IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR SKAGIT COUNTY

STATE OF WASHINGTON,

Plaintiff,

-VS-

JOE McCOY,

Defendant,

NO. 2187

MEMORANDUM OPINION

The trial commenced December 13, 1960. On December 15, 1960 the case was recessed until January 24, 1961 to enable councel to obtain exhibits then enroute from Washington, D. C. On January 24, 1961 additional testimony was taken and a further recess was granted to obtain additional exhibits from the National Archives. All exhibits received were admitted by stipulation of councel and the matter was finally submitted to the Court for determination March 21, 1961.

The evidence reveals that in the early morning hours of July 28, 1960 Joe McCoy was arrested by the Department of Fisheries officers as he fished from his boat in the jetty drift near the Swinomish Indian Reservation in Skagit County, Washington.

The "jetty drift" is an irregular semi-triangular area of water lying near the mouth of the North Fork of the Skagit River. It is bounded roughly by a rock jetty running between Goat Island and McGlinn Island on the north and by Goat Island and Ika Island on the west and east (see Plaintiff's Exhibit 1 and Defendant's Exhibit 2). At extreme low tide the area is bare and dry except for shallow gutters of water that run through the tide flats from the Skagit River (Defendant's Exhibit 2). When the tide is high a slightly triangular-shaped tide rip or drift is formed. It is apparently caused by the River being diverted by the rock jetty as it meets the waters of Puget Sound (Plaintiff's Exhibits 4 and 5).

At the time of the arrest the Defendant was alone, operating a 18-foot gill net boat powered by a 25-horse outboard motor. It was equipped with a 600-foot modern nylon gill net with an 8-1/4-inch mesh, 18 meshes deep. The Defendant had rented all of the requipment from another person.

When arrested McCoy had just completed his second pass through the jetty drift and the gill net was still in the water, extending northerly from the boat toward the rock jetty. His location as the time of arrest is marked with a red "X" upon Plaintiff's Exhibit 1, and Defendant's Exhibit 2. He admitted that the six Chinook salmon found in his boat had been caught in the jetty drift area. At the time he was catching fish for sale to commercial buyers for commercial purposes rather than for his own personal consumption.

On July 28, 1960 there was a Department of Fisheries closure order in effect for Area 9 (Plaintiff's Exhibit 3), which covered the vicinity of the jetty drift. No fishing for Chinook salmon was authorized at the time in question. The Defendant was arrested for violating the order and was charged with unlawful fishing. The violation of a Department closure order is a criminal offense; however, Defendant contends that the order does not apply to him as a Swinomish Indian.

At the time of the occurrence the Defendent knew of the Departmental order. Likewise, the Department officers expected to find the Defendant or some other Swinomish Indian fishing in the closed area. This action was brought as a test case.

The Defendant's contention raises several basic questions:

1. Are the provisions of the Treaty of Point Elliott applicable to this Defendant?

11. Was the Defendant fishing on or within the confines of the Swinomish Indian Reservation?

111. If the Defendant was not fishing on or within the confines of the Swinomish Indian Reservation, was he fishing at a location protected by his rights under the Treaty of Point Elliott?

IV. Was the Defendant fishing at a usual and accustomed fishing ground?

V. Has the State proved the necessity of regulating usual and accustomed grounds for the purpose of conservation of salmon?

1.

Are the provisions of the Treaty of Point Elliott applicable to the Defendant?

The Treaty of Point Elliott, 12 Stat. 927 (Defendant's Exhibit 30) was signed January 22, 1855 and proclaimed April 11, 1859. It has been stipulated that said Treaty originally applied to all Indian tribes in the area; that the Swinomish Indian Tribe was a prrty to the Treaty; and that its members are entitled to such rights as are therein established.

Joseph Billy, an elderly Swinomish Indian, traced his ancestry to two signers of the Treaty. One was a Chief of the Skagit Tribe and the other a Swinomish Cheif. He also attempted to trace the lineage of the Defendant. Although his testimony was not too clear, he did assert that Joe McCoy was related to the same two signers through his mother.

However, it was established that McCoy is an American Indian whose forebearers were members of the Swinomish Indian Tribe. In more recent years his parents joined the Swinomish Indian Tribal Community and enrolled the Defendant at birth (Defendant's Exhibit 16). The Defendant has lived upon the Swinomish Indian Reservation all of his life. As such tribal member he is entitled to such rights as are available to the Tribe under the Treaty of Point Elliott.

11.

Was the Defendant fishing on or within the confines of the Swinomish Indian Reservation?

A. General location of the south boundary as defined by the Treaty and Executive Order.

Article II of the Treaty provided, as follows:

> "There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz:.....
>
> "...the peninsula at the southeastern end of Perry's Island, called Shals-Quihl . . . All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use . . ."

The parties have stipulated that "Perry's Island" is now known as Fidalgo Island and that the Reservation referred to in the Treaty is the Swinomish Indian Reservation located on the peninsula at the southeastern end of the Island.

On September 9, 1873, the boundary between the Reservation and the rest of Fidalgo Island was established by Executive Order (Defendant's Exhibit 29) as follows:

> "Agreeably to the within request of the acting Secretary of the Interior, it is hereby ordered that the Northern Boundary of the Swinomish Reservation in the Territory of Washington, shall be as follows, to-wit: beginning at low water mark on the shore of Similk Bay at a point where the same is intersected by the North and South line bounding the East side of the surveyed tract of 9.30 acres, or Lot No. 1 in the N.W. corner of Section 10 in Township 34 North, Range 3 East; thence North on said line to a point where the same intersects the Section line between Sections 3 and 10 in said Township and Range; thence East on said Section line to the S.E. corner of said Section 3; thence North on East line of said Section 3 to a point where the same intersects low water mark on the Western shore of Padilla Bay." (emphasis supplied)

The Reservation, as defined, is the large peninsula on the southeastern end of Fidalgo Island (Plaintiff's Exhibit 1). The northerly boundary runs from a point located at low water slightly east of the middle of the shore on Similk Bay, thence northeasterly across the small neck of land about one mile to a point located at low water on Padilla Bay. Otherwise the peninsula (or Reservation) is bounded on the westerly side by Similk Bay, Saratoga Passage and Skagit Bay and on the easterly side by the Swinomish Slough.

The Reservation boundry was further defined in 1936 by State v. Edwards, 186 Wash. 467. The Supreme Court held that the boundry line of the westerly side of this reservation was established at the extreme low tide mark. The area in question was between Hope Island and Pull-and-Be-Damned Point.

Although the Court limited its decision, the language of the Edwards case applies to the instant action. It dealt with the same reservation and same tribe of Indians. The tide lands herein are immediately adjacent to those referred to in the Edwards case. What that case said about the knowledge and understanding of the Swinomish Indians in the early days would apply equally to this case.

> "The Indians, by their continuous use of these tide lands to the extreme low water mark for the digging of clams and the like, have demonstrated their understanding of what was meant by 'low water mark' and, . . . we must hold that the judgment of the trial court . . . is just and right." (emphasis supplied)

Although the Edwards case clearly demarked the westerly boundary of the Reservation as far south as Pull-and-Be-Damned Point and, although the easterly boundary is fairly well defined by the Swinomish Slough (Defendant's Exhibit 2), there is no such clear demarcation of the south boundary. The question presently before this court is the correct location of the southern boundary between Pull-and-Be-Damned point and the Hole-in-the-Wall.

Unlike the easterly, westerly and northerly boundaries, the southern boundary has never terminated at a natural salt water line of demarcation. The Reservation peninsula lies parallel to the mainland (Plaintiff's Exhibits 1, 9 and 10 and Appendix A) with the tide flats of both the mainland and peninsula running one into the other (Plaintiff's Exhibits 1 and 9, and Defendant's Exhibit 2 and Appendix A). This makes it difficult to determine whether the tide flats belong to the mainland as they run west or to the Reservation peninsula as they run south and, thus, where the extreme low tide line of such tide flats are.

