish at all usual and accustomed places" on the Columbia River and its tributaries, and declared the manner and extent to which the State of Oregon could regulate Indian fishing.

(Sohappy v. Smith (D. Ore. 1969) 302 F. Supp. 899.)

The district court retained jurisdiction to grant further or amended relief and permitted "[a]ny party at any time [to] apply to the court for a subsequent modification of any provision of this decree where the continued application of the decree has become inequitable or impracticable, but this right shall not affect the finality of the decree with respect to times prior to any such modification." No one appealed.

All concerned parties accommodated themselves to the decree, albeit restively, until April, 1974, when a dispute arose over Indian fishing rights in the 1974 spring run of Chinook Salmon. The spring run was not large enough to satisfy all the demands upon it and to conserve the resource. On April 17, 1974, the Washington Department of Fisheries moved to intervene and sought an injunction prohibiting any treaty fishing until the States of Oregon and Washington promulgated regulations permitting Indian fishing. The State of Washington was then substituted for the Department of Fisheries. Upon receiving the consent of Washington to be bound by

the 1969 decision and judgment and conditioned thereon, the district court permitted intervention. Oregon and Washington had previously held a hearing which resulted in the decision to close the Columbia River to Indian commercial fishing for the 1974 spring Chinook run while allowing Indian subsistence and ceremonial fishing (a trivial quantity of fish) and sports fishing under general state law. The States then sought a preliminary injunction to restrain the Indians from commercially fishing the river. On April 29, 1974, the district court denied the motion because the States' decision had not been made in conformity with the standards set out in the court's 1969 opinion. The next day the States held another hearing and again found that the closure of the river to Indian commercial fishing was necessary. Based on this finding, the district court issued a temporary restraining order against the Indians on April 30, 1974. After several hearings, the court dissolved the temporary restraining order on May 8, 1974, because in conducting the States' hearings to promulgate regulations for the 1974 Chinook run, the States did not comply with the requirement of the prior decree that state regulations must be the least restrictive upon Indian treaty rights as can be imposed consistent with assuring the necessary escapement of fish for conservation purposes. The district court found that the

States had not considered means less restrictive upon the protected Indian treaty rights than limiting Indian commercial fishing nor had they accorded to the Indians the rights to proper notice and to hearing secured to them by the decree.

If that is all that had happened, this controversy would have evaporated at the end of the 1974 run, but the district court, on May 10, 1974, also entered an order amending the 1969 judgment as follows:

The Indian treaty fishermen are entitled to have the opportunity to take up to 50 percent of the harvest of the spring Chinook Salmon run destined to reach the tribes' usual and accustomed grounds and stations. Except insofar as amended here, the 1969 judgment remains in full force and effect.

The States attack the amendment on several grounds, and the United States and the Indians defend the apportionment. Before we discuss these contentions, we dispose of some preliminary points.

Washington has attempted to appeal from the order dissolving the temporary restraining order. This portion of the appeal must be dismissed because the order is not appealable under 28 U. S. C. § 1291(a) (1). (St. Helen v. Wyman (9th Cir. 1955) 222 F. 2d 890, 9 J. Moore, Federal Practice (2d ed. 1975) ¶ 110.20 5, at 253-54.) Washington did not seek an interlocutory appeal pursuant to 28 U. S. C. § 1292(b).

We dismiss Washington's appeal from the district

court's order denying her motion for a preliminary injunction. This order is appealable under 28 U. S. C. § 1291(a) (1), but the appeal is moot. The 1974 run is over. The States' closure orders have also expired by their own terms.

We also dismiss Washington's attempted appeal from the original 1969 judgment. The judgment is alive for purposes of appeal only in respect of the amending order that the district court issued pursuant to its reservation of jurisdiction. The judgment was otherwise final for appeal purposes years ago, and no one can now appeal from it. Moreover, Washington is estopped from attacking the 1969 decree or its underpinnings because she consented to be bound by the judgment and the opinion as a price for permission to intervene.

