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In the

Supreme Court of the United States

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, Petitioner, v. THE PUYALLUP TRIBE, INC., ET AL., Respondent.	No. 72-481
PUYALLUP TRIBE, Petitioner, v. DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, Respondent.	No. 72-746

Washington D. C.

October 10, 1973

Pages 1 thru 48

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v.	:	No. 72-481
THE PUYALLUP TRIBE, INC., ET AL., Respondent.	:	
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v.	:	No. 72-746
DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, Respondent.	:	

Washington, D. C.
Wednesday, October 10, 1973

The above-entitled matter came on for argument at 1:23 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOSEPH L. CONIFF, JR., ESQ., Assistant Attorney General, State of Washington; for Department of Game of the State of Washington

HARRY R. SACHSE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; for Puyallup Tribe

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-481, State of Washington v. Puyallup Tribe.

Mr. Coniff, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOSEPH L. CONIFF, JR., ESQ.,
ON BEHALF OF THE DEPARTMENT OF GAME OF THE
STATE OF WASHINGTON

MR. CONIFF: Mr. Chief Justice, members of the Court: My name is Joseph Lawrence Coniff, Jr., and I am an Assistant Attorney General from the State of Washington, and I am here representing the Washington Department of Game.

As I am sure the Court is aware, this is the second time that this particular matter has been before the Court. The previous occasion was of course in 1968, when the Court had occasion to render its opinion in this matter, at 391 U.S. 392. This case basically involves a further clarification of the treaty language, Indian treaty language pertaining to claimed off-reservation Indian fishing rights. And I would like to preliminarily note for the Court's information that at the time that this litigation was commenced in 1963, that both the Washington Department of Game and the Washington Department of Fisheries were parties plaintiff and adopted the same position. However, I have been instructed to advise the Court that the Washington Department of Fisheries has not sought review of the lower court opinion, which is now before you, but

that the Washington Department of Game has authorized and instructed me to file the petition for certiorari which of course the Court has granted.

I should also advise you that the Washington Department of Fisheries' position, as contrasted to the Washington Department of Game's position, is predicated upon its reading of this Court's prior opinion.

The Fisheries' position appears to be predicated upon the concept of granting to Indian, treaty Indians special Indian only commercial netting seasons for salmon in the fresh water streams of the State of Washington. It is the position of the Washington Department of Game before this Court that the position of our sister agency is incorrect and is unlawful, because a state law prohibits the use of this type of set net or commercial netting gear for the catching of anadromous fish of which both salmon and steelhead are anadromous fish in off-reservation waters, and in reality the position which has been adopted by the Fisheries Department and which is closely paralleled by the federal government's position in this case before the Court is predicated upon the assumption that a state administrative agency director has the authority by regulation to issue a regulation authorizing activity which the state legislature has prohibited. And it is Game's position that a fair reading of this Court's opinion in Puyallup, and in particular the language used by Justice Douglas, who wrote for

a unanimous court, in the concluding paragraph of that opinion, which emphasizes the equal protection concepts implicit in the treaty fishing clause language, that language is that the right to fish in off-reservation waters, in usual and accustomed places outside reservation boundaries, is one which might be exercised in common with all of the citizens of the territory. And Justice Douglas, speaking for the Court, emphasized the equal protection concepts implicit in that language. And it is Game's position before this Court that the equal protection concepts implicit in the treaty language itself require a reversal of the lower court.

In other words, gentlemen, the line of demarcation should be the reservation boundaries, and that once an Indian, a reservation Indian moves outside of the reservation boundaries into off-reservation areas, that he is fully subject and amenable to the jurisdiction and enforcement, if you will, of state conservation laws, rules and regulations pertaining to the taking of fish. And this would include salmon as well as steelhead.

I believe that our position, and I mean Game's position, is further sustained by the opinion of this Court in the Mescalero Apache decision v. Franklin Jones, which is 41, Law Week, 4451. This decision I feel is of very critical importance to the legal position which has been taken by the Department of Game before the Court, in that it deals with

off-reservation activities on the part of the Indian tribe in the State of New Mexico. And the facts of the case are that the Mescalero Tribe, pursuant to a federal program, constructed a ski enterprise in an off-reservation location, and the argument was that the State of New Mexico could not impose its taxing laws to this particular enterprise, and this Court, citing interestingly enough the Puyallup decision, held that the absent federal law to the contrary, Indians going beyond reservation boundaries have been generally held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. See Puyallup Tribe v. Department of Game and other cases, a series of other cases. I think the following language in that paragraph is sufficiently important to call it and emphasize it to the Court's attention.

In discussing Racehorse, it states that principle, the Racehorse principle, is as relevant to a state's tax laws as it is to state criminal laws -- see the case -- and applies as much to tribal ski resorts as it does to fishing enterprises, citing Village of Kake v. Egan.

Q In this case we have the particular words of a particular treaty, don't we, General --

MR. CONIFF: Yes.

Q -- the right of taking fish at all usual and accustomed grounds and stations, it is further secured as set Indians, in common with all citizens in the territory. What

we have in this case is to try to ascertain the meaning of those particular words in that particular treaty, rather than be guided by the general kind of rules to which you have been referring.

MR. CONIFF: Well, I don't believe Ward v. Racehorse is the kind of general language that you are referring to. The facts of Ward v. Racehorse involved a treaty with comparable language, involving I believe the Vanek Tribe in the State of Utah, and this is of course an older decision of the Court, but I believe that it has been revitalized.

In that particular case, that happened to involve hunting instead of fishing, but I think the same type of language was involved.

Q It is not the type of language, it is really the particular words of the particular treaty here, isn't it?