Under these circumstances it is necessary to determine where the original line of extreme low tide was located between Pull-and-Be-Damned Point and the Hole-in-the-Wall. If the area of the jetty drift is situated over submerged tide lands that were originally attached to the Reservation at extreme low tide the State has no power to control the fishing in that area, State v. Edwards, supre.

B. Specific location of the south boundary of the peninsula Reservation.

Plaintiff's Exhibit 1 and Defendant's Exhibit 2 are of little assistance in locating the original southern boundary of the peninsula. All man-made structures shown thereon were added long after the Executive Order of 1873, for example:

1. All jetties or dikes (see also Defendant's Exhibit 21 for their location).
2. The deep-water channel that runs northerly of the Goat-McGlinn island jetty.
3. The course of the Skagit River as re-routed to its present location south of the Goat-McGlinn Island jetty.

However, the foregoing two exhibits are of assistance wherein they illustrate:

1. The location of various permanent natural landmarks such as Fidalgo Island, the Reservation peninsula, Goat Island, Ika Island, Bald Island, McGlinn Island, Seal Rocks, Skagit Bay, Martha's Bay, Swinomish Slough, Pull-and-be-Damned Point, the Hole-in-the-Wall and Gallaher's Point.
2. The location of the old Indian fish traps south of the peninsula.
3. The tide flats as they look today at extreme low tide.
4. The location of man-made structures erected since 1873.
5. The location of the "jetty drift" and the place of arrest.

Prior to 1893, when the Federal Government began building a series of dikes and jetties at the south end of the Reservation peninsula (hereinafter called the peninsula), the North Fork of the Skagit River (hereinafter called the River) emerged into Skagit Bay some place between Bald Island and McGlinn Island (Plaintiff's Exhibits 9 and 15, Defendant's

Exhibits 19 and 20, and Appendix A). At extreme low tide the River followed a fairly well defined channel which curved from a northwest course at Bald Island ato a westerly course toward McGlinn Island less than half a mile away (Plaintiff's Exhibit 9).

At McGlinn Island the River split (Plaintiff's Exhibits 26 and 27). The smaller arm ran northerly between McGlinn Island and Gallaher's Point (Plaintiff's Exhibit 9) and thence out through the Swinomish Slough (hereinafter called the Slough) to the north (see Appendix A).

The area between McGlinn Island and Gallaher's Point through which the north arm flowed had only about two feet of water at mean lower low water and much less at extreme low (Plaintiff's Exhibits 9 and 25 - page 1; and 26 - page 1). As explained by the State's hydraulic expert, the River's regular direction of flow through the Slough was northerly. However, the River's flow could be reversed by the salt water current through the Slough when the tide was higher on the Padilla Bay and then on the Skagit Bay end of the Slough (see Appendix A).

The River's main stream flowed in a westerly direction south of McGlinn Island, along the south end of the peninsula and thence out to Skagit Bay (see Appendix A).

The River's main stream flowed in a westerly direction south of McGlinn Island, along the south end of the peninsula and thence out to Skagit Bay (see Appendix A). In so doing it ran past the Hole-in-the-Wall, Martha's Bay and Pull-and-be-Damned Point. At the Point it became quite shallow, dissipating itself into shallow gutters in places on the exposed tide flats (see Appendix A). It finally reached deep water near Seal Rocks (see Appendix A). Plaintiff's Exhibit 9 and the yellow line on Defendant's Exhibit 2 illustrate the Riber's original course from Bald Island to Seal Rocks. Defendant's Exhibit 2 illustrates the manner in which the River presently dissipates itself in gutters over the tide flats, although the River as shown is in a much different location than in 1873.

At high tide the River dissipated itself into the waters of Skagit Bay near McGlinn and Bald Islands. Thus, it was not too much in evidence other than by the current it produced. However, its current had a tendency to follow the two courses mentioned above.

No uniform depth was maintained by the River channel at extreme low tide as it ran westerly past the Hole-in-the Wall, Martha'a Bay and Pull-and-be-Damned Point toward Seal Rocks. By subtracting four feet from charts related to mean lower low water it is possible to determine depth of water at extreme low tide. We, therefore, find that at extreme low tide the Hole-in-the-Wall had only four to six feet of water (Plaintiff's Exhibit 9 and Defendant's Exhibit 20), while at Martha's Bay it varied from one foot or less to three feet in depth at mean lower low water. This means that at extreme low tide the River channel was devoid of tidal water from near the Hole-in-the-Wall to the west end of Martha's Bay (Plaintiff's Exhibit 9 and 15 and Defendant's Exhibit 20). At Pull-and-be-Damned Point the channel deepened abruptly. In places it was as deep as nine feet at extreme low tide and then, except for deep gutters, the channel flattened out to about one foot in depth at extreme low tide (Plaintiff's Exhibits 9 and 15 and Defendant's Exhibit 20).

As explained by George Lemke, the foregoing extreme low tide figures do not mean that river water did not run in the channel between the Hole-in-the-Wall and Pull-and-be-Damned Point at extreme low water. The soundings on the above-mentioned charts were made in relation to tidal waters and not the River. Whether river water actually flowed in the channels at extreme low tide would depend upon the height of the river at a given time. Sufficient height would cause enough pressure behind the stream to force it out over the tide flats. It would naturally follow the channels and gutters to the Bay as paths of least resistance.

The Court is convinced that even at extreme low tide the River originally flowed in a well defined channel between the Hole-in-the-Wall

and Pull-and-be-Damned Point. However, in the Martha's Bay area it was very shallow at extreme low tide, not exceeding one to two feet. According to Alex Edge, Joseph Billy and Pat Willup (three elderly Indians) it was so shallow that boats with as little as a three-foot draft found it necessary to wait for the tide at Seal Rocks to keep from running aground. At times the River in this channel was so low that an Indian dug-out canoe had to wait for the tide. At these times one could wade across the River in the most shallow places in as little as six inches of water.

It is interesting to note that after converting the charts to extreme low tide readings none of them made prior to 1893 (e. g. prior to the building of the dikes) seriously contradict the testimony of the three old Indians. Furthermore, considering a combination of extreme low tide and a low river (not uncommon in the summer) the story related by the old men is entirely credible and worthy of considerable weight.

Mr. Joshua Green, one of the State's most important witnesses, gave testimony as to the depth of the River at extreme low tide. He asserted that from the Hole-in-the-Wallwesterly to deep water there was never less than four feet of water in the River channel. He said that he had worked on the steamer Fairhaven (Defendant's Exhibit 17) which had a draft of from three and a half to four feet. This vessel departed regularly on a daily schedule from Seattle to LaConner via the River and the Slough. He contended that it had never been necessary to wait for the tide between Seal Rocks and the Hole-in-the-Wall.

Mr. Green admitted on cross-examination that the Fairhaven had been stuck in the River channel on occasion. This coincides with the testimony of Alex Edge and Pat Willup. They recalled that as boys they had seen boats stuck at Pull-and-be-Damned Point at low tide. It also throws some doubt upon Mr. Green's conclusion that the channel was never less than four feet in depth.

Mr. Green also stated that until he quit active steamboating in 1900 his boats always used the River channel that ran just south of the peninsula between the Hole-in-the-Wall and Pull-and-Be-Damned Point. According to him, there was no change in the channel between 1888 and 1900 when he quit. His recollection is correct that the original channel ran just south of the peninsula between the Hole-in-the-Wall and Pull-and-Be-Damned Point (see Defendant's Exhibit 2 location in yellow crayon). However, the remainder of his recollection fails to coincide with the maps and charts of those days.