The 1969 decree established that these Indians are entitled under their treaty rights to their opportunity for a fair share of the Columbia River fishery, within the broad guidelines set by the court. The same decree permitted the States to regulate fishing "to the extent that [they] can establish that such regulations are reasonable and necessary for conservation of the fish resources and do not discriminate against the Indians." Thus, the decree did not permit the States to regulate Indian treaty fishing unless the States fulfilled their burden in respect of any such regulation by establishing

that the particular regulation was (1) reasonable, and (2) necessary to conserve fish resources, and (3) did not discriminate against these Indians.

The States vigorously argue that the 50 percent allocation provision in the 1974 amending order was a substantial departure from the 1969 decree, that they had no adequate notice that any such allocation was in issue, and that the provision cannot be justified or substantiated by the record before the district court in the 1974 proceedings.

We do not think that the 1974 order was a departure from the 1969 decree. That decree established the Indians' right to a fair share of the salmon harvest, if any harvest there was to be. The 1974 order did no more than define "fair share" in the context of the spring Chinook Salmon run, after the States had failed to promulgate any regulations that complied with the 1969 decree. Although the order was prompted by the controversy over the 1974 spring run, the district court obviously intended the order to apply to future spring Chinook Salmon runs. If its intention were otherwise, the court would have expressly restricted the amending order. Nothing on the face of the order or in the skimpy record suggests that the allocation is either inequitable or impracticable. (Cf. United States v. Washington (9th Cir. 1975) 520 F. 2d 676.) We note,

in passing, the merit in the States' contention that they should have an opportunity to make a record concerning the propriety of the district court's apportionment of spring Chinook Salmon runs yet to occur. Evidence directed to that issue, which the States could muster and present, should no doubt prove useful to the district court. The States, not the Indians, have the burden of establishing the respects, if any, in which the proposed allocation of future spring Chinook Salmon runs is inequitable or impracticable and of offering alternative allocation proposals which will as well or better protect the Indians' treaty rights as defined by the 1969 decree and the conservation of this fish resource.

Many of the participants and issues in this litigation were also present in United States v. Washington, supra, 520 F. 2d 676. There the district court decreed a 50-50 division of fishing opportunity. It is not surprising that a similar division was adopted by the court below as to the 1974 spring Chinook Salmon run. In United States v. Washington, supra, at 687, we said:

The district court has a great amount of discretion as a court of equity in so devising the details of an apportionment as to best protect the interests of all parties, as well as those of the public.

And later we stated:

The district court was not required to decree a perfect 50-50 division of fishing opportunity. (Id. at 688.)

On remand, the district court will have the benefit of United States v. Washington, supra, to aid in its future determinations. There is no reason to conclude, however, that the apportionment there approved represents the only resolution of this difficult controversy.

We decline the States' invitation to examine a number of other issues that were not presented to the district court. Accordingly, no other question raised by the United States, the Indians and the States requires discussion.

We affirm the district court's order denying the non-Indian commercial fishermen's post-judgment motion for leave to intervene as a matter of right. (Columbia River Fishermen's Protective Union and some named individual fishermen.) We agree with the district court that the attempted intervention was untimely; these fishermen have not succeeded in showing any extraordinary or unusual circumstances that would justify their late intrusion into this suit.

The cause is remanded to the district court for further proceedings consistent with the views herein expressed.

*Honorable William J. Lindberg, Western District of Washington, sitting by designation.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

and

THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS
RESERVATION OF OREGON; CONFEDERATED TRIBES AND BANDS OF
THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE
UMATILLA INDIAN RESERVATION; and NEZ PERCE TRIBE OF IDAHO,

Plaintiff-Intervenors,

v.

STATE OF OREGON,

Defendant,

and

STATE OF WASHINGTON,

Defendant-Intervenor.

