ORIGINAL

In the

Supreme Court of the United States

c/

PUYALLUP TRIBE, INC., AND RAMONA BENNETT,

PETITIONERS,

V.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, ET AL.,

RESPONDENTS.

No. 76-423

Washington, D. C.
April 18, 1977

Pages 1 thru 72

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IN THE SUPREME COURT OF THE UNITED STATES

PUYALLUP TRIBE, INC., and RAMONA BENNETT, Petitioners,	:	No. 76-423
v.	:	
DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, et al., Respondents.	:	

Washington, D. C.

Monday, April 18, 1977

The above-entitled matter came on for argument at 11:35 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

WILLIAM H. RODGERS, Jr., Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D. C. 20001, for the petitioners.

H. BARTOW FARR, III, Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the United States as amicus curiae.

APPEARANCES: (Cont.)

DON S. WILLNER, Esq., Willner, Bennett, Riggs & Skarstad, Suite 1400, One S. W. Columbia, Portland, Oregon 97258, for the respondents.

SLADE GORTON, Esq., Attorney General for the State of Washington, Temple of Justice, Olympia, Washington 98504, for the respondents.

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I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-423, Puyallup Tribe against Department of Game of the State of Washington.

Mr. Rodgers, I think you may proceed.

ORAL ARGUMENT OF WILLIAM H. RODGERS, JR.

ON BEHALF OF THE PETITIONERS

MR. RODGERS: Mr. Chief Justice, and may it please the Court: My name is William Rodgers. I represent the petitioner Puyallup Tribe in this case. This litigation returns here for the third time in its 14-year history. The case involves a fishery for steelhead trout in the Puyallup River, Puyallup Reservation, State of Washington. It has been in the courts now for a period covering some four generations of steehead. We believe that is long enough, and we submit that there is but one issue left -- whether the State has the power to regulate an on-reservation fishery. This case does not involve salmon; this case does not involve the Department of Fisheries; this case most assuredly does not involve whether traffic lights will be honored in the streets of Tacoma.

I will attempt to put the issue in context first by outlining briefly the history of this litigation and then identifying the three propositions that we believe are decisive.

The action was commenced in the Pierce County

Superior Court back in 1963 against the tribe and 39 named individuals. The litigation initially resulted in an injunction restraining individual tribal members from net fishing for steelhead in the Puyallup River.

The first time the case was here this Court, viewing the case as an off-reservation case and therefore within Article III of the treaty -- I will be talking about the treaty for the next several minutes. It is reprinted in Appendix 1a of our brief. The first time the case was here, this was viewed as an off-reservation case, and the Court held that State strictures on Indian net fishing could be justified only upon conservation grounds.

On remand for the first time we learned that the Game Department read conservation as permitting a total prohibition against an Indian net fishery if you called it a conservation ban. Now, that position eventually resulted in the case coming back here. This Court held in Puyallup II that allocating all of the harvestable steelheads in the watershed to the sportsmen could not be reconciled with the treaty language of Article III. Again the case was viewed solely as an off-reservation case.

Now, before this case went to trial for the third time, in June of 1974, two Federal decisions were handed down in cases initiated by the United States involving fishing rights of the Puyallup Tribe and other tribes in the area.

Both of these cases were filed early in the 1970s, the first in 1970, the second in 1971.

Now, the first of these cases, United States v. Washington, involved virtually all aspects of treaty fishing rights of the tribe in the western Washington region -- conservation, allocation, tribal self-regulation, and so on. That decision, affirmed by the Ninth Circuit, certiorari denied here, is now being implemented with the assistance of millions of dollars of congressional appropriations.

Now, phase II of that litigation, scheduled for trial next year, involves claims by the tribes, backed again by the United States, of treaty entitlement to hatchery fish. This is basically now the litigation, involves all tribes, all species, all of the watersheds in the case area, and also claims with regard to environmental damage.