Four major diking projects were completed between 1893 and 1897, as a result of which the position and condition of the River channel were radically changed (Defendant's Exhibit 21, Plaintiff's Exhibits 24, 25, 26 and 27 and Appendices A, B and C). In 1893 the original 6,120-foot jetty was built, extending from a point 400 feet west of the Hole-in-the Wall to a point 300 feet northwest of Goat Island (Defendant's Exhibit 21, Plaintiff's Exhibits 25 - pages 2, 6 and 7, 26 - page 2 and Appendix B). A small opening was left at the east end of the jetty near the Hole-in-the Wall to accomodate small boats and canoes (Plaintiff's Exhibit 25 - page 4). Thus, the Fairhaven would have been cut off from the old channel as early as 1893. The River current and channel were by that time diverted to a point south of the jetty (Defendant's Exhibit 21 and Plaintiff's Exhibit 25 - page 6). The new mouth was moved approximately 3,600 feet south of its original position at Pull-and-Be-Damned Point to the new location just north of Goat Island (see Appendix C).

By 1894 the River had been completely diverted from the south shore of the peninsula (Defendant's Exhibit 21). The old channel had become "very shoal", having only one or two feet of water at mean lower low water (Plaintiff's Exhibit 26 - page 6) and, of course, less at extreme low tide (see Appendix B).

Thus, Mr. Green's recollection must be faulty insofar as he contends that the channel did not change between 1888 and 1900 and insofar as he asserts that the Fairhaven ran in and out of the old channel until 1900. If the Fairhaven ran in and out of the channel without regard to tide it must have used the new channel dug south of the jetty in 1894.

In the final analysis, Mr. Green's testimony fails to refute that of Alex Edge, Joseph Billy and Pat Willup with regard to the very shallow nature of the original river channel at extreme low tide. One of the basic reasons for diking the old channel, diverting the river and digging a new channel was to rectify the shallow nature of the old River channel (Plaintiff's Exhibits 24, 25 and 26).

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1. Defendants contentions as to location of south boundary of Reservation based on above facts.

Defendant contends that the Reservation's south boundary is located on the tide flats some place south of Goat and Ika Islands in the vicinity of his arrest. He asserts that the very shallow nature of the original River channel bounding the south end of the peninsula prevents it from being considered a natural water boundary.

However, the Point Elliott Treaty mentioned only Perry's Island. Had the contracting parties intended to include Goat and Ika Islands within the confines of the Reservation it could have been accomplished easily by name or other reference in the Treaty or in the Executive Order of 1873. Furthermore, Plaintiff's Exhibits 10 and 11 delineate a retracement and re-establishment of the lines of the original survey in their true position in accordance with the best available evidence of the position of the original corners. According to those maps, Goat and Ika Islands, like Whidbey Island, were excluded from the 1874 resurvey of the Swinomish Indian Reservation.

Defendant also contends that since State v. Edwards, supra, places the boundary of the Reservation at extreme low tide, the tide flats extending to Goat and Ika Islands and south thereof belong to the Reservation (see Appendix A and Defendant's Exhibit 2). He points to the fact that prior to the construction of the first jetty in 1893 the tide flats south of the original River channel were exposed at extreme low tide over an extended area south of Goat and Ika Islands and south of the jetty drift. In fact, they were exposed even at mean lower low tide (Plaintiff's Exhibit 9). However, the Defendant and his witnesses have failed to indicate just how far south their proposed boundary should be. They merely say that it includes the jetty drift and thus place it within the confines of the Reservation. To extend the argument to its logical extreme, one must move the boundary south of the peninsula many miles, and at least as far as the tide flats extend to the south (see Defendant's Exhibits 2 and 13 combined).

While Indian treaties should be interpreted broadly in favor of the original understanding of the Indians, they cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties, Choctaw Nation of Indians v. United States, 318 U.S. 423. The Court doubts that State v. Edwards, supra, extends the intention of the contracting parties to the extreme asserted by the Defendant.

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2. Actual location of south boundary of Reservation based upon above facts.

State vs. Edwards, supra, set the Reservation boundary at extreme low tide. Even at extreme low tide the River originally followed a well defined channel along the south shore of the peninsula from the Hole-in-the Wall past Martha's Bay to Pull-and-Be-Damned Point. There it eventually dissipated itself in gutters on

the tide flats in the vicinity of Seal Rocks. Defendant's Exhibit 2 illustrates how the same river dissipates itself on the tide flats at low tide. However, this is a recent picture of the river in its new location.

At extreme low tide the River was non-navigable because of its shallow guttered condition west of Pull-and-Be-Damned Point and its very shallow condition in the area of Martha's Bay, Brewer-Elliott Oil & Gas Co. v. United States, 270 F. 100; State ex rel. Pealer v. Superior Court, 58 Wash. 565. However, despite this the River channel was a well known, well defined, visible, natural fresh-water line of demarcation between the south end of the peninsula and the tide flats further south. In fact, at tide stages other than extreme low, the River was navigable. The River actually prevented the tide flats, on its south, from attaching to any uplands of the peninsula on its north. Thus, the tide lands were not a part of the Reservation, U.S. v. Snohomish River Boom Co., 246 F. 112. Even considering the intent of the parties in 1855, it is obvious that this natural fresh water barrier would have been considered a logical boundary between the uplands of the peninsula and the miles of tide flats to the south.

A tract of land bounded by a non-navigable stream is deemed to extend to the middle of the stream. Thus, the south boundary of the Reservation was the center of the River at extreme low tide as it ran past the Hole-in-the-Wall, Martha's Bay and Pull-and-Be-Damned Point, United States v. Ahtanum Irrigation Dist., 236 F. (2nd) 321; Hirt v. Entus, 37 Wn. (2nd) 418.

It is impossible to pinpoint the line of demarcation with exactness. However, it was located south of the mean lower low water mark as shown on Plaintiff's Exhibit 9. Inasmuch as extreme low tide is three or four feet lower than mean lower low water, it is possible to obtain an approximation of the extreme low water line

of the channel by drawing a line through all soundings of three or four feet in depth on Plaintiff's Exhibit 9. By so doing one can get also a rough indication of the center of the non-navigable channel followed by the River at extreme low tide.

By using the above-mentioned formula, the Court places the south boundary of the Reservation, between the Hole-in-the-Wall and Pull-and-Be-Damned Point, south of the mean lower low water line as shown on Plaintiff's Exhibit 9 as follows:

0	ft.	south	of	N.L.L.W.	line	at	the	Hole-in-the-Wall		
550	"	"	"	"	"	1,000	ft.	west	of	"
450	"	"	"	"	"	2,000	"	"	"	"
350	"	"	"	"	"	3,000	"	"	"	"
600	"	"	"	"	"	4,000	"	"	"	"
300	"	"	"	"	"	5,000	"	"	"	"
100	"	"	"	"	"	at Pull-and-Be-Damned Point				

The Defendant was fishing much farther south than this. Thus, he was not within the original boundary of the Reservation.

III.

If the Defendant was not fishing on or within the confines of the Swinomish Indian Reservation, was he fishing at a location protected by his rights under the Treaty of Point Elliott?

As previously indicated, the south boundary of the Reservation, between Pull-and-Be-Damned Point and the Hole-in-the-Wall, was the center or thread of the River at extreme low tide. The jetty drift is not within the confines of the Reservation thus bounded. The question then arises as to whether his Treaty rights permitted him to fish in the jetty drift with the same force and effect as if he had fished on the Reservation.

A. What Treaty rights exhist with regard to fishing in the River at its original location?

It was the intent of the contracting parties that the Indians have reserved to them the right to fish in the River as it bounded the south end of the Reservation. Such rights would allow them to use the River and take such fish as were necessary for their personal and commercial use.