MR. CONIFF: Yes. Well, my point is, Your Honor, the treaty involved in Ward v. Racehorse is so close to the Isaac I. Stevens treaties that we are confronted with in the State of Washington that the Court's revitalization, if you will, of the equal footing doctrine of Ward v. Racehorse I believe to be extremely significant, and that is why I was pointing out this Court's reliance I believe in revitalization of the Ward v. Racehorse doctrine --

Q What is equal footing doctrine and how is it treated in Puyallup I?

MR. CONIFF: It was not treated in Puyallup I except as I understand the final paragraphs of that opinion, as authorized by Justice Douglas, which indicated that the final resolution of the problem which the Court did not reach in that opinion, should include the equal protection concepts implicit in the treaty language in common with the citizens of the territory.

Now, I would submit that the question certainly is not foreclosed at this time, particularly in light of this Court's decision in the Mescalero case and in the citation of Ward, and I believe -- I am sure -- when I say equal footing, we all know what I am talking about, so I am not going to go back and try to run that one through again, unless you want me to. But I think it is extremely important, and I think it is important when we keep in mind that in 1854 and '55, the Indians who were resident in Washington territory, with whom Governor Stevens was ordered to treat, were not citizens, and I think that the Civil War obviously had not been fought, the 14th Amendment lay in the unforeseeable future. It of course was not adopted until 1868, and so when we look at the actual positions of the parties, the American commissioners on the one side and the Indian people on the other. The Indians were being asked to move to a place where they would have exclusive rights. They do have exclusive rights within their reservation boundaries insofar as the taking of fish and game is concerned.

This is conceded and, as far as I am aware, this has always been the position that my clients have taken. We have no jurisdiction and no authority to go into, within the exterior boundaries of an Indian reservation and enforce any state conservation laws, rules or regulations, and we do not do so.

So when we --

Q Are there in fact, just as a matter of information, tribal regulations?

MR. CONIFF: In some instances there are, in some instances there aren't. The larger tribes, for example the Yakima, the Macaw, the Quinaielt, some of these larger groups not only have printed regulations but they actually have an enforcement, where they have tribal courts, with policemen. I happen to know the Yakima Tribe also has a jail, and I understand that they do arrest people for infractions and that they enforce.

Q Conservation regulations?

MR. CONIFF: I can't answer you on my own personal knowledge. I believe that it is true in some instances, generally, with some of the larger tribes. I would point out to the Court that there are over forty-some-odd tribes listed in the preambles to the Governor -- the five Governor Isaac I. Stevens treaties. Some of these tribes were in reality small villages in 1855, and so some of the memberships and some of the groups that are claiming these rights within the State of

Washington at this time are very small, rather -- if you will -- fragmented organizations without any real cohesive political or governmental authority.

So when we say the word "Indians," you still have to take it a step further in terms of your analysis. It is apples and oranges when you get down to the reality on the riverbank.

I did want to make the point very clear, however, for the record that we are not here discussing any attempt at infringement, if you will, of any self-government or any on-reservation activity on the part of any Indian tribe in the State of Washington.

Q Conservation isn't necessarily at stake either, is it?

MR. CONIFF: Well, I believe that it is. I believe that the taking, that the use --

Q Well, is there challenge in this case of the power of Washington to forbid commercial fishing, that it will lead to the extinction of the fish?

MR. CONIFF: If all we were to be here talking about is the extinction of the fish, then I would agree with you, but the term "conservation" connotes something more than simply saving the last few.

Q Isn't really the only issue who is going to be permitted to take the fish first?

MR. CONIFF: Yes. I --

Q Or how the catch is going to be divided really?

MR. CONIFF: All right. I think, if I might, refer the Court --

Q It is the same question.

MR. CONIFF: -- refer the Court to the Appendix in No. 247, October Term, 1967, this is the complaint, page 6, this was the complaint that I drafted when I was out of law school about one year, here I am --

Q Well, --

MR. CONIFF: But I wanted to point out what the complaint was asking the court to do, and I don't think we have reached it, I don't think we have reached the answer yet. Paragraph 5 reads: "The defendants claim special privileges or immunities from the application of valid conservation laws of the State of Washington to which they are not legally entitled. By virtue of the claimed special privileges or immunities, the defendants are fishing extensively in the Puyallup River and Commencement Bay with set nets and drift nets."

Paragraph 6: "As a result of the defendants' fishery, the anadromous fish runs of the Puyallup River will be virtually exterminated if said fishery is permitted to continue, with no adequate and speedy remedy," and so forth.

Q Well, let me put it to you this way: Let's

assume that whatever judgments came out of this Court, came out ultimately, Indian fishing was sufficiently limited so that there would be no problems about extinction of the fishing runs, as long as sports fishing was eliminated. Now, that --

MR. CONIFF: You would be trading the resource from the public interest to the Indian interest.

Q That doesn't satisfy you?

MR. CONIFF: That would not be my client's position, and that is not, I do not believe, and I would submit to the Court is not a fair reading of the treaty provisions and is not a fair reading of the decision that might be applicable or might apply.

I would also add, in response --

Q Well, assuming that X number of fish may safely be caught each year, assume X number.

MR. CONIFF: All right.

Q Now, you say the Indians shouldn't have first whack at that number of fish. You say that they should be on the same footing with sports fishing?

MR. CONIFF: With all other citizens, whether it be sport or commercial. I would like to point out, there is no discrimination against Indians to go outside the reservation and engage in either sports fishing activities or commercial fishing activities, pursuant to state regulation.

Q Yes.