The second Federal case preceding trial here, also denominated United States v. Washington, is the so-called Puyallup Reservation case. Now, that case was initiated by the United States in 1971 directly in response to footnote 1 of this Court's decision in Puyallup I where the Court left open the question of whether the reservation had been terminated or extinguished. That case was litigated on a complaint seeking a declaration that the tribe had exclusive right to regulate the fishery within the reservation. It was litigated on a 60-page pretrial order containing a stipulation of facts

detailing the entire history of the reservation. That litigation resulted in a holding by the United States Court of Appeals for the Ninth Circuit, again with certiorari denied here, that the reservation continues to exist and that the tribe has a right to fish free from State interference on the river within that reservation.

Now, with this background, we went to trial for a third time, and we submit that three propositions emerge as decisive of the single question presented in the petition here.

Proposition 1. The Puyallup Reservation continues to exist. This proposition, litigated in the Ninth Circuit only a month before trial in this case, was conceded by counsel for the State throughout the trial, found as fact by the trial court, accepted as fact by the State Supreme Court.

Proposition 2. We are dealing with an on-reservation fishery. The facts, again as found by the trial court, recognized and accepted by the State Supreme Court, is that substantially all of the tribe's future steelhead fishery will occur within the boundaries of the reservation. Both of those propositions established by the findings below.

Then we reach Proposition 3, which is decisive here. That proposition is found in Article II of the treaty. Article II reserves for the exclusive use of the tribe the reservation properties there depicted, including, of course, the river, which is directly within the boundaries of the reservation.

We submit that Article II must be read as reserving to the tribe exclusive power and control to regulate its own members on reservation fisheries.

QUESTION: I had thought your question presented under writ of certiorari was that the State courts simply lacked jurisdiction to hail the tribal court before it. I get the impression from hearing your last proposition that you are talking more about the merits. Am I wrong?

MR. RODGERS: No, your Honor. Both propositions are presented here, and we present them both in a jurisdictional sense and in a sense with regard to the merits. We do believe that the argument that I am submitting here, namely, a preemption argument is basically a jurisdictional argument. That is, we feel that Article II of the treaty preempts from State authorities any and all power to adjudicate and to regulate that on-reservation fishery. So we read that as being jurisdictional in that sense.

QUESTION: And would that extend to individual Indians as well as the tribe, if it depends on Article II of the treaty, that preemption?

MR. RODGERS: Your Honor, that would be the case except there are qualifications with regard to individual Indians, namely, other provisions of Federal law, perhaps the Indian Civil Rights Act. But basically we think that that preemptive argument would apply to the individuals as well.

We have here, of course, the second issue of sovereign immunity, which depends in part upon that characterization.

Now, ultimately --

QUESTION: You said proposition 1 is the reservation still exists and has not been terminated. And that, you say, was accepted by the Supreme Court of the State of Washington in this case?

MR. RODGERS: That's correct, your Honor.

QUESTION: Could you tell me offhand where in its opinion that factual proposition is accepted?

MR. RODGERS: I cannot, your Honor, except that in the course of the opinion the findings below were accepted, namely, that the Ninth Circuit reservation decision recognized by the State throughout as being dispositive on the status of the reservation was accepted by the State Supreme Court.

QUESTION: Because in the first Puyallup case the Supreme Court of Washington indicated that the reservation had been terminated and that was not decided by this Court in the first Puyallup case.

MR. RODGERS: That's correct. It would be our position that that question earlier addressed in the course of this litigation has been waived both by the State by accepting the Ninth Circuit and the --

QUESTION: We don't have the Ninth Circuit here. This comes from the State of Washington.

MR. RODGERS: That's right, but --

QUESTION: The Ninth Circuit decision was in a different case, wasn't it?

MR. RODGERS: That's right, your Honor. Basically we feel -- your question may be whether it's a matter of law of the case that the reservation does not exist.

QUESTION: In this litigation, that is, as it began a good many years ago, in the first Puyallup decision by the Supreme Court of Washington the court held -- you correct me if I am mistaken -- that the reservation had been terminated.

MR. RODGERS: That's correct, your Honor.

QUESTION: And that holding was not disturbed by this Court.