(Civil No. 68-513)

ORDER

Plaintiffs The United States of America and the Warm Springs, Yakima, Umatilla, and Nez Perce Indian tribes bring this motion for temporary restraining order or preliminary injunction seeking to enjoin the defendants State of Oregon and State of Washington from permitting any further harvest of fish bound for the tribes' usual and accustomed fishing grounds above Bonneville Dam until the states in cooperation with the tribes promulgate rules that provide for (1) sufficient fish escapement to preserve the resource, and (2) assure that the tribes will receive up to 50% of the harvest of those fish destined to reach the said fishing grounds.

BACKGROUND

Defendant states each held hearings earlier this year to consider restrictions on the area and season opening dates for the Pacific Ocean commercial and sports salmon fishing and other restrictions of marine fishing. Both states received reports from their professional biological staffs indicating "a substantial reduction in troll fishing is needed" and that "the opening of the troll season should be delayed until July 1 in order to protect the stocks and protect the rights of treaty Indians as defined by this Court."

The Oregon staff stated, "We believe that there are three primary reasons for restricting the ocean

troll fishery in 1976:

- "1) To satisfy the legal requirement imposed by the federal court for the District of Oregon, i.e., to provide treaty Indians with the opportunity to take up to 50% of the states' catch of upriver runs of Columbia River salmon and steelhead;
- "2) To bolster sadly depleted runs of Columbia River spring and summer chinook, and to improve the reduced runs of other stocks of wild salmon which may be in need of additional protection;
- "3) To divide the harvest of Columbia River stocks of fish more equitably between ocean and river users. Prior to 1976, only the river sport and commercial users have been curtailed to offset the decline in upriver runs caused by losses at dams and to provide for additional harvest by the Indian fishery. Except for fall chinook, upriver runs essentially have not supported a river fishery since 1973."

The Washington staff submitted substantially the same report.

All of the evidence is to the effect that ocean commercial troll fishery must be curtailed to satisfy the requirements of escapement and insure a share to the treaty Indians.

Oregon has closed the ocean troll fishery as of June 15. Washington has not closed ocean troll fishery; therefore Washington must be enjoined.

The Court finds that the plaintiff has established a substantial likelihood of success on the merits. That Washington's actions and continuing actions in prohibiting meaningful treaty Indian fisheries while allowing nontreaty harvest has created and will continue to create irreparable injury to the plaintiff tribes who are dependent upon the earnings from their treaty Indian commercial fishery to provide for the necessities of life. That no substantial harm will result to Washington, and based upon the evidence presented it is in the public interest to grant relief to the plaintiffs.

IT IS ORDERED that the State of Washington is enjoined from permitting any further ocean commercial troll fishery harvest or landing of anadromous fishes bound for such of the Intervenor Tribes' usual and accustomed fishing grounds and stations as are located above Bonneville Dam by persons subject to its jurisdiction until such time as Washington shows that the closure is no longer necessary to insure sufficient escapement to conserve the resources and a fair share of the fish to the Indian treaty tribes, or until July 1, 1976, whichever date occurs first.

IT IS FURTHER ORDERED that the motion to enjoin

the State of Oregon is denied as being unnecessary.
Oregon has closed ocean commercial troll fishing until
July 1, 1976.

DATED this 15th day of June, 1976.

ROBERT C. BELLONI

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

and

THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS
RESERVATION OF OREGON; CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF
THE UMATILLA INDAIN RESERVATION; and NEZ PERCE TRIBE
OF IDAHO,

Plaintiff-Intervenors,

v.

STATE OF OREGON,

Defendant,

and

STATE OF WASHINGTON,

Defendant-Intervenor.

(Civil No. 68-513)

ORDER

Plaintiffs the United States of America and the Warm Springs, Yakima, Umatilla, and Nez Perce Indian tribes bring this motion for temporary restraining order or preliminary injunction seeking to enjoin the defendants State of Oregon and State of Washington from permitting any further harvest of fish bound for the tribes' usual and accustomed fishing grounds above Bonneville Dam until the states in cooperation with the tribes promulgate rules that provide for (1) sufficient fish escapement to preserve the resource, and (2) assure that the tribes will receive up to 50% of the harvest of those fish destined to reach the said fishing grounds.