The Swinomish Indian Reservation was carved out of a much

greater tract of land which the Indians owned and had a right to occupy and use. It was adequate for the habits and wants of an uncivilized people, Pioneer Packing Co. v. Winslow, 159 Wash. 655; Tulee v. Washington, 315 U.S. 681; United States v. Wimans, 198 U.S. 371. When the Indians agreed to change their habits and become civilized people, using the smaller Reservation area, the Treaty of Point Elliott, supra, was not a grant of rights to the Indians but a grant from them and a reservation of those not granted, United States v. Ahtanum Irr. Dist., supra; United Stats v. Romaine, 255 F. 253; Pioneer Packing Co. v. Winslow, supra. This being the case, all rights not specifically granted were reserved to the Indians, Skeam v. United States, 273 F. 93; United States v. Winans, supra; Winters v. United States, 207 U.S. 564; Pioneer Packing Co. v. Winslow, supra.

Before the Treaty the Indians had the right to use not only all of the Skagit River (including both sides) but to use it for its full length, as well as all other streams in a vast area. The Indians did not surrender any part of their right to use the Skagit River regardless of whether it became the boundary or whether it flowed entirely within the Reservation, United States v. Ahtanum Irrig.DIst., supra. We cannot assume that when they agreed to move to the peninsula, immediately to the north of the River, that they surrendered all rights to use it, United States v. Ahtanum Irr. Dist., supra. Nor is it to be supposed that in making the Treaty the Government intended to take from the Indians any of the rights that they had theretofore enjoyed in the River that bounded their peninsular Reservation, United States v. Romaine, supra.

Indian treaties are to be liberally construed, to the end that Indians will retain the benefits conferred by the treaty at the time of its execution, United States v. Stotts, 49F. (2nd) 619; Tulee v. Washington, supra; Alaska Pacific Fisheries v. United States, 248 U.S. 78; United States v. Walker River Irr. Dist., 104F. (2nd) 334.

Article II of the Point Elliott Treaty (Defendant's Exhibits 30 and 34) reads in part as follows:

> "There is, however, reserved for the present use and occupation of said tribes and bands the following tracts of land, viz . . . the peninsula at the southeastern end of Perry's Island, called Shais-quihl . . . All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use . . ." (emphasis supplied)

The reference to a reservation of "land" was not intended to limit the Indians to mere occupancy of the uplands of the peninsula, State v. Edwards, supra; Heckman v. Sutter, 119 F. 83; United States v. Romaine, supra; United States v. Stotts, supra. The all-inclusive word "land" as used in a statute or a treaty can and frequently does include "non-navigable" waters, Conrad Inv. Co. v. United States, 161 F. 829; United States v. Walker River Irr. Dist., supra, that form the boundary of a reservation, United States v. Walker River Irr. Dist., supra, Brewer-Elliott Oil and Gas Co. v. United States, supra; Conrad Inv. Co. v. United States, supra; United States v. Ahtanum Irr. Dist., supra; even though the river was not specifically mentioned, United States v. Walker River Irr. Dist., supra. The same has been held to be true of "navigable" waters and rivers where the Treaty and Executive Orders preceded statehood, Moore v. United States, 157 F. (2nd) 760; Alaska Pacific Fisheries v. United States, supra; Winters v. United States, supra Hynes v. Grimes Packing Co., 165 F. (2nd) 323, even though not specifically mentioned, Alaska Pacific Fisheries v. United States, supra. Even the fact that a Government survey fails to show or include the river or tide lands does not prejudice the rights of the Indians if, in fact, the intent of the treaty was that it was to be considered a part of the reservation, United States v. Stotts, supra.

Likewise, it is not necessary that tide lands be specifically mentioned in the Treaty (Defendant's Exhibits 30 and 34) or the Executive Order (Defendant's Exhibit 29), or that it be shown in the

Survey (Plaintiff's Exhibits 10, 11 and 12) in order for it to be deemed a part of the Reservation, State v. Edwards, supra; United States v. Stotts, supra. Whether it is to be considered as a part of the Reservation is largely determined by the understanding of the parties at the time the treaty was made, State v. Edwards, supra.

Thus, whether the contracting parties intended that the Indians have a reservation of the uplands of the peninsula, as well as a right to use the boundary River for the purpose of fishing must be determined by the historical facts surrounding the making of the Treaty. In this regard one must consider the purpose for which the Reservation was formed, Skeem v. United States, supra; Alaska Pacific Fisheries v. United States, supra; the original needs and wants of the Indians, Winters v. United States, supra; Conrad Inv. Co. v. United States, supra; how they met those needs and wants immediately following the treaty, State v. Edwards, supra; the actions of the parties at the time of negotiating the treaty, and whether the Reservation was capable of providing a living without access to the surrounding waters, State v. Edwards, supra; Alaska Pacific Fisheries v. United States, supra.

To say merely that these Indians were "fish eating" would be to convey a wrong impression. The testimony clearly indicates that these people caught fish in order to exist. Fish was the main part of their diet not only in the spring and summer but it was dried and saved for winter. Their reliance upon fish is substantiated by Governor Stevens' statement at the Walla Walla Council May 29, 1855, following the Point Elliott Treaty (Defendant's Exhibit 22 - page 12). The Point Elliott Treaty itself supports the contention by providing in Article V for the right of "erecting temporary houses for the purpose of curing . . ." fish. There is also an interesting comment about the Lummi tribe located immediately to the

north in United States v. Stotts, supra:

> "I think the court may judicially know that the Indians subsisted during this time by hunting and fishing, and the tide lands were a necessary prerequisite to the enjoyment of fishing . . ."

As a result of the Treaty and the Executive Order, the Swinomish Indians moved to the small peninsular Reservation on the south tip of Perry's Island (Fidalgo Island). It was obviously a rocky, hilly bit of land covered by forest in most places except for portions that were tidal marsh (Plaintiff's Exhibits 1, 4, 5, 6, 7, 10 and 11 and Defendant's Exhibits 2, 17 and 19). Very little of it was then or is today conducive to profitable or successful farming. Even wild game was apparently not too plentiful on the peninsula because, according to Alex Edge, fish was all they used to live on.

It was obvious from the nature of the peninsula and the background of the Indians who were to occupy it that their major means of subsistence on the peninsula would be to catch, eat and sell fish or to cut and sell timber. As aptly stated in the Alaska Pacific Fisheries case, supra:

> "The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation . . ."

The same reasoning was followed in Moore v. United States, supra.

> "It is the consideration of such circumstances which determines the government's intent in making a reservation, whether by a Congressional Act as in the Alaska Fisheries case or a departmental reservation as in our decision in United States v. Walker River Irr. Dist., 104 F. (2nd) 334 . . ."

It is not logical to assume that the Indians voluntarily or knowingly agreed to reduce the area of their occupancy and to give up the waters and the very fish therein which made the Reservation livable or adequate, United States v. Ahtanum Irr. Dist., supra; Winters v. United States, supra.

However, it is not necessary to speculate upon the Indian's need to fish or upon the Government's intent that the Indians have the right to fulfill that need. In this regard one may refer to the minutes of the Treaty Council, January 22, 1855 (Defendant's Exhibit 33). Although the Defendant's Exhibits 22 and 33 are very similar, the quotations are taken from Defendant's Exhibit 33 because it is a photostatic copy of the Government documant and probably more accurate than defendant's Exhibit 22.

