



Ocean Law Memo

Issue 3
VOL. 1, NO. 3

PREPARED BY THE OCEAN RESOURCES LAW PROGRAM, UNIVERSITY OF OREGON
LAW SCHOOL, EUGENE, OREGON 97403, AS AN ADVISORY SERVICE OF THE
SEA GRANT COLLEGE PROGRAM.

August 16, 1974

Indian Fishing Rights -- United States v. Washington

United States v. Washington, the most recent major decision involving Indian fishing rights, has created much controversy since it was decided in February 1974. Because of the length of the decision (203 pages), its relative inaccessibility to the layperson, and its importance to fishermen, this memo will attempt to extract the major holdings of the case and present in a few pages the essence of the court's opinion.

How did the case arise?

Since United States v. Taylor was decided in 1887, the nature and extent of Indian fishing rights reserved by treaty have been at issue. In recent years, the controversy has spread outside the courts to the rivers and streams and occasionally has ended in violent confrontations between Indians and whites. Hoping to bring an end to the controversy, the United States on its own behalf and as trustee for the interested tribes sought to have the extent of Indian fishing rights declared by the U.S. District Court in Tacoma. Shortly after filing, the U.S. was joined as plaintiff by thirteen Western Washington tribes. The defendants in the case were the state of Washington, its Departments of Fisheries and Game, the Washington State Game Commission and the Washington Reef Net Owners Association.

What geographical area does the case cover?

The decision in United States v. Washington affects only the waters of Western Washington from the three mile limit of its seaward jurisdiction to the Cascades. Indian fishing in Oregon is still governed by the decision in Sohappy v. Smith, a 1969 case. In so far as Sohappy and Washington differ, problems could arise with the regulation of fishing on the Columbia River which currently is done on a cooperative basis. However, both courts have retained continuing jurisdiction in the two cases. Therefore any difficulties can be settled without the necessity of filing new cases.

What were the court's major holdings?

a) Indian treaty fishermen are entitled to an opportunity to take up to 50 percent of the harvestable stock of fish.

The court interpreted the fishing rights clauses of the various treaties as meaning the Indians and other fishermen were to share the fishery resource equally. In the past, regulations were drawn in such a way that most of the

harvestable stock was taken before the fish reached the customary Indian fishing grounds. From now on, regulations will have to be drawn to assure the passage of more harvestable fish upstream to the Indian fishing grounds. This will most likely be accomplished by shorter commercial seasons off-shore, and a lower bag limit for sports fishermen.

Should the Indians not take the necessary number of fish to limit the size of the run reaching the spawning grounds, there are three options open to the court. It could reduce the 50 percent requirement permanently: it could allow the tribes to license other fishermen to help take up to the 50 percent requirement: or it could allow heavier commercial and sport fishing until the Indians were able to increase their take to the 50 percent limit.

b) Tribes may regulate member fishing upon meeting certain criteria.

The court found that the predominant philosophy of Congress in dealing with Indian tribes was to encourage self-government. Consistent with this philosophy, the court established lists of qualifications and conditions which, when met, would entitle a tribe to adopt and enforce regulations for its member fishermen.

The qualifications are primarily personnel type requirements. Among them are requirements of competent and responsible tribal leadership, enforcement personnel and fisheries experts. The conditions on the other hand list procedural type requirements such as providing fish catch reports and allowing monitoring of tribal fishing. One of the conditions merits special mention to allay ungrounded fears of inadequate regulation: A self-regulating tribe is required to include in its regulations any regulations promulgated by the state which are proved necessary for conservation. Therefore allowing for tribal self-regulation will provide more extensive regulation than could be exercised by the state, and it has the distinct advantage of making possible greater Indian participation than existed prior to this case.

The qualifications and conditions must be met to the satisfaction of Fisheries and Game or the court before the tribe may begin self regulation. At any time a self-regulating tribe fails to maintain the required qualifications or adhere to the required conditions, self-regulation will be suspended until the tribe again meets the

requirements.

c). The State may regulate Indian fishing to a limited extent.

The question of state regulation of Indian treaty fishing has been a major point of disagreement between the Indians and the state. There are two extreme positions frequently argued by each. The Indians have urged that since their fishing rights are secured by treaty and that treaties are, with the U.S. Constitution, the supreme law of the land, the state may not regulate their fishing. The state on the other hand has argued that the treaties give Indians only an equality of rights with other fishermen of the state, and therefore Indian fishing may be regulated just as other citizens' fishing.

The court adopted a compromise position between the two extremes which allows limited state regulation of Indian treaty fishing. The limit of permissible state regulation is defined by the court as that which is "reasonable and necessary to prevent demonstrable harm to the actual conservation of fish." In the past, state conservation regulations often served a dual function, conservation and allocation of a particular run among user groups. The courts' definition of "conservation" makes clear that regulations of Indian fishing cannot include allocation decisions, but must be limited solely to conservation measures.

What is the current status of the decision?

United States v. Washington is a decision of the federal district court. It has been challenged on appeal to the 9th Circuit Court of Appeals in San Francisco. From there, it could be appealed to the Supreme Court.

Hollis K. McMilan
August 15, 1974

Ocean Law Memo is published periodically as an advisory service of the University of Oregon Ocean Resources Law Program (ORLP). ORLP is partially supported by the Department of Commerce National Oceanic and Atmospheric Administration's Institutional Sea Grant to Oregon State University, Corvallis, Oregon.

For further information on the subject covered in this memo, contact Jon Jacobson, Ocean Resources Law Program, University of Oregon Law School, Eugene, Oregon 97403. (Telephone: 503/686-3845)

WHAT SHOULD BE THE TOPIC OF THE NEXT OCEAN LAW MEMO?

YOU TELL US!

What ocean law questions do you have that might be the subjects of future Ocean Law Memos? We would like to respond to questions of general interest and at the same time urge you to take your own particular legal problems to a licensed lawyer. Please give us your ideas in the space below:

Please mail this page to:

Ocean Resources Law Program
University of Oregon Law School
Eugene, Oregon 97403



*Sea Grant College Program
Oregon State University
Corvallis, Oregon 97331*

Non-Profit Org.
U.S. Postage
PAID
Permit No. 200
Corvallis, OR