MR. RODGERS: Well, this Court --

QUESTION: We said that what we are dealing with was individual Indians fishing off reservation.

MR. RODGERS: This Court, however, did indicate that the question of the reservation question was not being resolved.

QUESTION: Exactly.

MR. RODGERS: This Court also indicated the same proposition in the Satiacum case five years later, recognizing the unresolved nature of that proposition. Then the Federal court litigation ensued.

QUESTION: In a different case.

MR. RODGERS: Yes, your Honor, but we believe the

acceptance of that litigation by State authority --

QUESTION: That's rather important. You said proposition 1 was that the reservation hasn't been terminated and moreover that that has been accepted in this case by the Supreme Court of Washington. I am interested to know where it accepted it. On the other hand, I don't want to tie you up.

MR. RODGERS: Yes, your Honor.

Well, in my rebuttal time I will address that.

QUESTION: We are talking about suburban Tacoma, aren't we?

MR. RODGERS: The reservation boundary does reach suburban Tacoma.

QUESTION: In fact, inside the city limits.

MR. RODGERS: That's correct. That's correct. Of course, there remains in the reservation lands in trust status, and we believe that that characterization would apply as well to the riverbed in the case.

QUESTION: You didn't present any question of res judicata in your petition for certiorari, did you?

MR. RODGERS: Your Honor, we believe that the question of res judicata is fairly within the petition for certiorari.

QUESTION: How do you explain that? Look at your question presented on page 2 of your petition where you say, "Whether, consistently with established principles of tribal

immunity, a state court may adjudicate on-reservation treaty fishing rights of an Indian tribe and allocate the catch among tribal and nontribal fishermen."

MR. RODGERS: We believe that that ought to be read as fairly embracing the issue that would be dispositive. And, of course, in our petition --

QUESTION: What do you mean by that, that it ought to be fairly read as embracing the issues that ought to be dispositive. Dispositive of what?

MR. RODGERS: Your Honor, the res judicata issue, we believe, because it does establish the reservation, should be recognized as binding and controlling in this case. And in fact in our petition we did address and indeed argue res judicata in the body of the petition.

QUESTION: Is your cohort or colleague going to argue the res judicata point or are you prepared to deal with it?

MR. RODGERS: I am prepared to deal with that.

QUESTION: Res judicata in this case would just be a matter of the laws of the State of Washington, wouldn't it?

MR. RODGERS: No, your Honor; we believe it would be a Federal question.

QUESTION: Why?

MR. RODGERS: Because the res judicata effect to be accorded that Federal judgment, although not directly covered by the full faith and credit statute, we would present the

Federal question under principles of basically the Supremacy Clause.

QUESTION: Do you care to articulate that, because you certainly don't spell it out in your brief at all. You are not relying on 2817-38, are you?

MR. RODGERS: No, your Honor. That does not address that proposition. That is correct, we do not spell it out in the brief, but we believe that the issue is a Federal issue.

QUESTION: What is your authority for that?

MR. RODGERS: As we cite in our reply brief, your Honor -- well, we do not have case authority for that posture.

QUESTION: Your argument is, though, that the State of Washington was constitutionally bound by the decision of the Federal court --

MR. RODGERS: That's correct.

QUESTION: -- on an issue --

MR. RODGERS: On two issues.

QUESTION: -- under the Supremacy Clause.

MR. RODGERS: That's correct. On two issues; we believe the reservation status, and that we believe was accepted by the courts below. The second issue, the question of the power to regulate on reservation, we believe is also a preclusive.

QUESTION: But you have no cases. You have no support for that proposition.

MR. RODGERS: We cite res judicata cases including, in fact, --

QUESTION: Yes, but you are not citing anything which says that a State is constitutionally bound.

MR. RODGERS: That is correct -- no, we do cite a case book in which that question is addressed. It is a very interesting question because the full faith and credit statute doesn't address it directly.

QUESTION: You would have thought if Congress intended to have that provision, the full faith and credit statute would have addressed it directly, wouldn't you?