MR. CONIFF: So that there isn't this discrimination. And really the point I -- the reason why I went back and read the complaint --

Q The question is whether the treaty does give them a special --

MR. CONIFF: That's it. It is a quantification question, a question of interpreting the language and attempting to quantify it. And I am submitting to the Court that a fair reading, a fair interpretation of the treaty language in question would necessarily imply, in light of the historical circumstances under which it was executed, that Indians were entitled, were given a right in 1854-55 not to be discriminated against, keeping in mind the date, the historical setting, and in which these treaties were executed, the 14th Amendment was in the future, and pioneers and settlers, pursuant to government policy, were being encouraged to move out, move into this territory and let's settle it, let's take it over, we just settled things with the Nation of Great Britain, and we wanted to -- the Hudson Bay Company was moving and we wanted to populate this area. But the government obviously had a problem, they had to go out and trade with the native populations, and part of the deal was to give them exclusive rights, to give them a place to reside and hopefully to be integrated into society at some time. But the reservations -- I am off the subject a little -- I believe the reservations were

intended to be temporary, but they haven't turned out to be that way. I am not quarreling with that. I believe that is the law today.

But certainly, when you compare the exclusive rights to fish and hunt within the reservation, which clearly was understood I believe by everyone at that time, I think you keep that fact in mind when you look at the quantum, if you will, of the off-reservation in common right, I think that --

Q Would you answer Justice Stewart's and Justice White's question in the context of off-reservation fishing?

MR. CONIFF: Yes. Yes. I am trying to --

Q This applies to only steelhead, doesn't it? It does not involve salmon?

MR. CONIFF: In my view, the question of treaty interpretation does not depend upon the species of fish.

Q I thought this issue, I thought all that was before us was the --

MR. CONIFF: No, I would not agree. I would not agree with that, otherwise you are going to have a bifurcated analysis, a bifurcated law, if you will, depending upon the way the state legislature decides to classify a fish. The treaty says the right to fish at usual custom grounds in common.

Q I thought that the salmon issue and the salmon regulation was not before us here.

MR. CONIFF: I do not agree with that, because I

recognize that the government is urging upon the Court that this is foreclosed. I am pointing out to the Court that the treaty does not say salmon. The treaty does not say steelhead. The treaty does not say trout or bass or any other species. It says the right to fish, and I honestly believe that the impact of this Court's decision would be to establish a common rule which would apply to all species of fish which might be subject to commercial netting activities in off-reservation waters of the state.

Q Well, that issue is clear with respect to any kind of fish, but I thought that in fact in this case what the issue was was the -- your state court's treatment of the steelhead. Well, if I am mistaken, I am mistaken, but that is the impression I got --

MR. CONIFF: That is not my impression.

Q -- in reading the briefs before I came into the argument.

MR. CONIFF: Perhaps I didn't express myself well enough in my statement of the issues in the brief or in the petition. But at page 10, the first issue stated in my brief is "Whether the Equal Protection concepts implicit in the Treaty phrase '...in common with all citizens of the Territory ...' means that treaty Indians must abide by state conservation laws and regulations when they engage in fishing in off-reservation waters."

Clearly, the treaty itself, which is the fundamental predicate from which we are going to legally operate, does not make the distinction, and I believe that the actual impact of any decision of this Court will not be limited to a given species of fish.

Q Well, where can I most easily find the opinion of your state court?

MR. CONIFF: It would be as Appendix A to the Petition for a Writ of Certiorari, which was filed on September 20, 1972.

Q Your petition?

MR. CONIFF: Yes. It is an Appendix which is printed thusly.

Q This one? September 21st, it says.

MR. CONIFF: Yes.

Q And it is Appendix A of that?

MR. CONIFF: Yes.

Q Thank you.

MR. CONIFF: Now if I might add another point here, to this question of treaty interpretation, which I feel is quite germane and, frankly, I feel is important as an interpretive aid to the Court in interpreting the content or quantification, if you will, or meaning to the in common language as it might pertain to off-reservation fishing and hunting, is the rather interesting fact that the in common with language

does appear in another context in a Governor Stevens' treaty, and that is the treaty with the Yakima.

Now, the treaty with the Yakima provides, in addition to the usual language on the right in common to fish at usual and accustomed grounds, it also provides immediately following, as is also the right in common with the citizens of the United States to travel upon all the public highways. And I would submit to the Court that a rather unusual result would obtain if the application of state police power in the form of traffic rules and regulations on public highways, if there is a constitutional impediment to the application of the state laws in that regard in the terms of the fishing in the context of fishing, we could really reap some very strange results if we attempted to apply that rationale to this language which appears in the treaty with the Yakima. And I frankly don't know what the answer would be to the problem that I have posed.

But I am relying upon the language in the Yakima treaty, at least as an interpretive aid, in other words, where the same language was used by the same author, in this case Governor Stevens --

Q In the development of the decision of this case or in the interpretation of the treaty, especially as it applied today to inquire whether and to what extent the state contributes annually to the steelhead run?

MR. CONIFF: I do not believe that that is -- in my judgment, I do not believe that that would resolve the question before the Court.

Q It may not resolve it, but is it relevant though? I take it that, left to its own devices, the steelhead run might not maintain itself at the present level.

MR. CONIFF: That is correct.

Q That the native steelhead run is only a fraction of what it would be if the state didn't annually feed the steelhead in the Puyallup.

MR. CONIFF: That is correct. Now, the studies that the department has undertaken regarding the extent of hatchery contribution to sport catch have reached somewhat varying results, depending upon the study, but there are minimum developments since.

Q Isn't that a relevant consideration, as to what in common with others ought to mean in the treaty today?

