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Ocean Law Memo

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SUPREME COURT RULING ON BOLDT DECISION USED TO CLOSE OCEAN TROLL FISHERY

The continuing story of disputed Northwest Indian fishing rights added two new chapters during the month of July. On July 2 the Supreme Court upheld the major portions of the celebrated Boldt decision, and on July 24 the decision was applied in another case resulting in partial closures of the ocean troll fishery. This Ocean Law Memo will discuss the closures and how the Supreme Court's ruling of July 2 was used in a separate case to effect them. Also included are a recap of the Boldt decision and some speculations about what the future may hold for the salmon and those who seek them.

On July 24 Judge Schwarzer, in the case of Confederated Tribes v. Kreps, signed an order closing the commercial troll fishery north of Cape Falcon from July 25 through August 3 and ending the season in that area on September 1, seven days earlier than planned. A hearing was later scheduled for August 13 in Portland to hear arguments on whether recreational fishing should be included in the early September closure, to consider pleas for and against additional closures this summer, and to discuss procedures for setting ocean salmon regulations in 1980.

The Confederated Tribes v. Kreps case involves the Yakima, Warm Springs, Umatilla, Nez Perce, Shoshone-Bannock, Quinault and Quileute Tribes, the Secretary of Commerce Juanita Kreps (through her attorneys), the All Coast Fishermens Marketing Association and the Washington Trollers Association. The basic issue is relatively simple: under the 1979 salmon regulations will enough "treaty salmon" escape the ocean harvest and thus be available to satisfy the Tribes' treaty allocation. The Tribes said no, that additional ocean closures were necessary; the Secretary of Commerce who authorized the 1979 salmon regulations argued otherwise, as did the trollers' associations. The legal arguments involved in the case are complex. For purposes of understanding the controversy from a practical standpoint, some background information is necessary.

The Tribes are federally recognized Indian Tribes residing on reservations located within the states of Oregon, Washington and Idaho. All but the Quinault and Quileute hold treaty-secured fishing rights on the Columbia River and its tributaries, and utilize the anadromous fisheries resources for ceremonial, subsistence and commercial purposes. The specific run of Columbia River Salmon in which the tribes have treaty rights and which are at issue is the upriver adult fall chinook, a run that is in poor condition due mainly to environmental factors. The treaty rights in Columbia River fisheries were defined in the Columbia River Settlement Plan as a result of other litigation. The Settlement Plan calls for a sixty percent allocation of the in-river harvest to go to the treaty tribes and forty percent to non-treaty fishermen. It also sets goals of increasing the in-river numbers of harvestable upriver fall chinook to at least 200,000, up from the present 138,000.

The Quinault and Quileute tribes have treaty fishing rights in other Washington streams. Their rights were established in the Boldt decision and recently affirmed by the Supreme Court in its review of that decision.

The Secretary of Commerce, Juanita Kreps, is in court as defendant in her role as the authorizing agent for fishery management plans recommended by the Pacific Fishery Management Council (PFMC). The Fisheries Conservation and Management Act of 1976 (FCMA), also known as the 200-mile limit law, established a management scheme whereby management councils recommend management plans for certain fisheries to the Secretary of Commerce for approval. To be approved, the plans must be found by the Secretary to be consistent with all provisions of the FCMA including the "national standards" for fishery plans as well as consistent with all "other applicable law." It is the treaty tribes position that the FCMA, through its "other applicable law" language,

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applies to Indian treaty fishing rights as determined by the Columbia River Settlement Plan for those tribes subject to it and as determined by the Boldt decision and the recent Supreme Court affirmation for the Quinault and Quileute. It is also the Indians' contention that the 1979 Salmon Management Plan is invalid because it fails to assure regulation of ocean fishing so that enough "treaty salmon" will be available in the rivers at the usual and accustomed tribal fishing grounds to satisfy the respective treaty rights.

The All-Coast Fishermens Marketing Association and the Washington Trollers Association side with the Secretary of Commerce in this case, even though they have opposed her Salmon Plan the past two years. Apparently the trollers feel that, although the 1979 Salmon Plan is even more restrictive than either the 1977 or 1978 plans, it is the best they can hope for under the circumstances of depressed salmon stocks, recognition of Indian fishing rights, and the complexities of mixed stock ocean salmon management. The suit by the Indians threatened to result in even greater troll restrictions and therefore the trollers wound up siding with their nemesis of previous fishing seasons.

On July 11 Judge Schwarzer reviewed the record and concluded that there was insufficient evidence to convince him the 1979 Salmon Plan complied with treaty rights. He repeatedly referred to the July 2 Supreme Court affirmation of the Boldt decision as aiding him in his decision to close fishing. It therefore seems appropriate to recap the Boldt decision to gain a fuller understanding of its implications here.