MR. RODGERS: Not necessarily, your Honor, for the reason that we believe that it could well be argued that the preclusive effect to be accorded Federal judgments in light of the Supremacy Clause ought well to be governed by Federal law.

QUESTION: Would this Court be bound by that res judicata holding?

MR. RODGERS: Ah --

QUESTION: I mean, on the question of the reservation, are we bound even if --

MR. RODGERS: Your Honor, I would think that this Court clearly, if it desired, could go on to decide the reservation question. I submit that would be unacceptable here for a number of reasons. First, the first time in this

litigation the status of the reservation has been raised has been in the State's brief here Basically because they have conceded, we have not addressed the existence of the reservation, we have not addressed the host of material that is relevant to that disposition.

Secondly, if indeed, let us say, the Court were inclined to remand for a decision --

QUESTION: For the fourth time?

MR. RODGERS: That would be my next point. If the Court were inclined to remand, what we would do again is to plead res judicata, the Federal judgment, and you would then have the entire record of the Ninth Circuit case back here a fourth time and the issue --

QUESTION: That would be if we took it.

MR. RODGERS: That's correct.

(Laughter.)

MR. RODGERS: More importantly, however, we think this is a decisive proposition.

QUESTION: I would think if res judicata is what we are talking about, it would be the holding of the Washington Supreme Court that the reservation had been terminated that would be res judicata in this case involving the same parties and the same litigation.

MR. RODGERS: Well, I think not, your Honor, because we submit that is not the law of the case and it was recognized

as not the law of the case by both the State in the course of litigation and by the court --

QUESTION: You are going to tell us after lunch where and how the Washington Supreme Court has not accepted the proposition that the reservation has been terminated.

MR. RODGERS: That is correct, your Honor.

Let me say also that the decision on -- there is no version of this reservation, however narrowly diminished, that would change the result of this case. For that reason, basically the --

QUESTION: Unless the reservation has been terminated.

MR. RODGERS: That is the only version that could change the result of this case, and we say that because the river, part of the original reservation, we believe to be trust land and therefore the fishing is occurring on trust land within that river, and therefore -- and if the reservation hypothetically were diminished to the point that all that remained were the tribe's agency tract, then even on that supposition, we submit there is total authority to regulate the tribal fishery.

Now, I say total authority. The issue here is whether the State has that power. That issue, we submit, has been conceded by the State in litigation for 30 years. There is no question here about the Federal supervision that might be imposed upon the tribe's regulation of this fishery. Indeed,

the Congress obviously could have a role to play here. We concede that under some circumstances the Federal district court might exercise jurisdiction over on-reservation fisheries. The same may be true of the Secretary of the Interior.

The question is whether the State can exercise its power and authority with regard to an on-reservation fishery.

QUESTION: Could I ask you if it weren't for your res judicata argument, would there be any other reason, would there be any barrier to the State's raising the issue of the existence of the reservation in this case?

MR. RODGERS: Simply for the reason, your Honor, that --

QUESTION: It would support the judgment.

MR. RODGERS: That is correct. A termination decision here would support the judgment below, that's correct. The reason we say, of course, that it should not and could not be resolved here is that the record is not --

QUESTION: It isn't an issue that was raised in the State court in this litigation, was it?

MR. RODGERS: No. No, sir.

QUESTION: And the State court has not addressed the question in this decision, has it?

MR. RODGERS: Yes, the State court has addressed it. There were findings of fact by the trial court that the reservation continues to exist, that seven miles of the stretch of the

river is within that reservation. Those findings, incidentally --

QUESTION: Were those findings reviewed in the appellate court?

MR. RODGERS: They were reviewed, but that particular finding, your Honor, with regard to the extent of the reservation is accepted by implication, but I think necessarily by the four-judge concurring opinion which concludes that this fishery, substantially all of it, occurs within the boundaries of the reservation. Now, that is accepted by the four judges --

QUESTION: Then except for the res judicata point, you would say the State is entitled to argue the reservation question.