MR. CONIFF: Well, I suppose in that sense it may be. I still maintain before the Court that what should be relevant and what were the relative circumstances of the parties, read the entire instrument as a whole, keeping in mind the exclusive nature of the rights which were to be granted and confirmed to the Indian tribes in terms of their on-reservation fishing and hunting activities, and contrasting that with the off-reservation in common with language, keeping in mind the fact

that Indians were not citizens at that time, and keeping in mind that this language does appear in another context, in Article III of the Treaty with the Yakima, and that should the Court reach a result in interpreting in common with to mean exclusive, paramount or prior in some sense, so that they have a right to catch these fish perhaps superior to all other citizens, and may be able to catch all the fish and the citizens not any.

Then suppose at that point, Your Honor, that then these considerations that you have mentioned of the extent of contribution to the resource by public funds would become relevant and important. But unless, I believe, that you have to first answer or reach the question of some sort of quantification, and it is only at that point that you would then begin to judicially inquire into, well, perhaps the native runs would not be as high absent the contribution of the state, and I might add the federal government, for that matter, to the resource in the form of fish passage facilities, dams, stream clearance projects, hatchery programs. As I just mentioned, the Washington Department of Game, our lowest study shows on the Puyallup the lowest contribution in a single year I believe was 60 percent, running as high as 80 percent of total catch developed from our hatchery program, which for the most part is financed by the sale, approximately 80 percent financed by the sale of fishing licenses and steelhead punch

cards. So the sportsmen themselves are, you might say, paying for a large part of the resource. But I still maintain that we don't reach this question unless we first have reached the fundamental question of what is it that was secured. And my primary argument is geared to that level, rather than to the level that you suggested, although in my brief, I will admit, I do take an alternative position.

There is a recent opinion, post-Puyallup and post-Mescalero, a copy of which I have caused to be lodged with the Clerk of the Court, entitled "Settler v. Yakima Tribal Court." It was issued by the Federal District Court for the Eastern District of Washington, by the Honorable George H. Powell, on September 26, 1973. This is the only decision that I am aware of on the federal level which deals with Puyallup and Mescalero, and the issue before the Court -- it is not obviously in my brief, as I mentioned copies are lodged -- the issue before the Court was whether or not the Yakima's passed regulation pertaining to off-reservation fishing by the Yakima Indians in the Columbia River. They then went down on the river and arrested a couple of members of the tribe who were violating those regulations, they were about sixty miles off the reservation, took them back and tried them and convicted them. The issue then was whether or not they had jurisdiction.

The Federal District Court for the Eastern District of Washington, relying on the Puyallup-Mescalero rationale,

held that the Yakimas did not have extra territorial jurisdiction.

I note the white light is on, and I would like to, if I may, reserve the two or three moments remaining to me for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Sachse?

ORAL ARGUMENT OF HARRY R. SACHSE, ESQ.,

ON BEHALF OF THE PUYALLUP TRIBE

MR. SACHSE: Mr. Chief Justice, and may it please the Court:

I want to start out by saying that I think the Department of Game's position, contrary to its own state court's finding, and contrary to its own Department of Fisheries' position, tries to take out of nothing at all, just out of air an argument that would eradicate the third article of the treaty with the Puyallups, and that would jeopardize almost every Indian treaty in the country. The idea that when a state comes into the state, that it can then ignore whatever treaty had been made by the United States prior to the time that it came into the state, because other states didn't have treaties with Indians, and this would have to be equal footing.

But before I get into that in much detail, I want to say I also think that it is based on a total misunderstanding of this Court's prior decision in this case. Mr. Coniff argues that this Court's prior decision in this case, because

of the one phrase that in determining whether the regulation is necessary for conservation, it should take into account the issue of equal protection implicit in the phrase in common with, means that whatever laws the state passes, they label as conservation laws, apply equally to Indians and non-Indians in the state. That is the exact position that this Court rejected when it affirmed the decision below in the prior Puyallup case.

What had happened there, this was the position that Mr. Coniff had argued in the lower court in the State of Washington in 1963, I think it was. The Supreme Court in the State of Washington, in 1967, rejected that position and held that the essence of this opinion is in the decree as reframed should so reflect, one, if the defendant proves that he is a member of the Puyallup Tribe and, two, he is fishing at one of the usual and accustomed fishing places of that tribe; three, he cannot be restrained or enjoined from doing so unless he is in violation of the statute or regulation of the department's promulgated thereunder which has been established to be reasonable and necessary for the conservation of the fishery.

And when this Court had the case, it made perfectly clear, I think, that the issue was -- the issue was the following, that in the treaty, the tribe reserved for itself the right of fishing off-reservation, but it limited that right in that its fishing in common with the people of the state.

And the Court --

Q Usual and accustomed places?

MR. SACHSE: Usual and accustomed places, that's right. And there is no issue here that these are --

Q And do you think it also means in the usual or accustomed manner?

MR. SACHSE: I think it means more than that and different from that, and I will try to get to that in just a minute.

Q Well, what did Puyallup I say about that?

MR. SACHSE: Puyallup I says -- the treaty doesn't say anything as to the manner.

Q Did Puyallup say anything else --

MR. SACHSE: Sir?

Q Did Puyallup say anything else about it in terms of how Indians could be able to fish, even if they had the right to fish in the accustomed places? Did it say anything about whether they could fish in unaccustomed ways?

MR. SACHSE: The Puyallup I decision?

Q Yes.

MR. SACHSE: The prior decision of this Court?

Q Yes.

MR. SACHSE: I think it said that the state is free to regulate the manner of fishing, if it can show that it is necessary for conservation, and that it does not discriminate

against the Indians in doing so. I think the real point in this case, and it is a point that I want to get to in a minute, is whether the regulation of the Department of Game in this case has been shown to be necessary for the conservation of fish.