A hearing on a motion for a temporary restraining order or preliminary injunction was held on June 11 in Salem. At the conclusion of the hearing the motion was taken under advisement and on June 15, I issued an order enjoining the State of Washington as follows:

"IT IS ORDERED that the State of Washington is enjoined from permitting any further ocean commercial troll fishery harvest or landing of anadromous fishes bound for such of the Intervenor Tribes' usual and accustomed fishing grounds and stations as are located above Bonneville Dam by persons subject to its jurisdiction until such time as Washington shows that the closure is no longer necessary to insure sufficient escapement

to conserve the resources and a fair share of the fish to the Indian treaty tribes, or until July 1, 1976, whichever date occurs first."

"IT IS FURTHER ORDERED that the motion to enjoin the State of Oregon is denied as being unnecessary. Oregon has closed ocean commercial troll fishing until July 1, 1976."

A further hearing was held in this matter on June 18, 1976, in Portland. At that hearing I dissolved the injunction entered on June 15 based upon the argument made by defendants that they had not had adequate time to prepare a defense and were deprived of an opportunity to meet plaintiff's argument. Counsel for the State of Washington introduced additional evidence, including testimony from a witness, and further arguments were heard from counsel on both sides. Based upon the evidence, the following findings are made:

The Court finds that the plaintiff has established a substantial likelihood of success on the merits and that the ocean commercial troll fishery must be curtailed to satisfy the requirements of escapement and insure a share to the treaty Indians.

Oregon has closed the ocean troll fishery as of June 15. Washington has not closed the ocean troll fishery; therefore Washington must be enjoined.

Washington admits that if commercial troll fishing

continues the Indians will not receive their share without careful regulation of Columbia River fishing. The most credible evidence is that the Indians will be irreparably harmed if river fishing is not so regulated. The States of Washington and Oregon could not assure me that such regulations will be enacted.

No substantial harm will result to Washington if commercial troll fishing is closed and based upon the evidence presented it is in the public interest to grant such relief to the plaintiffs.

Counsel for the State of Washington stated in a document filed in the Supreme Court of the State of Washington:

(1) Commercial troll fishing ". . . by Washington fishermen . . . will detrimentally affect the salmon resources of the State of Washington and harvest salmon in a wasteful manner."

(2) Commercial troll fishing ". . . will cause irreparable harm to the Washington Department of Fisheries and the public interest . . . "

Subsequent to my June 18, 1976, oral decision enjoining the State of Washington, that state filed a motion for orders implementing the injunction. I am taking that motion under advisement pending further discussions by counsel for the State of Washington and the United States to solve the problems presented

by the motion.

IT IS ORDERED that the State of Washington is enjoined from permitting any further ocean commercial troll fishery harvest or landing of anadromous fishes bound for such of the Intervenor Tribes' usual and accustomed fishing grounds and stations as are located above Bonneville Dam by persons subject to its jurisdiction until July 1, 1976.

IT IS FURTHER ORDERED that the motion to enjoin the State of Oregon is denied as being unnecessary. Oregon has closed ocean commercial troll fishing until July 1, 1976.

DATED this 22nd day of June, 1976.

ROBERT C. BELLONI

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

and

THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS
RESERVATION OF OREGON; CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF
THE UMATILLA INDIAN RESERVATION; and NEZ PERCE TRIBE
OF IDAHO,

Plaintiff-Intervenors,

v.

STATE OF OREGON,

Defendant,

and

STATE OF WASHINGTON,

Defendant-Intervenor.