MR. RODGERS: No. Well, I would say they are not entitled for the reason that they have never raised it before, they have never given me an opportunity to respond to any evidence that they might present, they have never led me to believe that the 60-page stipulation of facts which is in the Federal court record is to be contradicted and reconsidered here. I would think that if that reservation issue were to come up, the necessary disposition would be a remand, and as I have indicated to an earlier question from the Court, it is perfectly satisfactory and easy, we believe, to recognize that with the sole exception of a termination decision, which we don't think would conceivably be justified, the remand would result in the same conclusion.

QUESTION: Mr. Rodgers, if you are right as to the jurisdiction of the State, where I take it it was without jurisdiction when the action was originally filed in '63?

MR. RODGERS: No, your Honor.

QUESTION: When did it lose jurisdiction?

MR. RODGERS: The initial action, although I am shifting grounds slightly, the initial action was based upon the supposition that we were dealing with off-reservation fisheries and that we were suing individual tribes. I would submit when it became clear that we were dealing with an on-reservation fishery--that is basically the status of the litigation in Puyallup III -- when it became clear we were dealing with an on-reservation fishery,first, and secondly, when it became clear that we were not talking about a lawsuit against individuals but rather a suit against the tribe, on two grounds, the Article II ground and on the sovereign immunity ground, the State courts are without jurisdiction.

QUESTION: Was the tribe just brought in after remand from this Court in Puyallup II?

MR. RODGERS: The tribe has always been in, your Honor, but the court orders do not go in the earlier litigation to the tribe in any particular. The judgment and the order in this case basically controls all aspects of tribal fishing. And I use that "all aspects" advisedly. The orders go to the tribe. They involve reporting, allocation, closures, essentially

all there is to do with regard to fishing. And that is the significant difference between a case involving individuals and a case involving the tribe and the sovereign status of the tribe, which, of course, is what is behind the sovereign immunity doctrine.

QUESTION: What does the 60-page stipulation have to say about the status of the reservation?

MR. RODGERS: The 60-page stipulation goes into considerable detail on the entire history of the reservation.

Do you wish me, your Honor, to address --

QUESTION: What does it conclude? What is the effect of the stipulation on the present --

MR. RODGERS: Well, it indicates that a reservation status decision, indeed as all of the reservation status cases of this Court have indicated, require a close look at the history of the reservation. It requires a close look at all the legislation, the legislative history, department practices, and so on. One of the facts in that stipulation is the fact that ever since the Reorganization Act in 1936, both the Department of the Interior and the Department of Justice have considered the Puyallup Reservation to be extant. And we submit, more importantly --

Well, let me turn --

QUESTION: Does the stipulation show how many people own the fishery?

MR. RODGERS: No, it does not, your Honor. The record of this case indicates the numbers of tribal fishermen and the extent of support.

QUESTION: About eight or nine, wasn't it?

MR. RODGERS: No, your Honor.

QUESTION: In Puyallup II how many was it?

MR. RODGERS: In Puyallup, I do not recall that there were numbers of fishermen addressed there. The record in this case indicates that there were 60 fishermen. Their fishing activities support up to 150 members of the tribe, which is a substantial percentage of the tribal membership.

QUESTION: There are 20 full time, aren't there?

MR. RODGERS: Twenty full time, 20 part time, 20 occasionally.

MR. CHIEF JUSTICE BURGER: We will resume after lunch.

[Whereupon, at 12 noon, a recess was taken until 1 p.m. the same day.]

AFTERNOON SESSION

(1:02 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Farr.

ORAL ARGUMENT OF H. BARTOW FARR ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. FARR: Thank you, Mr. Chief Justice, and may it please the Court: The United States is appearing this afternoon in support of the position of the Puyallup Tribe in this case. That position is that the Puyallup Tribe and their tribal members have the right to fish for steelhead trout within the confines of their reservation free from State interference. Now, this position self-evidently embraces two necessary propositions. First, that there is a reservation, and, secondly, that the State may not exercise its power over Indian fishing activities within it.

QUESTION: And third, that the fishing in this case goes on on the reservation, if any.