Q Mr. Sachse, as I read Puyallup, at least on page 98, it says that the manner may be regulated in the interest of conservation, it doesn't say that it has to be necessary for conservation. Do you find other language in the case that supports --

MR. SACHSE: Yes, sir, on page 402 in the footnote. It is Footnote 14. The court said, "As to irregulation concerning the time and manner of fishing outside the reservation, we said that the power of the state was to be measured by wehther it was necessary for the conservation of fish." And the court then contrasts the lesser power of the state to regulate Indian fishing from its general police power, and I think that is also implicit in the affirmance of the court below.

Q How would you weigh a statement in the opinion itself that seemed to conflict with a statement in a footnote?

MR. SACHSE: I would look at the case as a whole and I would say that this case affirmed the decision below which held in accordance with several other decisions of this Court, that the standard is whether it is necessary for the

regulation of fish, and that this Court actually went further in Puyallup, it said that the Court should show that it is necessary for the regulation of fish and implicit in that is the idea that the regulation should not be discriminatory against the Indians, in the sense that it shouldn't make them bear the whole burden of the conservation regulations.

Q Do you think the treaty would give the -- do you think the treaty fishing right would cover, would guarantee the right to Indians to fish commercially even though at the time the treaty was signed, they had never fished commercially, they simply did it as a matter of subsistence?

MR. SACHSE: Well, to start off with, the Court in Puyallup I assumed that the Indians did fish commercially.

Q That isn't what I asked you, Mr. Sachse.

MR. SACHSE: No.

Q I asked you whether -- what is your view of the treaty, did the treaty guarantee the right of Indians to fish commercially when they never had fished commercially at the time the treaty was signed.

MR. SACHSE: I think that would be a difficult question. I think the better argument would be, the better answer would be that, yes, it did, what the purpose of --

Q Is it a relevant question in this case or not?

MR. SACHSE: I don't think so, because at the time

of this treaty, these Indians did fish commercially, and the record when the case was here before, the statement of an anthropologist to the effect that these Indians were supplying the Hudson Bay Company with their salmon and steelhead at the time of this treaty.

Q They caught with nets?

MR. SACHSE: Which they caught with nets. They fished with nets, they fished commercially. I think also the Court has to --

Q With gill nets?

MR. SACHSE: Yes, sir. Well, let me say this: The record of this case doesn't show that it was with a gill net. Indians in that general area did fish with gill nets before the white men came, and there is a statement to that effect in a book called "Kroeber," on the Indians of the northwest coast, which describes how they made the nets and how big the nets were. Gill nets are not an invention of the white man.

I think a good deal of what Mr. Coniff has argued were the same points argued in the Winans case in 1905, and that were rejected in that case. Now, I want to take a minute on that and then I want to get into the question of these present regulations and what this has to do with conservation of fish today.

To start off with, when the treaty was made, this treaty, like the treaty with the Yakimas, all the treaties in

the northwest coast did three things. To start off with, they were peaceful treaties. Governor Stevens was sent in to negotiate with the Indians. In each treaty, there is a clause in which the Indians cede to the United States a very large section of land that they had occupied. There is a second clause in which the Indians reserved to themselves a very small piece of land on which they were to live; and there is a third clause in which they reserve to themselves the right of fishing at all their usual and accustomed places in common with the people of the territory and the right of putting up houses and so forth to dry their fish at those places.

It is quite clear that that third clause was considered necessary for them to be able to maintain themselves, the land they were giving up was large, the land they were keeping was too small for them to make a living on. And the treaty was negotiated in a kind of jargon, it was called a Chinook jargon. And there is also evidence in the first record here that the treaty was translated to the Indians in very simple terms, and what it obviously meant to them was that they had to give up the big land, they had to live on the small land, but they could continue to fish at the usual places that they could fish, but that they would no longer have that exclusive right, that the settlers would be able to fish there, too.

There is nothing in it that said they submitted to

regulation by the state, there is nothing in it that says we want to be sports fishermen and go out and angle, they were fishing to feed their families and to trade. And since that time they have continued to fish that way except when the state has prohibited them from fishing that way.

Now, in United States v. Winans, 1905, Winans was a landowners who had set up a fish wheel to make a large commercial fishery on the Columbia River, it was under license from the state and also under state law no one would have the right to come on his land anyway to fish. Winans argued that all the treaty means is that Indians must obey all the fishing laws of the state, and if they do they can then continue to fish, but that they have no special treaty rights. And Winans argued this case of Ward v. Racehorse, that had been decided seven or eight years before that, and that Mr. Coniff relies on.

He said the treaty may have been fine for the old days, but when Washington came into the state, these Indians lost any special right that they had prior to that time. And this Court strongly rejected both of those arguments in the Winans case.

The Court explained that the right to fish was part of the rights, and I quote here, "not much less necessary to the Indians than the atmosphere they breath." The Court said in ceding most of their land, they did not cede their fishing

rights, but only limited them to be no longer exclusive, and that to interpret those rights retained as giving them nothing more than they would have without the treaty would be, in the words of the Court, "an impotent outcome to negotiations and a convention that would seem to promise more and to give the word of the Nation for more."

The Court also said the right is intended to be continuing against the United States and its grantees, as well as against the state and its grantees.

And then Tulee v. Washington, in 1942, Justice Black, if it please the Court, in the same vein, strongly supported the specialness of these Indian fishing rights and their right to fish even without paying for a commercial fishing license. Tht was argued to the Court as a conservation requirement, to have them pay the commercial fishing license. Justice Black said even though this method may be both convenient and in its general impact fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to preserve. It cannot be reconciled with a fair construction of the treaty. We therefore hold that the state is invalid as applied in this case.

Now, Justice Douglas, in the prior Phuyallup case, cited both of those cases with approval. He stated that -- the Court stated that it would not say that the fishing regulation had to be indispensable for conservation but that it

would say that it had to be necessary for conservation and it couldn't discriminate against the Indians, and then remanded the case for trial on the issue of whether these regulations were unnecessary.