(Civil No. 68-513)

ORDER IMPLEMENTING INJUNCTION

Pursuant to and in compliance with the order of this Court dated June 15th, 1976, Donald W. Moos, as Director of Fisheries of the State of Washington, on June 21, 1976, promulgated the following order No. 76-50:

I, Donald W. Moos, Director of Fisheries of the State of Washington, find that immediate adoption of the following emergency regulation governing the taking of food fish is necessary for the preservation of the general welfare and that to delay adoption in order to present views on the proposed action would be contrary to the public interest. Emergency adoption of this regulation is necessary to comply with, and under the authority of, the Order of June 18, 1976 by Judge Robert C. Belloni entered June 21, 1976 in United States Federal District Court, District Court, District of Oregon, Cause No. 68-513.

Effective immediately and through July 1, 1976, it shall be unlawful for any person to take, fish for, or possess chinook and coho salmon with commercial troll gear for commercial purposes in waters of the Pacific Ocean.

Effective immediately and through July 1, 1976, it shall be unlawful for any person, corporation, business, or company to possess, buy, receive, handle, deal in, or have in possession or under control any chinook or coho salmon taken with commercial troll gear by commercial troll fishermen.

Failure to comply with this Order will be in violation of the United States Federal District Court, District of Oregon, and punishable as contempt of that court.

The Court approves the regulations, restrictions and prohibitions contained in Order No. 76-50.

All non-treaty citizens are prohibited from commercial fishing for salmon in waters off the coast of Washington until July 1, 1976, and non-treaty citizens are likewise prohibited from the receipt, possession or purchase

of salmon caught in violation of this order.

This order is binding on the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them, including but not limited to, fishermen, fish buyers, fish dealers, and boat owners, who receive actual notice of the order by personal service or otherwise.

Employees of the Washington State Department of Fisheries are specially appointed to serve process, including orders, in the above-entitled action on all fishermen and buyers and boat owners in the State of Washington and any other person when such service is deemed necessary.

DATED this 22nd day of June, 1976.

ROBERT C. BELLONI

Chief Judge, United States
District Court, District of Oregon

APPENDIX II

Table 1. Probable Effects of Some Potential Changes in Managing the Ocean Fisheries of Washington and Oregon (Based on Fishery Model Projections of the Washington Department of Fisheries)

Potential Management Change	Effects on Columbia River Fall Chinook					Effects on Other Stocks
	U.S. Troll Fisheries	U.S. Sport Fisheries	U.S. Net Fisheries	Canadian Fisheries	Return to Upriver	
Catches Made Under Existing Fishery Regulations	271,761 fish 3,184,639 lbs 11.7 lb fish	246,732 fish 2,596,752 lbs 10.5 lb fish	260,417 fish 4,999,782 lbs 19.2 lb fish	498,229 fish 6,605,104 lbs 13.3 lb fish	132,962 fish	--
<hr/>						
Options:						
1. Reduction in sport daily bag limit from 3 to 2 fish for WA & Col. R. mouth. No troll fishery changes.	+ 4,077 fish (+2%) + 56,551 lbs (+2%) 11.8 lb fish	- 40,344 fish (-15%) - 402,290 lbs (-15%) 10.6 lb fish	+ 21,060 fish (+8%) + 399,767 lbs (+8%) 19.2 lb fish	+ 6,575 fish (+1%) + 103,967 lbs (+2%) 13.3 lb fish	+11,340 fish	Reduce sport catch of major stocks by 93,884 fish or over 2.3 times the reduction shown for chinook.
2. Establish chinook minimum size limit of 26" for Puget Sound, WA coast & Col.R. mouth sport. Assume effort shift to coho. No troll fishery changes.	+ 8,797 fish (+3%) + 114,617 lbs (+4%) 11.8 lb fish	- 89,158 fish (-36%) - 534,919 lbs (-21%) 13.1 lb fish	+ 30,624 fish (+12%) + 591,604 lbs (+12%) 19.2 lb fish	+ 13,025 fish (+3%) + 193,287 lbs (+3%) 13.3 lb fish	+17,085 fish	Increased sport catch due to effort shift.
3. Reduce sport bag limit from 3 to 2 fish, 26" min. chinook size for Puget Sound, WA & Col.R. Mouth. Assume effort shift to coho. No troll fishery changes.	+ 11,314 fish (+4%) + 151,167 lbs (+5%) 11.8 lb fish	- 114,141 fish (-46%) - 854,823 lbs (-33%) 13.1 lb fish	+ 46,872 fish (+18%) + 898,327 lbs (+18%) 19.2 lb fish	+ 17,210 fish (+3%) + 262,054 lbs (+4%) 13.3 lb fish	+24,842 fish	Reduce sport coho catch 70,000 fish and shift U.S. troll, U.S. net and Canadian fisheries. Reduce 3-yr. old spr.chin.catch.