MR. FARR: That the fishing that we are arguing --

QUESTION: The premise of Puyallup I was that these were individual Indians fishing off the reservation.

MR. FARR: That is correct. And the arguments that I am discussing this morning do not deal with whatever Indian fishing may occur off the reservation. I am simply talking about fishing that occurs on the reservation.

I would like in view of the discussion this morning

to move directly to the question of whether the existence of the reservation is properly an issue before the Court in this case. The State has argued at length in its brief on the merits that there is no Puyallup Reservation.

At the outset we note that the State did not argue this point at all in Puyallup III. In fact, as the appendix clearly shows, the State --

QUESTION: You mean in the State Supreme Court?

MR. FARR: They did not argue it either before the State Superior Court or in the State Supreme Court.

QUESTION: In this case.

MR. FARR: In this case, Puyallup III.

The appendix on page 20 and 21 in fact indicates that counsel for the State, for the Department of Game, said that unless this Court overturned the decision by the Ninth Circuit in the reservation case holding that there was a reservation, that it would accept that decision.

The Washington Superior Court, in Puyallup III, on page C-39 of the appendix to the petition for certiorari, noted that this Court had denied certiorari in the Ninth Circuit case and stated that it would accept the decision of the Ninth Circuit that there was a continuing Puyallup Reservation.

Now, the Washington Supreme Court was a little bit less specific, but on page B-6, B-7 of the appendix to the

petition for certiorari, the Washington Supreme Court stated, "It has also been contended that the recently established, continuing existence of the Puyallup Indian Reservation --

QUESTION: Where is that?

MR. FARR: I am sorry, Mr. Justice Brennan. It's page B-6 of the first sort of aqua-colored volume, down at the bottom of the page. This is the Washington Supreme Court again. It says, "It has also been contended that the recently established, continuing existence of the Puyallup Indian Reservation" -- with a citation to the Ninth Circuit case and this Court's denial of certiorari -- "precludes any state jurisdiction over activities occurring within the reservation boundaries."

Now, the Court does not then go on to comment on the continued existence of the reservation, but then discusses the right to control fishing on the reservation.

QUESTION: Well, except the citation of Mattz v. Arnett necessarily goes to the question of whether or not the reservation continues.

MR. FARR: I disagree, Mr. Justice Stewart. In this context--Mattz v. Arnett, of course, was a question of termination of reservation boundaries, but they are talking about Mattz v. Arnett in this context not on that issue, but on the fact that the Court remanded, leaving open in their minds the question of whether even though the reservation did still exist in that case, whether the State had some regulatory authority

within it.

QUESTION: I see. That is the page citation?

MR. FARR: Yes.

QUESTION: Mr. Farr, is it correct, though, that the issue of the status of the reservation was raised in an earlier stage of this proceeding?

MR. FARR: It was an issue in Puyallup I.

QUESTION: And it has never been decided in this case.

MR. FARR: By this Court it has not.

QUESTION: Or by any other court in this case.

MR. FARR: In this case, it has not.

QUESTION: So then is it not an open question?

MR. FARR: We believe that it is an open question, but we also believe it is not a question properly before the Court in this case.

Mr. Justice White mentioned in the morning's argument the principle, which of course we recognize, that a respondent can urge in support of a judgment below any ground that supports it even though not relied on by the court below.

QUESTION: What if it had never been raised in the State court or never decided by any court, then is the respondent free to raise that question?

MR. FARR: Our understanding of the rule, Mr. Justice White, is that it is an issue that must have been in the record

of the case below. And in fact, this Court --

QUESTION: And that is not true here.

MR. FARR: We do not believe it's in the record in Puyallup III. The only thing that is in the record in --

QUESTION: Puyallup III is just another stage of the same litigation.

MR. FARR: Well, within reason, I suppose, that's true.

QUESTION: Would the rule necessarily be the same in a case coming here from the State court as in a case coming from the Federal court as to whether something must be in the record? Might not Washington proceed to have a different rule than Federal procedure in that respect?