Q The State Supreme Court did that, and we affirmed?

MR. SACHSE: That's correct.

Q This court affirmed.

MR. SACHSE: That's correct.

Q We didn't remand it to the State Supreme Court, we affirmed --

MR. SACHSE: You affirmed and remanded for trial on the merits on the question of whether the regulations were necessary for conservation and did not discriminate against the Indians.

Now, I would like to get to that trial. To start with, when the case was remanded, the Department of Fisheries immediately changed its position. Fisheries had argued that you couldn't have a net fishery for any fish in the Puyallup River. Fisheries changed its -- and they had argued it on this basis: They said you can't have a fishery where the fish spawn, and you can't have a fishery where the fish are milling about and the same fish will be fished over and over, and it is that language that the Court quoted, that you can't have this fishery where the fish are milling about over and over.

Well, the Department of Fisheries did a reasonable thing, they said we will prohibit the fishery at the mouth of the river, where the fish mill over and over and over, and we will prohibit the fishery twenty miles upstream where the fish are actually spawning and where people are walking around there with nets would be destructive to the fish. But in the middle area, we will permit a limited net fishery for salmon. There is still a dispute between the tribe and the Department of Fisheries as to how big that fishery ought to be, but there is no dispute --

Q Salmon, that is not before us.

MR. SACHSE: That is for salmon and it is not before the Court, but it does indicate that the net fishery can properly be managed in that river.

Q Well, at least for salmon?

MR. SACHSE: At least for salmon.

Q Yes.

MR. SACHSE: There are at least a dozen statements in the record that there is no significant difference in the management of nets and so forth for salmon or steelhead. The steelhead are very much like salmon in all their habits. There are statements that the steelhead is a smaller run.

Q The size of the population might be quite different in any given stream --

MR. SACHSE: That's right.

Q -- between the two species?

MR. SACHSE: That's right.

Now, the size of the steelhead population in this stream has been sufficient every year in recent yeasr --

Q Mr. Sachse, are you asking us to make a review of the state court's findings on facts?

MR. SACHSE: No, what I am asking you to do is to affirm the state trial court's findings of fact and to reverse the State Supreme Court's reversal of the trial court's findings.

Q Well, what test do we apply here when the Supreme Court of Washington has reversed on a factual ground the Superior Court?

MR. SACHSE: They haven't reversed on a factual ground. They have reversed on a misunderstanding of the law, and I think I can show it to you very simply.

Q Well, if it is a misunderstanding of law, why is it necessary for you to get into all the testimony below as to whether, you know, the milling and that sort of thing, if it is strictly a point of law?

MR. SACHSE: Well, I just want the Court to understand that we are not proposing something that is detrimental to the fish in that area or that has to do with conservation; that what we are talking about is whether the state has the right to appropriate the fish first for sports fishermen and

totally exclude the traditional Indian fishery.

Q Well, isn't that actually what they did for one year? Isn't that what you are saying?

MR. SACHSE: No, I'm not, because the Supreme Court of the State of Washington set up a standard that has assured that every year since then that the Indian fishing will also be prohibited, and that has occurred in each year since then.

Q I see.

MR. SACHSE: And let me show you --

Q I thought the standard they set up indicated -- I thought the standard they set up for future years would be based on what was necessary for conservation. I guess it is -- I guess it would be if you said that they had to supply a sports fishery.

MR. SACHSE: Let me give you two -- I think I can answer this graphically for you. The findings of fact of the trial court were that 15,000 to 18,000 fish were being taken per year by sports fishermen.

Q Now, we are talking about steelhead, are we not?

MR. SACHSE: Steelhead. I am talking only about steelhead.

Q Exclusively, are we not?

MR. SACHSE: Yes, sir.

Q I thought so.

MR. SACHSE: Steelhead.

Q At least that is what you are talking about.

MR. SACHSE: That is what I am talking about. And the most succinct statement is in the opinion of the trial court. It says, "In view of the large number of steelhead caught in the Puyallup River, it would seem the department is not in a position to say the Indians can be entirely excluded from the exercise of any special right."

Q Right.

MR. SACHSE: Okay. Now, the Supreme Court of Washington reversed --

Q Such as a commercial fishery?

MR. SACHSE: Sir?

Q Such as a commercial fishery?

MR. SACHSE: As a commercial fishery or a fishery for their own -- yes, such as a commercial fishery. The Washington Supreme Court reversed that. They didn't reverse the findings -- they didn't argue with the findings that 13,000 to 18,000 fish are being taken each year by sports fishermen. What they said is the catch of the steelhead sports fishery alone in the Puyallup River leaves no more than a sufficient number of steelhead for escapement necessary for the conservation of the steelhead fishery in the river. And so they reversed the lower court, upheld the prohibition of fishing for steelhead with net, and said that until -- each year this will be reviewed, and when there are enough left over after the sports

fishermen are through, the Indians can come in and if the Department of Game says there are enough, the Indians can fish for those.

Q Now, where do you find that language? I am looking at the petition for certiorari of the Game Department, the Department of Game, September 21st, the Appendix. Around page --

MR. SACHSE: I think I have a citation to it in my brief. It is at page 573 of the opinion.

Q Page 573. All right, this is the same pagination here.

MR. SACHSE: Okay.

Q 573.

MR. SACHSE: I will find it.