As one considers Governor Stevens' statement to the assembled Indians it must be remembered that they spoke no English and found it necessary to rely upon an interpretor (Defendant's Exhibit 22 - page 8). It must also be remembered that they were not skilled in diplomacy or masters of a written language. The people who listened to Governor Stevens were uncivilized men and women whose existence depended upon fish either to eat or sell, whose proposed reservation had no river running through it but did have one that formed its south boundary. Likewise, their proposed reservation was hardly conducive to successful farming. How could they have interpreted the Governor's glowing words?

> "My children, you are not my children because you are the fruit of my loins but because you are children for whom I have the same feeling for from (sic. probably means "as if", see Defendant's Exhibit 22) little children the fruit of my loins. You are my children because I will labor for you persistently for all of my life. What will a man do for his children. A man for his own children will see that they are well cared for. He will see that they have clothes to guard them from the wintery season. He will see that they have food to guard them against being hungry. And as for thirst you have your own glorious brooks. But as for food you yourselves now, <u>as in time past, can take care of yourselves</u>.

"I have called you my children and as my children I have spoken to you of the food that could save you from hunger and your flowing brooks that could save you from thirst but I give to my own children food and drink and sometimes more. I want that you shall not have simply food and drink now but that you may have them forever . . ."

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"You understand well my purpose, now you want to know what we desire to do for you. We want to give you houses and having homes you will have the means and the opportunity to cultivate the soil to get your potatoes and to go over these waters in your canoes to get fish. We want more. If you desire to go back to the mountains and get your roots and your berries you can do so and you shall have homes and shall have these rights, the Great Father desiring them."

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"The Great Father wants you to have a school where you can learn agriculture and to be artisans and to get two blankets when you have one now and learn to take care of yourself as white people the Great Father wants this in fact. He wants you to have a place where your children can learn to read and write, learn to be farmers and mechanics and also wants you to take your fish and go back to the mountains and get berries. Is this good, don't you want this?"

It is interesting to not that Governor Stevens made no mention of restrictions on the Indian's right to fish in his explanation of the Treaty. Nothing was said about fishing in common with the whites, or what it would mean. It was made abundantly clear that the Indians could fish as needed as they had since the time of their forefathers (Defendant's Exhibits 22 and 33). The matter of "usual fishing grounds" and "fishing in common with the whites" appeared for the first time in the Treaty itself

after he had made the above-quoted speech. In later treaty negotiations the Governor did mention these things to the Indians near Walla Walla (Defendant's Exhibit 22 - page 12) and to the Yakima tribes, State v. Tulee, 7 Wash. 124; see the dissent at page 146. However, these were different tribes in another part of the State and subject to different treaties.

Further light is shed on the type of life led by these Indians, as well as their needs in this area, by reference to the Walla Walla conference of May 29, 1855. Governor Stevens told the assembled tribes (referring to the Point Elliot Treaty):

> "I have made treaties with all the Indians on that Sound. They number more than all the tribes present. They have all agreed . . . to go on one reservation. That reservation is only about one-fifieth part as large as this; they have however, few horses and cattle. They have not three hundred head. They take salmon and catch whale and make oil. They ask for no more land. They think they have land enough. You will be farmers and stock raisers and wool growers and you need more." (Defendant's Exhibit No. 22 - page 12)

From the foregoing it can be seen that Governor Stevens did not seriously consider that the Swinomish Indians were to be farmers and stock raisers. They had been and were to be fishermen. It is obvious that the Indians must have had a similar estimate of their situation in light of the reservation they were willing to accept on the south end of Fidalgo Island. It was well suited to the kind of life they had lived and the manner in which they had always supported themselves, provided they were allowed to fish in the manner Governor Stevens insinuated in his above-quoted speech.

If Governor Stevens was not sincere and the Government secured from the Indians the large domain ceded to it by the making of promises it did not intend to keep, and did not keep, then fraud was practiced on the Indians and the wrong done to them should be rectified. On the other hand, if the promises made by Governor Stevens were made in good faith, as I am sure they were, then all of the facts relative to the making of the Treaty should be considered in arriving at the intent of the parties. Including the speeches of Governor Stevens, wherein he explained the meaning of the proposed Treaty and the desires of the Federal Government.

The interpretation of this same treaty, with regard to this same tribe, was faced by our Supreme Court in State v. Edwards, supra. In quoting from Jones v. Meehan, 175 U.S. 1, our Supreme Court said:

> ". . . 'In construeing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves, that the treaty is drawn up by them and in their own language, that the Indians, on the other hand, are a weak and dependent people, who had no written language and are wholly unfamilliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sence in which they would naturally be understood by the Indians. . ."

Historically the factual situation facing the Swinomish Indian at the time of negotiating and signing the Point Elliott Treaty, supra, was much the same as that referred to in Alaska Pacific Fisheries v. United States, supra.

> "While bearing a fair supply of timber, only a small portion of the upland is arable, more than three-fourths consisting of mountains, and rocks. Salmon and other fish in large numbers frequent and pass through the waters adjacent to the shore, and the

"opportunity thus afforded for securing fish for local consumption and for salting, curing, canning and sale gives to the islands a value for settlement and inhabitance which otherwise they would not have.

"The purpose of the Metlakahtlans in going to the islands was to establish an Indian colony which would be self-sustaining and reasonably free from the obstacles which attend the advancement of a primitive people. They were largely fishermen and hunters, accustomed to live from the returns of those vocations, and looked upon the islands as a suitable location for their colony because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for Industrial and commercial development.

"The purpose of creating the reservation was to encourage, assist, and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining, and advance to the ways of civilized life."

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"The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation." (emphasis supplied)

Without a salmon fishery the Reservation was incapable of producing adequate food. Fish from the immediately surrounding waters and bounding River had always been their major, if not sole, diet. They also sold fish to the white settlers for some of their support. The River, with its fish, formed the south boundary of the Reservation. These things were obvious to the negotiating parties (Defendant's Exhibits 22 and 33). It must have been contemplated by both parties that the River would be a prt of the Reservation. At the very least, the Indians must have intended to reserve the right to use it for fishing purposes. To hold otherwise would be to contend that the parties intended to reserve to the Indians a rocky peninsula upon which they were to live but upon which it would be next to impossible to produce food and a means of subsistence. This is wholly illogical.

This approach to the problem is not new to the law governing Indian treaty rights. The "water rights" cases have held that

where reservations have been created for Indians there has been impliedly reserved therewith the right to use all of the water reasonably necessary for their needs, Winters v. United States, supra; United States v. Fallbrook Public Utility Dist., 165 F. Supp. 806; United States v. Walker River Irr. Dist., supra.

The treaty in the above-cited Winters case specifically designated the center of the river as the boundary. In the instant case the Court found the south boundary of the Reservation to be the center or thread of the River in its non-navigable state at extreme low tide. However, it was the need of the Indians and their past use of the river as based upon that need that was the basis for the Winters decision and not whether the Treaty or Executive Order designated the center of the river as the boundary, Winters v. United States, supra; Conrad Investment Co. v. United States, supra; or whether the boundary ran "to" the River, United States v. Ahtanum Irr. Dist., supra; United States v. Walker River Irr. Dist., supra; or whether the water, although not named, did in fact form the boundary, State v. Edwards, supra.

As explained in the cases just cited, whether the lands only were to be reserved or whether the waters of the stream were to be reserved for the use of the Indians is to be determined by the intent of the parties. Doubts whether the reservation of lands for Indians include rights to water power or even other latent resources such as minerals, petroleum, etc., as a practical matter, almost uniformly have been resolved in favor of the Indians, United States v. Walker River Irr. Dist., supra; Justice Stone, United States Opinion of Attorneys General, Vol. 34, page 171.

The intent is not required to be evidenced by any specific language in the treaty, executive order or statue. The intent may be derived from the wording of the instrument under consideration, from the surrounding circumstances, the situation and needs of the Indians,

of the Indians, and from the purpose for which the lands were reserved, United States v. Walker River Irr. Dist., supra; Winters v. United States, supra; United States v. Ahtanum Irr. Dist., supra; Conrad Investment Co. v. United States, supra.