MR. FARR: I had understood that the court's rule in this case was actually its own rule, regardless of whether Washington permitted it to be --

QUESTION: In order to review an issue doesn't it have to have been decided, or must it not have been at least raised at some point in the State proceeding?

MR. FARR: Our position is that it has to be appearing in the record. That is the language from Langles in 289, it has to be a matter of appearing in the record --

QUESTION: If it is, even if it wasn't decided below, the respondent may --

MR. FARR: The court may ignore it. For instance,

the State of Washington could have argued in this case that there was no reservation and the State courts could have ignored it, and we would believe in that case the issue would be properly in front of this Court. Or the State courts could have said, "We disagree."

QUESTION: The trouble, Mr. Farr, is if we decide the single limited question that is put forward in the petitioners' petition for certiorari, i.e., does the State have power to regulate on the reservation fishing by Indians who are members of the tribe or reservation --

MR. FARR: That's correct.

QUESTION: -- that would be nothing more than -- however we decide it would be nothing more than an advisory opinion if there is no reservation. Isn't that correct?

MR. FARR: Well, if there is no reservation in this particular case, that is possibly correct. However, there is --

QUESTION: That is an advisory opinion. If there is no reservation, then however we decide that question is an advisory opinion.

MR. FARR: There is a separate question as to whether in fact the riverbed is trust land over which the State has no jurisdiction.

QUESTION: That is a separate, different question.

MR. FARR: Well, it's a different question in some respects, but the same principles of jurisdiction would

probably apply. So it would not necessarily mean if the Court concluded there were no reservation that the State would have jurisdiction to regulate in this case.

QUESTION: Is there anything in this record which would show me where the reservation is?

MR. FARR: To show you where the reservation is? My understanding is that there is not a map in this record.

QUESTION: It would look like a map of the city of Tacoma or part of it, wouldn't it?

MR. FARR: Well, part of the reservation is within the city of Tacoma. And I might just digress for a second to point out --

QUESTION: Don't you have to know where the reservation is in order to find out where the river is?

MR. FARR: Well, the river runs through the reservation.

QUESTION: Where? What part of the river is through the reservation?

MR. FARR: I don't know precisely, but there is a finding of the State Superior Court that a 7-mile stretch of the river is within the reservation.

QUESTION: Are we being asked to pass on a certain point in the river?

MR. FARR: You are being asked to pass on a 7-mile stretch of the river which is within the reservation according to the findings of fact of the trial court.

QUESTION: Which we don't know where it is.

MR. FARR: Other than that, I don't know where it is, that's right. But I do believe that it is fairly embraced within the reservation boundary.

Now, there was also considerable discussion this morning about the res judicata question, and I would like to address that just for a moment. This is a confusing case procedurally because we have litigation in the State courts and litigation proceeding at the same time in Federal courts, and the judgments between the two courts are not necessarily consistent. In fact, they have tended to be inconsistent on most issues.

Our position is that the judgment issued by Judge Boldt, which did not concern the existence of the reservation but simply discussed the right of the State to regulate on-reservation and which concluded that the State did not have regulation, as in fact the State conceded and has conceded throughout the litigation in this case, and in fact conceded before this Court numerous times in the oral argument in Puyallup II. We believe that Judge Boldt's decision is binding as a matter of res judicata or collateral estoppel on the State courts.

QUESTION: Is your position for that the direct authority of the same case book that yourcolleague referred to this morning?

MR. FARR: Our authority for that is that that was litigation between the same parties. We are not relying on the Supremacy Clause.

QUESTION: But res judicata -- unless you are talking about the Full Faith and Credit Clause or about 28 U.S.C. 1730, res judicata is a matter of State law. It's up to the State of Washington to decide how much credence or faith it wants to give to the decisions of courts --

MR. FARR: We think the Full Faith and Credit Clause does implement the res judicata.

QUESTION: But it says nothing about Federal courts.

MR. FARR: That is true. I think that it does extend more broadly than that, but if it doesn't, then I do agree that the question of res judicata is a matter of State law. I do not think that is a matter of overriding --

QUESTION: That is something we wouldn't review here if the Supreme Court of Washington decided it one way or the other. It's a question of State law.