Q Well, if that is about where it is -- I think what --

MR. SACHSE: It is Finding No. 4, page 573, it is in this --

Q I see it now. But the holding was, wasn't it, only as Justice White has suggested, back on page 571, under Finding 4, the second paragraph, "We are satisfied from the record in the present case, however, that a regulation of authorizing an Indian net fishery for steelhead for the year 1970 in the Puyallup River would have been destructive to the conservation of the steelhead fishery, and the Department of

Game's contention that there should be no commercial fishery in the Puyallup River for steelhead, should be sustained for that year." That is the holding in this --

MR. SACHSE: That is the holding in this case.

Q -- with respect to steelhead.

MR. SACHSE: That is the holding in this case.

Q That's it.

MR. SACHSE: That is the holding of the Supreme Court of the State of Washington in this case, but the Supreme Court clearly established, the Supreme Court of the State of Washington clearly established a priority for sports fishermen in deciding whether an Indian fishery can be allowed in the Puyallup River, and they established that priority in section 4 of --

Q It is all there. That is what you are quarreling about?

MR. SACHSE: That is what we are quarreling about, and we are also -- I think you can see why we are quarreling about it, because the Department of Game of the State of Washington still contests the rights of the Indians to have any fishery there at all.

Q You don't attack the finding that if you take into consideration the number of fish that are caught in the sporting business, that to allow the commercial fishery will endanger the run? As long as you accept that many fish taken

by the sporting industry, the Supreme Court is quite right in saying that a commercial fishery can't be allowed. You don't contest that, do you?

MR. SACHSE: I don't know about that. The evidence doesn't show one way or another as to --

Q Well, that is what the court found.

Q It is a fact.

MR. SACHSE: Well, the Court found that --

Q As a fact. And let's assume you accept that fact, now your real argument is that the sports industry should not be able to take that many fish if it means cutting the Indians out of a commercial fishery.

MR. SACHSE: That's correct. My real argument is that this treaty provided the Indians with an off-reservation fishing right beyond the simple fishing of other people in the state, that the treaty should be interpreted in terms of its meaning in context, which was that these people would be able to some extent support themselves and feed themselves from these fishing rights.

Q And the treaty makes it incumbent upon the state to cut down the volume of sports fishery?

MR. SACHSE: That's correct.

Q So long as the facts remain as they are. Is that it?

MR. SACHSE: That's right, that they can't take the

entire harvestable fishery here and devote it entirely to a sports fishery to the detriment of the Indians who fish here.

Q I suppose you would concede that Washington could, if we agreed with you, cease putting steelhead in the river?

MR. SACHSE: I have no quarrel with that at all. And I wish to point out also that the federal government has a large fishery development program in connection with Indians and Indian reservations just in general, and that the federal government also plants fish in rivers, though not in the Puyallup. And if the state wanted to stop planting fish in the Puyallup, the federal government very likely would start planting fish --

Q But then I suppose, Mr. Sachse, that what is necessary to conserve the runs might be considerably different than what is necessary when the fish is putting in 61 percent of the fish that are caught?

MR. SACHSE: To this extent, that it makes a larger run, it makes a larger harvestable amount, and to take that harvestable amount and give a preference to sports fishermen for that harvestable amount in an area where the Indians have traditionally fished and where they have relied on fishing as part of their life is contrary to this treaty.

Q Is there anything in the record to indicate what size of a commercial fishery the Indians are talking about

or desire to conduct?

MR. SACHSE: There is nothing as to the second part, desire to conduct. There is evidence as to a few years on salmon when the Indians had a large --

Q Well, have they ever had --

MR. SACHSE: -- but there is no evidence as to the size of commercial fishery on --

Q They have never had a commercial steelhead fishery, you say?

MR. SACHSE: As far as I know they fished steelhead mainly for their own sustenance, and there is no --

Q But there has never been a commercial steelhead fishery on the Puyallup?

MR. SACHSE: I can't say that because there are on the Quinaielt reservation, for instance, there is a commercial steelhead fishery and sports fishery that are conducted together by the tribe.

Q But in hearing, in order to find that the Indians couldn't be allowed to run a sports fishery, there must have been some evidence put in by the Indians as to what kind of a sports fishery -- commercial fishery they were talking about.

MR. SACHSE: Let me say this, that the Indians traditionally and to this day don't make much of a distinction between steelhead and salmon. Steelhead is Salmo gairdnerii,

the big fish like salmon, and it is fished the same way in the commercial markets, the steelhead too. But there is no solid evidence as to what the Indians would want if, for instance, they were allowed to fish legally for these fish.

Now I should say this: We are not asking this Court to determine how many fish the Indians should get and how many fish the sports fishermen should get. There is another case under way in the District Court, Federal District Court in the State of Washington, called United States v. Washington, where the attempt is somehow to quantify the fishing rights of the Indians. It deals primarily with salmon but it also can deal with the steelhead issue. There is a very big record there.

But what does seem clear to us is that in -- for the 1970 regulations, every regulation since then, based on this conclusion of the Supreme Court of Washington, that the sports fishermen have to come first, that the Indians are being deprived of their share fo the fishing for steelhead in that stream --

Q You don't claim discrimination against the Indians here, do you?

MR. SACHSE: I claim a discrimination against their treaty rights, a denial of their treaty rights.

Q A denial of their treaty rights --

MR. SACHSE: But there is a discrimination, too, and

I do claim it, and I want to make this clear. The Indians fish in the rivers and there is -- I don't want to get into the record on this -- part of the reason is they don't have the money to go out and fish deepsea fishing, and the state has evidence it would cost $122 per fish to catch a steelhead as a sports fisherman. They don't have that kind of money. And they have always fished near where they live in the river where they can fish on a rather occasional basis, often after they come back from what other job they may have, and it is a discrimination against the Indians.

Q But it is not as if the State of Washington were saying to a white man that you can fish commercially but the Indians can't.

MR. SACHSE: No.

Q The regulation applies across the board.