The practice of adapting the theory of the "water rights" cases to a "fishery" case is not novel. As indicated above, this has been done regularly in the Federal cases and was done by our Supreme Court in Pioneer Packing Co. v. Winslow, supra.

The Court has considered the historical facts surrounding the present case, as well as the needs of the Swinomish Indians at the time of the Treaty and subsequent thereto. The Court has also considered the location of the River, as well as the Indian's original need to use the River as a means of subsisting on the Reservation. It is clear the Indians intended that insofar as the River bounded the south end of the Reservation its use was to be reserved to them for fishing as needed for their personal and their commercial use.

As between the Federal and State governments, the United States was sovereign in its territories. It had the right and the power to dispose of absolutely any and all of its public land therein, high or low, wet or dry, navigable or non-navigable. Brewer-Elliott Oil and Gas Co., supra, Conrad Investment Co. v. United States, supra. The power of the Federal Government to reserve the waters and exempt them from control under the State laws is no longer in question, Conrad Investment Co. v. United States, supra; United States v. Walker River Irr. Dist., supra;

While the United States usually held its navigable waters in trust for future states, there was no requirement that this be done. It has frequently exercised the absolute power to grant such rivers, or the land under them, or the use in them, or some other interest in them irrevocably wherever it became necessary to do so to perform some obligation or to carry out other public purposes appropriate to the objects for which it has held the lands

in its territories, Brewer-Elliott Oil and Gas Co. v. United States, supra. When such irrevocable exercise of the power has taken place prior to statehood, the State has taken the river, whether navigable or non-navigable, subject to the prior dedication, United States v. Walker River Irr. Dist., supra; United States v. Winans, supra; Brewer-Elliott Oil & Gas Co. v. United States, supra.

Even if one were to consider the Skagit River to be navigable at all stages of the tide, there is no inconsistency between the rights of the Indians to use it as a fishery and the fact that the Federal Government also holds the navigable stream in trust for public navigation. As stated in Moore v. United States, supra;

> "The fact that navigable waters are a part of a. . reservation held in trust for the Indian fisheries does not conflict with the trust also to hold them for the public for navigation. . ."

The right of the Swinomish Indians to use the River, as it bounded the south end of the Reservation, for fishery purposes was not abrogated when the Territory of Washington was later admitted into the Union. Section 4 of the Enabling Act provides:

> "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. . ."

Thus, had the Defendant fished in the area of the Skagit River as it bounded the south end of the Reservation he would have been where he had a right to fish under the Point Elliott Treaty. His activities would not have been subject to the laws of the State of Washington. However, he did not fish at such place. He was arrested in the jetty drift south of the River's original location.

B. Was the Defendant's Treaty rights affected by diverting the River from its original location?

The Defendant did not fish in the area of the Skagit River as originally located. He fished in the area of the River as re-located. When the Federal Government moved the River to its new location the right to use the River as a fishery was not thereby extinguished. The Indian's right to use the River was transferred to the new location.

In 1893 the United States Corps of Engineers changed the original course of the River by Diverting it almost 3,600 feet to the south. Thereafter it no longer formed the south boundary of the Reservation between Pull-and-Be-Damned Point and the Hole-in-the-Wall (Defendant's Exhibit 21 and Appendices A and B). In 1896 they built another dike from McGlinn Island to Gallaher's Point on the mainland. This completely blocked the flow of the River north of McGlinn Island and out the Swinomish Slough toward Padilla Bay (Defendant's Exhibit 21 and Appendix C). In 1938 the Engineers built a jetty between Goat Island and McGlinn Island (Plaintiff's Exhibit 1, Defendant's Exhibit 21 and Appendix D). This last project caused the River to be diverted a total of approximately 6,000 feet south of its original course past Pull-and-Be-Damned Point and Martha's Bay to a new opening between Goat Island and Ika Island (Plaintiff's Exhibit 1, Defendant's Exhibits 2 and 21, and Appendix D). As a practical matter, this series of engineering projects destroyed the Indians' opportunity to exercise their fishing rights in the original River channel. The same thing happened to their right to use the north arm of the River that flowed north through the Swinomish Slough. However, they still had the use of the Slough itself. Although this latter problem is not now before the Court, it is mentioned as part of the total picture.

The Federal Government was not alone in the diking and channel project. Defendant's Exhibit 24, pages 1-6, indicates

that the Town of LaConner sought the work and that the Washington State Legislature asked the Federal Government to make the Improvement. In this regard see House Memorial No. 5, page 739 and Senate Joint Memorial No. 22, page 783, Laws of 1889-1890. Although the legislative Resolutions and Memorials are not law, State ex rel. Todd v. Yelle, 7 Wn. (2d) 443, 50 Am. Jur. Statutes, sec. 4, 338, they prove that the Legislature of this state encourage the work done by the Federal Government and voiced

> "A recommendation already approved and endorsed by the boards of trade or municipalities of the cities of Olympia, Tacoma, Seattle, LaConner and Whatcom, and petitions numerously signed by the people along the line; and as in duty bound your memorialists will ever pray." House Memorial No. 5, supra.

The Federal Government's deliberate act of diverting the River and the act of the State Legislature in recommending and acquiescing therein did not automatically extend the southern boundary of the Reservation southerly to the new River location. When a river or other natural body of water is designated as a boundary line, that line remains fixed with reference to the original location of the river. It may be changed by legal instrument or by adverse possession (neither of which is applicable here). It may also be changed by accretion or the natural gradual washing away on one side of a river bank and a gradual building up on the other. Under such conditions the owner's boundary changes with the changing course of the stream, Heikkinen v. Hansen, 157 Wn. Dec. 741; Harper v. Holston, 119 Wash. 436; Hirt v. Entus, supra.

However, in this case there is no evidence of accretion. The River's course was changed by engineering projects designed for the specific purpose, among others, of diverting its flow. Although the Reservation's boundary was not extended south to the new River location, the diversion of the River did not thereby extinguish the Indians' right to use the River as needed for fishery purposes. That right was originally established by treaty.

It was superior to the power of the State of Washington to regulate fishing at that location.

The Federal Government's act of diverting the River (recommended and acquiesced in by the State Legislature and local white residents, for their own benefit) did not change these rights. To hold otherwise would make a mockery of treaty rights. The parties could not have intended that the use of the bounding River would be available to the tribe for only thirty or forty years, thereafter to be diverted without a substitute being provided for subsistence or livelihood. The Indians would never have agreed to allow the Federal Government or the State to take, at will, the only major source of food for the Reservation. As aptly stated in United States v. Walker River Irr. Dist., supra:

> "The good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserving the lands only, leaving the waters of the stream to be diverted without limit by the settlers above."

The Swinomish tribe is under the guardianship of the United States and its property and land and affairs are subject to the control and management of the Federal Government, United States v. Creek Nation, 295 U.S. 103; United States v. West, 232 F (2d) 694; United States v. Shoshone Tribe, 304 U. S. 111. However, this power of control and management is not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it is subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions, United States v. Creek Nation, supra; United States v. West, supra; United States v. Shoshone Tribe, supra. The power of the Federal Government, as such guardian, does not enable it to give the tribal lands to others, or to appropriate them to its own use or purposes, without first rendering just compensation for them, United States v. Creek Nation, supra;

United States v. West, supra; United States v. Shoshone Tribe supra. That would not be the exercise of guardianship or management but an act of confiscation, United States v. Creek Nation, supra; United States v. Shoshone Tribe, supra; United States v. West, supra; United States v. Ahtanum Irr. Dist., supra.