The Boldt case was commenced in the United States District Court for the Western District of Washington in 1970. The United States, on its own behalf and as trustee for seven Indian Tribes, brought suit against the State of Washington seeking an interpretation of the treaties and an injunction requiring the State to protect the Indians' share of the anadromous fish runs. Additional Indian Tribes, the Washington Fisheries and Game Departments, and one commercial fishing group were joined as parties at various stages of the proceedings.

The District Court, Judge Boldt presiding, agreed with the parties advocating an allocation to the Indians and essentially agreed with the United States as to what that allocation should be. It held that the Indians were entitled to a forty-five to sixty percent share of the harvestable fish that at some point as adults pass through recognized tribal fishing grounds in the case area (essentially western Washington). Fish caught by Indians for ceremonial and subsistence purposes as well as fish caught within a reservation were excluded from the calculation of the Tribes' share. With minor modifications, the Court of Appeals for the Ninth Circuit upheld Judge Boldt's decision. After some delay, the United States Supreme Court agreed to hear the case in an appeal that consolidated several cases with similar issues.

The July 2 decision is considered a victory for the Indians in their battle to safeguard their 125-year-old treaty rights. The Supreme Court substantially upheld the lower courts' holdings, but found objectionable the lower courts' exclusion of ceremonial, subsistence and on reservation catches from the treaty tribes' allocation. It held accordingly that "any fish (1) taken in Washington waters or in the United States waters off the coast of Washington and (2) taken from runs of fish that pass through the Indians' usual and accustomed fishing grounds and (3) taken by either members of the Indian tribes . . . on the one hand, or by non-Indian citizens . . ., on the other hand, shall count against that party's respective share of fish."

A second, slight variation from the District Court's position may prove to be significant in the long run. The District Court under Judge Boldt's direction allocated to the Indians a forty-five to sixty percent share of the harvestable salmon (those in excess of spawning requirements), depending upon which run was being harvested, for an overall allocation of approximately fifty percent. The Supreme Court took a somewhat unexpected step by clarifying the fifty percent allocation as a maximum portion of the fish to go to the treaty tribes. Prior to July 2 some parties felt that a guaranteed minimum allocation would be the result of the High Court's deliberations.

At the July 11 hearing Judge Schwarzer gave the Secretary of Commerce ten days to come forward with convincing evidence that the 1979 Plan was in compliance with the treaties. The Secretary responded with a lengthy submission which, summarized, argued the following points:

1) The Secretary has and will continue to respect and attempt to comply with treaty fishing rights.

2) The Columbia River Plan sets in-river salmon run goals and data available indicates the ocean salmon regulations moved substantially toward fulfilling those goals.

3) The Quinault and Quileute tribes' rights in certain stocks are established now by the Boldt decision and affirmation as fifty percent of the harvest. Data are lacking on the harvest of "treaty fish" in the ocean, but there are indications that the 1979 Salmon Plan allows a fifty percent harvest by the Indians of the relevant stocks.

4) The 1979 Salmon Plan is therefore in compliance with treaty rights.

Judge Schwarzer remained unconvinced and on July 24 ordered the closures. He seemed to rely heavily upon the recent Supreme Court decision, which expressed the following analysis of various portions of the FCMA with respect to Indian fishing rights: "[T]hey clearly place a responsibility on the United States [through the management councils and the Secretary of Commerce] . . . to police the take of fish in the relevant waters [under federal management between three and two hundred miles] . . . insofar as is necessary to assure compliance with the treaties." Although

the Supreme Court decision applies only to the Quinault and Quileute treaties directly, Judge Schwarzer took the tone and expression of the decision and the general principles of law it contained and applied them to the Columbia River treaty tribes as well. And, while the treaty rights in the Columbia River fish only call for harvest goals the Judge apparently felt that work toward the goals was not speedy enough.

The July 25 through August 3 closure is intended to benefit those tribes on the Columbia River. The reason for closing the season so quickly and with so little warning is that a delayed closure could not save any of the fish at issue: they for the most part migrate out of the ocean and into the mouth of the Columbia by August 15. The later closure, that ending the season seven days early, is intended to spare some of the fish destined for the fishing grounds of the Quinault and Quileute Tribes.

With the announcement of the closures the trollers began immediately to prepare an appeal to the Ninth Circuit Court of Appeals in San Francisco. The ocean fishermen stand to loose approximately $2,000,000 in revenues as a result of the ordered closures, a situation difficult for them to accept in view of the poor seasons they have suffered in recent years and the apparent abundance of fish in which the tribes have no rights. It is doubtful that the results of the appeal could come in time to have any effect on the early closure; however, it is possible that the later closure could be modified or eliminated should the Court of Appeals accept the trollers argument that the 1979 regulations were in compliance with the law.