MR. SACHSE: It is like this. It is like this: If all the black people lived in a particular neighbood and the white people lived in a different neighborhood, and the Court said in this black neighborhood nobody can work in his yard, in this neighborhood nobody can work in -- nobody can have a business, in the other neighborhood you can. I think you could find that there is a discrimination there. The fishing has been prohibited in the place where Indians fished, and it is deliberate. It is deliberate.

Q But it is not just a place, it is a manner of

fishing that has been prohibited, isn't it?

MR. SACHSE: That's correct. It is the manner of fishing that these Indians use to fish, and there is no showing that it is necessary for conservation to prohibit that. It can be regulated and handled very well, and is being handled on Indian reservations and on this river with salmon.

Q May I see if I understand basically what the -- this is a petition and a cross-petition, these are cross-petitions, aren't they?

MR. SACHSE: Correct, two petitions.

Q And your brothers on the other side, I gather, say that the -- you tell me if I am wrong, because I am far from sure that I do understand this -- but the Game Commission of the State of Washington says that the Washington Supreme Court was -- the Department of Game of the State of Washington says the Washington Supreme Court was just wrong in basic principle and that Judge Hale's dissenting opinion was basically correct?

MR. SACHSE: That is correct?

Q Do you understand that?

MR. SACHSE: Yes, sir.

Q You say, on the other hand, that the Supreme Court of Washington was basically correct, but that they erred in giving total priority to game fishing and in their approach that if and only if there were enough left over after the game

fishermen got all the fish they wanted, only then could the Indians do any commercial fishing, and that that was wrong.

MR. SACHSE: That is exactly correct.

Q In fact, it was the only thing that is wrong about that.

MR. SACHSE: That is exactly correct. And we also say that the remedy here has to be looked to carefully because the Indians have been deprived for a long time of these rights in the same way.

Q And the only holding was with respect to 1970, wasn't it?

MR. SACHSE: The holding was with respect to 1970, but the standard has been applied ever since.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sachse.

Mr. Attorney General, you have got about three minutes left.

REBUTTAL ARGUMENT OF JOSEPH L. CONIFF, JR., ESQ., ON BEHALF OF THE DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

MR. CONIFF: Thank you. I will be very brief, Mr. Chief Justice.

The first point I would like to make is that steelhead, as a game fish, may only be taken with hook and line in waters in the State of Washington. There is no salt water or marine commercial fishery for this species and no sports

fishery to any substantial extent at all occurs in salt water, therefore the only place where steelhead may be taken under state law is by hook and line in fresh water streams at the very same locations where these Indians are claiming rights to put commercial nets.

Q Your own State Supreme Court didn't seek to modify that, did it?

MR. CONIFF: No. I am merely advising the Court that that is a fact. That is where the fishery occurs. That is where the sports fishery occurs.

Q Well, now you are saying that it is a law that steelhead may be only taken by hook and line. That is not a fact, that is a law.

MR. CONIFF: Okay. In the past, up until now, that is where this occurred. There is no commercial marine fishery, these are not commercial fish, there is no commercial market for steelhead in the State of Washington. They are a game fish, and I wanted to make that point.

The second point is, I wanted to just simply briefly reemphasize Mescalero-Ward v. Racehorse as a part of the reading of the equal protection concepts implicit in the treaty language.

Q Do you think Judge Hale's dissenting opinion was correct? Is that right?

MR. CONIFF: That is correct, and I agree with the

statements made by counsel, the way the issues are delineated before the court.

Q Okay.

Q Well, what was wrong with what the Supreme Court said?

MR. CONIFF: I don't believe --

Q Basically?

MR. CONIFF: Okay. The basic way that they were wrong is that they are allowing the Director of the Department of Fisheries to set special Indian only seasons for commercial harvest of fish in off-reservation waters, contrary to the treaty language.

Q They are wrong even though they never did that, because of the fish?

MR. CONIFF: I'm sorry, I don't understand.

Q Have they ever set a special Indian season?

MR. CONIFF: The Department of Fisheries has, not the Department of Game.

Q Well, have they set a special season?

MR. CONIFF: Yes, they have in a number of rivers.

Q Not for steelhead?

MR. CONIFF: Not for steelhead. Steelhead are a --

Q That is what I mean.

MR. CONIFF: Steelhead are under Game's jurisdiction, and the salmon are under the Fisheries' jurisdiction under

state law.

Q Right.

Q How was the Supreme Court wrong with respect to steelhead?

MR. CONIFF: With respect to steelhead, it imposed an additional burden upon the Washington Department of Game in that it has to demonstrate annually that it is --

Q You have been able to do that every year?

Q You succeeded in carrying out that burden every year, beginning in 1970?

MR. CONIFF: Under a whole series of court challenges, and that leads me to the final point I would like to make.

Q But the only way you have been able to carry it is because you have to -- because you say that you must satisfy the sports fishery?

MR. CONIFF: Under the language of the opinion that it indicates that a sports fishery being a very inefficient fishery, a hook and line as opposed to a net, would be satisfied, and then if it can be demonstrated there is a surplus, at that point it is then incumbent under the state of the law under the opinion below, to establish a special commercial season on game fish, steelhead, in the State of Washington.

I wanted to point out, there is no discrimination under state law in off-reservation areas. There is -- there has been a great deal of civil unrest in the state, a great

deal of confrontations, riverbank shoot-outs, if you will. Our Game Department headquarters have even been taken over, offices ransacked and so forth, and I merely point out that in light of these facts, and in light of the fact that there are a number of pending cases, including U.S. v. Washington, that there is a definite need for clarification beyond that given us by the Supreme Court of the State of Washington.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:20 o'clock p.m., the case was submitted.]

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