Table 1. (cont'd)

Potential Management Change	Effects on Columbia River Fall Chinook					Return to Upriver	Effects on Other Stocks
	U.S. Troll Fisheries	U.S. Sport Fisheries	U.S. Net Fisheries	Canadian Fisheries			
4. Delay WA & OR troll season to June 15, 29" min. for chin. No sport fishery changes.	- 131,251 fish (-48%) -1,213,430 lbs (-38%) 14.1 lb fish	+ 17,174 fish (+7%) + 231,930 lbs (+9%) 10.7 lb fish	+ 62,271 fish (+24%) +1,089,718 lbs (+22%) 18.9 lb fish	+ 20,026 fish (+4%) + 317,518 lbs (+5%) 13.4 lb fish		+33,003 fish	Increase all coho catches slightly by eliminating pre-June 15 "shaker" loss. Reduce spring & summer chin. for all age classes.
5. Delay WA & OR troll season to July 1, 29" min. for chinook. No sport fishery changes.	- 149,826 fish (-55%) -1,456,410 lbs (-46%) 14.2 lb fish	+ 20,504 fish (+8%) + 277,699 lbs (+11%) 10.8 lb fish	+ 75,931 fish (+29%) +1,325,215 lbs (+27%) 18.8 lb fish	+ 22,694 fish (+5%) + 361,680 lbs (+5%) 13.4 lb fish		+40,243 fish	Shift in coho catches from U. S. troll to U.S. sport, U.S. net and Canadian fisheries. Reduce spring and summer chinook catch of all age classes.
6. Reduce sport bag limit from 3 to 2 fish, 26" min. chin. size, effort shift to coho. Delay WA & OR troll to June 15, 29" min. for chinook.	- 123,880 fish (-46%) -1,100,099 lbs (-35%) 14.1 lb fish	- 101,772 fish (-41%) - 683,382 lbs (-26%) 13.2 lb fish	+ 115,424 fish (+44%) +2,091,910 lbs (+42%) 18.9 lb fish	+ 38,011 fish (+8%) + 593,048 lbs (+9%) 13.4 lb fish		+61,175 fish	Reduce sport catch shift to U.S. troll, U.S. net and Canadian fisheries. Increase total coho by less "shaker" loss. Reduce spring and summer catches.

Table 1. (cont'd)

Potential Management Change	Effects on Columbia River Fall Chinook					Return to Upriver	Effect on Other Stocks
	U.S. Troll Fisheries	U.S. Sport Fisheries	U.S. Net Fisheries	Canadian Fisheries			
7. Reduce sport bag limit from 3 to 2 fish, 26" min. chinook size, effort shift to coho. Delay WA & OR troll to July 1, 29" min. for chinook.	- 143,079 fish (-53%) -1,351,726 lbs (-42%) 14.2 lb fish	- 99,360 fish (-40%) - 649,442 lbs (-25%) 13.2 lb fish	+ 130,407 fish (+50%) +2,349,047 lbs (+47%) 18.8 lb fish	+ 40,783 fish (+8%) + 639,076 lbs (+10%) 13.4 lb fish	+69,116 fish		Increase total coho, shift catches from U.S. sport and U.S. troll to U.S. net and Canadian fisheries. Reduce spring and summer chinook.

Source: Staff, op. cit., footnote 6, pp. 21-23.