This is true whether the right of the Indians in the land was a fee simple title established by treaty, United States v. Creek Nation, supra; whether it was a conveyance under a statute with title remaining in the United States and a right of use being reserved for the benefit of the Indians, United States v. West, supra; whether it was a conveyance under a statute with an equitable interest being given to the Indians, Healing v. Jones, 174 F. Supp. 211; or whether it was a conveyance of a right of occupancy with all its beneficial incidents, with title remaining in the United States, United States v. Shoshone Tribe, supra.

It is true that the foregoing cases deal with the payment of Just compensation for a governmental taking or appropriating of tribal lands, however, the same general theory is applicable here, e.g. the right of the Indian to be dealt with fairly by the guardian and the corresponding duty of the guardian to manage the affairs of the Indian so that his main source of food and livelihood is not taken from him without some adequate substitute either in kind of in compensation.

Thus, although the Defendant was not fishing on the Reservation or in the area of the River's original location along the south boundary, he was fishing where he had a right to be under the treaty right to use the Skagit River, as needed, for fishing.

IV.

Was the Defendant fishing at a usual and accustomed fishing ground?

Even if one assumes that the Defendant had no right to fish in the jetty drift under the conditions heretofore discussed, it was at least a usual and accustomed fishing ground of the Swinomish tribe. Article V of the Point Elliott Treaty provided (Defendant's Exhibit 30):

> "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing . . ."

The record is clear that in the early days fishing was good in the entire Skagit Bay area and through the Swinomish Slough. The Indians originally fished at low tide with Indian traps near the present jetty drift area. They also speared fish in the shallow gutters made by the River on the tide flats all the way from Bald Island westerly to deep water. They also fished with bait from a canoe near the Hole-In-the-Wall.

As previously explained, this fish was their main source of food year around. Likewise, they caught fish to sell to the white settlers who farmed for a living on the flats east of the slough.

A. Is the right to fish at usual and accustomed grounds subject to regulation by the State of Washington?

The Treaty right to fish "at usual and accustomed grounds", as provided in Article V of the Treaty of Point Elliott is not subject to the control of the State of Washington.

Tulee v. Washington, supra, is cited to support the right of a State to impose regulatory restrictions upon the Indians' Treaty right to fish "at usual and accustomed grounds", when such regulations are necessary for the conservation of fish. However, the question before the Court in the Tulee case was the State's power to license the Indians' fishing right. The reference to a State's right to impose necessary regulations for conservation purposes was purely dicta. Unfortunately this dicta has been cited in numerous

subsequent decisions by non-critical application of the Tulee case. it is now cited to support a proposition that was never actually declared to be the law based on any issue before the Court. This error should not be perpetuated further.

Aside from the Tulee case, the State contends that regulation must be permitted because today the Indians follow more modern methods of fishing and thus take more fish than in former years. Their argument is set out in the separate opinion of Judge Rosellini in State v. Satlucum, 50 Wn. (2d) 513 at page 534:

> "The treaty with the Indians should be construed in the light of the conditions and circumstances existing at the time it was executed. It was never anticipated or imagined that at that time the present technological advances in the method of taking fish would be developed. Nylon net was unknown. The Indians did not possess the technical knowledge or materials to manufacture nets in lengths sufficient to span an entire stream. The outboard motor was nonexistent.
>
> "To interpret the treaty in a manner that would permit the Indians to use the best and most advanced techniques and equipment to the extent that the fish are destroyed would, in my opinion, go far beyond what was intended either by the citizens of the Territory or the Indians. Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each sought to share."

The same argument has been advanced frequently in the "water rights" cases and has been rejected. These cases have almost uniformly held that the Indian is neither limited to the mere extent of his needs as of the date of the treaty, nor is he limited to the extent to which he was able to make use of those rights on the date of the treaty. It was contemplated that the rights under the treaty would grow to meet future needs. As stated in United States v. Ahtanum Irr. Dist., Supra:

> "At the time of making the treaty construed in the Winters case it is plain there was little or no irrigation then being carried on by the Indians. . . The Indians might not have known the exact meaning of the word 'Irrigation' had it been used in the treaty. No one even thought in the Winters case that the rights of the Indians to the use of the water reserved should be limited to the quantities used at the date of the treaty. The implied reservation looked to the needs of the Indians in the future when they would change their nomadic habits and become accustomed to tilling the soil."

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> "It is plain from our decision in the Conrad Investment Co. case, supra, that the paramount right of the Indians was not limited to the use of the Indians at any given date but this right extended to the ultimate needs of the Indians as those needs and requirement should grow to keep pace with the development of the Indian agriculture upon the reservation." (emphasis supplied)

In this same regard, the Conrad Investment Co. case held:

> "What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of the government to reserve whatever water of Birch Creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters case." (emphasis supplied)

Skeem v. United States, supra., also dealt with the contention that the Indians' water rights should be limited to the quantity necessary for their original needs. This was rejected with the following noteworthy comment:

> "The purpose of the government was to induce the Indians to relinquish their nomadic habits and to till the soil and the treaties should be construed in the light of that purpose and such meaning should be given them as will enable the Indians to cultivate eventually the whole of their lands so reserved to their use."

The quantum of that right should not be measured by the use that was made at the time the treaty was made. The reservation was not merely for the use as it existed at that time, but for the future as well, United States v. Ahtanum Irr. Dist., supra.

> "It could not but be realized that the Indians, unskilled in the art of farming, would necessarily make slow progress, and that in any race for the actual appropriation of the stream this backward people would inevitably be left at the barrier. The good faith of the attempt to induce the Indians to make their homes on the reservation, and to remain there, seems inconsistent with a purpose of reserving the lands only, leaving the waters of the stream to be diverted without limit by settlers above." U. S. v. Walker River Irrig. Dist. supra.

This court agrees with the theory of the above-mentioned cases. The right of the Swinomish Indians to fish "at usual and accustomed grounds" should not be limited to needs as they existed in 1855 nor to the methods of fishing then used. It was contemplated by the parties that their knowledge and skills would grow and that

their needs would also increase. After being induced to move to the Reservation and relinquish their nomadic habits one cannot say logically that they cannot apply modern methods to their treaty rights.

The State also contends that this Indian treaty right must be restricted because they will deplete the fish and thus hurt many others who rely upon the fishing industry for a livelihood.

The "water rights" cases also considered this problem. It was contended that the Indians might exhaust the water in the river by exercising their rights and thus would injure the settlers further down the river. This argument was rejected. United States v. Ahtanum Irr. Dist., supra, is typical:

> "It does not appear that the waters decreed to the indians in the Winters case operated to exhaust the entire flow of the Milk River, but, if so, that is merely the consequence of it being a larger stream. As the Winters case . . . shows, the Indians were awarded the paramount right regardless of the quantity remaining for the use of white settlers. Our Conrad In. Co. case, supra, held that what the non-Indian appropriators may have is only the excess over and above the amounts reserved for the Indians. It is plain that if the amount awarded the United States for the benefit of the Indians in the Winters case equaled the entire flow of the Milk River, the decree would have been no different." Emphasis supplied)

The line of reasoning established in the Winters case, the Conrad Investment Co. and the Ahtanum irrigation District cases applies with equal force to the instant action. The fact that the white man's non-treaty use of a fishery may be lessened in value is no reason for denying the Indian a right established by treaty. The instant case is not a mere action between private citizens, nor one concerning ordinary civil rights of parties. It is one that involves the dealings between an all-powerful Federal Government on the one hand and the untutored savage of 1855 to 1873 on the other. Even more than that, this is a criminal action brought to enforce a penalty statute against a ward of the Federal Government who apparently was endeavoring to exercise the rights granted

to him by the Treaty, State v. Edwards, supra.