The Supreme Court's ruling on the Boldt decision also left some room for future litigation. In characterizing the Indians fifty percent allocation as a maximum rather than a minimum, the court said that "the central principle . . . must be that Indian treaty rights to a natural resource . . . secures so much as, but not more than, is necessary to provide the Indians with a livelihood--that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances." It remains to be seen under what circumstances the courts will consider a reduced allocation to the treaty tribes; however, at least one major party in other fisheries litigation has described the Supreme Court's decision on this issue as providing disgruntled non-treaty fishermen a "revolving door" into court to challenge the Indian allocation every season. It was suggested that the decision would do little except make the lawyers rich. If these predictions come to pass it would be a sorry result of extended legal battles expected to reduce tensions and clarify the rights of all parties concerned.

What About the Future?

The response to the Supreme Court's opinion was a predictable outcry of anger from all but the treaty fishermen. The response to Judge Schwarzer's troll closures adds to the anger and frustration already amply evident among non-treaty salmon fishermen. In just about any bay-front watering hole, on the docks, or anywhere else two or more fishermen gather the issue of Indian fishing rights is being discussed and the Indians and the recent court rulings are being damned. Petitions are being passed expressing unhappiness with the way the issues are being resolved and there is talk of national legislation being introduced again (attempts have been made twice in the past) to abrogate the treaties. It may be that the scorn and blame that are being heaped upon the Indians for problems with the salmon resource are misdirected; it may be that salmon fishermen coastwide can benefit from the very treaties they wish to destroy through congressional action.

It is a fact that the salmon runs in the Northwest are in the condition they are in because of environmental factors, not because of Indian harvests. Among all the activities of man that degrade the rivers as salmon habitat, far and away the worst offenders are dam building, reducing water flows, and poor logging practices. It is no secret that dams increase mortalities of young fish and disrupt the migratory patterns of adults, flood spawning grounds and rearing riffles, raise water temperatures and occasionally totally block access to upstream areas. Irrigation projects reduce water flows that are necessary for fish survival, and poor logging practices result in debris blocking streams, increased siltation that smothers and kills spawning beds, and increased water temperatures due to reduced cover.

The treaty tribes have recently initiated litigation over these competetive uses of the rivers that reduce fish producing capabilities on the legal basis that they violate the treaty rights of Indians. The same treaties that have been relied on to secure a chance to harvest a specific portion of fish destined for tribal fishing grounds are now being relied on to protect the river itself so that the allocation negotiated for and litigated over will not become fifty percent of nothing. This use of the treaties appears consistent with the interpretations of them as expressed or agreed with by the nation's High Court in the July 2 opinion.

The argument is that the Indians would never have agreed to negotiate their lifestyle, millions of acres, their very birthright away for the right to fish in common with the settlers for ever diminishing runs of salmon. It is likely that they agreed to the treaties on the basis that the fish would be forever abundant and certainly would not have agreed to cede a large chunk of the Northwest had they anticipated the settlers' capabilities and propensity to destroy the fish runs upon which they relied so heavily. The result of this line of reasoning is that activities that affect fish producing capabilities of a stream upon which Indians have treaty rights are in violation of those treaties and therefore illegal.

It is obvious but largely overlooked that the use of the treaties to protect the salmon habitat from competing uses would benefit all salmon fishermen, and in ways that cannot otherwise be accomplished. It is perhaps the lack of a legal basis to protect the fish runs that have led non-

treaty fishermen to look to the only other source of fish available; those taken by treaty fishermen. The legal rights of Indians now emerging from the treaties could be, in the long run, a means of protecting and improving the fish runs, a task that non-treaty fishermen have so far been unable to accomplish. Should the treaties be abrogated, the non-treaty fishermen would benefit in the short run but would again face the prospect of continued run reduction and in some cases extinction without the legal protection that the treaties are beginning to provide.

More research is being done on the use of treaty rights to secure protections for salmon habitat. A future issue of the Ocean Law Memo will deal exclusively with that area of law. At this point the impact of the treaty arguments on fish protection is largely speculation, but the results of current and proposed litigation should yield hard law in the near future.

Perhaps the one upbeat note sounded during this phase of the salmon fishing controversy comes from the Congressional delegation from the state of Washington. Although both Senators Magnuson and Jackson indicated that they would like to see the treaties modified to change fish allocations, their primary concerns were centered around enacting legislation to assure effective and fair management of the salmon and steelhead resource, including programs for enhancement and protection that benefit treaty and non-treaty fishermen alike. Similar intentions were voiced by the remainder of the congressional delegation. Members of Oregon's congressional delegation have indicated interest in fisheries legislation but it is at this point unclear what the thrust of their support would be; a change of allocations, protection and enhancement, or both.

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