As previously indicated, Governor Stevens' Point Elliott Treaty negotiations never hinted at or made mention of a limitation upon the Indians' right to fish at their usual and accustomed grounds. As he discussed the purposes of the Treaty and desires of the Great White Father, he left the distinct impression that the Indians could fish as necessary, as they have since time immemorial (see the quotations above from Defendant's Exhibit 33). It will be remembered that these negotiations took place through interpreters.

The Governor's statements were made at a time when the northwest was a wilderness. They were made at a time when Indians and white men alike hunted and fished as they desired without let or hinderance from the Federal or Territorial Governments. Regulations of fish and game were neither known nor dreamed of. The Indians had fished for salmon in the Skagit Bay area since time immemorial. The catching of salmon was necessary for the sustenance of themselves and their families. Neither the Governor nor the Indian chiefs could possibly have visualized present day restrictions. They entered into the treaty agreement under conditions as they existed at that time. Thus, we must interpret the Treaty and the rights of the Swinomish Indians in light of what they then knew about need for regulation, keeping in mind that both parties knew the needs and abilities of the Indians would obviously grow in the future.

Without any doubt the Governor and the Indians signed the Treaty fully intending that the Indians should be forever allowed to catch salmon "at their usual and accustomed grounds" without restriction. We must follow that intent. As stated in State v. Edwards, supra

> ". . . they had a right to assume, that though the treaty limited them to a certain peninsula, their rights on that peninsula were as broad and unrestricted as they had been before.

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". . . we are bound to construe the grant contained in the treaty, as fixed by the executive order, as it would naturally be understood by the Indians."

In arriving at the foregoing conclusion our Supreme Court quoted at length from Jones V. Meehan, supra, as follows:

"In construing any treaty between the United States and an Indian tribe, it must always. . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak dependent people, who have no written language and are wholly unfamillar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. . ."

It may be conceded that there is an ambiguity contained in the Treaty; however, that ambiguity, if there is one, should be resolved in favor of the Indians, Winters v. United States, supra.

Inasmuch as the Defendant was fishing in a usual and accustomed fishing ground of the Swinomish tribe, he had a right to fish in the area where he was arrested. The treaty right provided for in Article V of the Treaty of Point Elliott is not subject to control by the State of Washington. In this regard the trial court adopts the opinion in State v. Satiacum, supra, as written by Judge Donworth and concurred in by Judges Schwellenbach, Ott and Foster, Nothing would be accomplished by a review of the excellent opinion written by Judge Donworth.

B. Future protection of salmon fisheries.

Although the State has no power to regulate the Indians' right to fish "at usual and accustomed fishing ground," the

State does not lack protection. It may request Congress to establish Federal regulation of Indian fishing in this area or in other treaty areas throughout the State. The United States may abrogate or change Indian treaties by passing a clear and express act which is of such a nature that the treaty and the act cannot in any reasonable view stand together, Stephens, v. Cherokee Nation, 174 U.S. 445; Seneca Nation of Indians v. Brucker, 262 F. (2d) 27; Nicodemus v. Washington Water Power Co. 264 F. (2d) 614 United States v. 5,677.94 acres of Land, 162 F. Supp. 108. However, the fact that lawful control may be established by proper Federal action does not justify the State in its attempt to short-cut the necessary procedures, despite the apparent need.

V.

Has the State proved the necessity of regulating usual and accustomed fishing grounds for the purpose of conservation of salmon?

Even assuming that the dicta of the Tulee case is applicable to this action, the State must still prove that the regulation is necessary for the purpose of conservation, Makah Indian Tribe v. Schoettler, 192 F (2d) 224. The State has failed to sustain this burden.

The fishery officials who testified made it abundantly clear that there were alternative methods of regulation that had not been used prior to applying a complete periodic closure of treaty waters to Indians. The Department of Fisheries has attempted to curtail the Indians' treaty rights by closing usual and accustomed fishing grounds without first curtailing the fishing privileges of others with non-treaty rights.

Mr. Maines advised the Court that prior to salmon reaching the River (and the Indian fishery near the jetty drift area) they are subjected to the white commercial fishermen and sportsmen.

According to the State's witnesses there is a very active commercial salmon fishery in the Straits of Juan De Fuca and in north Puget Sound, to say nothing of the intensive salmon sports fishery in the same area. In this particular area (Area 9) sports fishing for salmon has been open in the salt water as well as in the Skagit River from its mouth to Gilligan Creek.

Sport fishing for salmon on the Skagit River has increased considerably in the past few years. Referring to Chinook salmon alone, the catch was as follows:

Year	Fishermen Trips Estimated	Estimated Number Chinook Taken
1956	10,000	550
1957	12,000	1,066
1958	41,000	4,138
1959	80,000	8,311
1960	37,000	5,884

The lower catch in 1960 was caused by a series of limited three-day River closures, plus a ten-day River closure at the peak of the salmon run. However, these closures did not apply to sports fishing on the salt water in the remainder of Area 9.

The Chinook salmon catch of licensed commercial gill net fishermen in Skagit Bay (e.g. roughly Area 9), exclusive of the River, was as follows:

1931 - 1955 estimated at approximately 22,000 salmon a year
1955 - 1958 estimated at approximately 8,000 salmon a year
1959 estimated at approximately 8,379 salmon

It should be noted that all of these figures exclude Indian trap catches.

These figures take on added significance when one considers that, according to the Director of Fisheries, the sports catch of salmon is equal to, if not greater than, the commercial fishery catch on the inside waters (e.g. Straits of Juan De Fuca and Puget Sound).

Mr. Moore testified that it is wasteful to take Blackmouth (immature Chinook salmon). However, the Department admitted that

while the River was closed periodically to sports and commercial fishing of salmon and while Area 9 was periodically closed to commercial fishing of Blackmouth and Chinook salmon, the Skagit Bay area and, in fact, the entire Puget Sound remained open to salmon sports fishing despite the large catch as compared to commercial fishing. Although sportsmen were limited as to the size of fish and daily catch, all the Department did was to ask the sportsmen for a voluntary closure on Silver salmon (and probably others) while the total commercial closures were in effect. Although Mr. Moore commented upon the success of the voluntary closure, it was left to the whim of the individual sportsman, rather than being enforced by Department regulation.

Thus, even though the State made no official closure of the area to salmon fishing for sport, it attempted to close the area to Indians who sought to fish commercially under a treaty right. It is inconsistent to close an area to the commercial fishing of Indians who have a treaty right and yet to leave it open for sportsmen who fish for recreation and who have no treaty right.

Under the circumstances of this case the State has failed to prove that there was a necessity for regulating the Indian treaty fishery at the jetty drift by total periodic closure. To allow a large non-treaty fishery (e.g. the sports fishery) to run with more restrictions and no enforceable total closures is inconsistent with their claimed need for regulation.

The Indians' treaty accords to them rights against state interference which do not exist for other citizens, Makah Indian Tribe v. Schoettler, supra. Although the closure of waters at the mouths of streams, as well as the closure of streams, during portions of the year is one method of conserving the resource and may be generally fair and convenient, it cannot be permitted to curtail treaty fishing rights of Indians where there are alternative methods

of attaining the same objectives, Confederated Tribes of Umatilla Indian Reservation v. Maison, 186 F. Supp. 519.

VI

CONCLUSION

The decision in this case is strictly limited to the facts and circumstances existing in the instant case. The burden of proof was on the State to prove beyond a reasonable doubt that the Defendant was guilty of fishing in an area closed to him by an applicable law of the State of Washington. This burden has not been sustained.

The Defendant is not guilty.

DATED this 25th day of May, 196.

Charles F. Stafford, Judge
of Department No. 1

cc: Walter J. Delerlein, Jr.
Harwood Bannister