MR. FARR: The State did not address the res judicata question. I would think that would be correct.

QUESTION: Could the Federal court enjoin the State officers from acting inconsistently with Judge Boldt's decision?

MR. FARR: State officers that were parties to Judge Boldt's case, I believe it could.

QUESTION: Including enjoining them from further

litigation in a State court?

MR. FARR: I don't know. I would think not, because I don't think there is anything in the judgment that would prevent further litigation of this matter in the State courts. I think that the order enforcing the judgment, any injunction enforcing the judgment would not necessarily reach to adjudication of different rights. So I don't think that would be the type of order that they would issue.

QUESTION: Aren't the State authorities asserting rights contrary to what Judge Boldt said they had?

MR. FARR: They are asserting them in this litigation. My understanding is they are not in disobeyance of Judge Boldt's decision, or if they are, that that is being worked out in the Federal court.

QUESTION: Could he enjoin them from further litigation about these rights?

MR. FARR: I don't know.

QUESTION: Do you know of any cases in which the Federal court has enjoined the State from proceeding with litigation?

MR. FARR: I don't know of any, Mr. Chief Justice, no.

I would like very briefly to discuss a point which exists independently in this case regardless of our res judicata or collateral estoppel argument, and that is simply the question of State power to regulate on-reservation fishing. We do

believe that the State courts and the Department of Game in this case found that power principally in the remand from this Court in Puyallup II, which we think had nothing to do with it. Puyallup II, as this Court has recognized, was an off-reservation fishing case, and we see nothing in the remand which required the State to take regulatory authority on reservation, or in fact authorized them to do so if they wouldn't otherwise have jurisdiction.

I should recede very slightly from a point made in our brief. On page 27 we indicated the State of Washington did not exercise general civil and criminal jurisdiction over the Puyallup reservation. That statement is not completely accurate, because it is too broad. They have exercised in a 1963 statute, general civil and criminal jurisdiction over Indian reservations within the State, with an exception for Indian trust lands and allotments, and also with a specific exclusion for matters affecting Indian treaty rights.

Now, the State suggests in its brief, at page 47 now, that somehow this may give them power. But I think they would be forced to concede that it's a power they have never before claimed under that Act and is a completely --

QUESTION: Is this jurisdiction under Public Law 280?

MR. FARR: Yes, this is Public Law 280 we are talking about. Not over this matter, clearly not over this matter, in our opinion. But the City of Tacoma is not being run by the

Indians. I can be run by the State of Washington under the jurisdiction of the 1963 Act implementing Public Law 280.

QUESTION: So your footnote 9 on page 27 is inaccurate.

MR. FARR: It is too broad.

QUESTION: Inaccurate in that sense.

MR. FARR: Inaccurate in that sense, that's right.

We see no other independent basis of jurisdiction for the State to exercise over on-reservation activities. We believe that the treaty of 1854, the Treaty of Medicine Creek, quite clearly gives the Indians exclusive rights to fish within their Indian reservation, and we don't believe that has ever been challenged before by the State, and we do not believe that the State's challenges to it now are based on any solid authority. We think that the fishing rights are naturally of great importance to the Indians. They are now as they were then. And we do not believe that they can be limited by the State simply because the State wants additional fish for its sports fishermen. We ask the Court to so rule.

Thank you very much.

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

Mr. Willner.

ORAL ARGUMENT OF DON S. WILLNER ON BEHALF OF THE RESPONDENTS

MR. WILLNER: Mr. Chief Justice, and may it please the Court: In this argument I will take 20 minutes, Attorney

General Gorton, of the State of Washington, will take 25 minutes. We have attempted to make an allocation among us by subject matter to the extent we can. I am going to be talking about conservation, about the exclusion of hatchery fish, about the res judicata concerns. Mr. Gorton will be talking about sovereign immunity, the reservation which has been considered in many of the questions here, and also the problem of allocation.

Both of us will be essentially saying to the Court that what the Supreme Court of Washington did was very faithfully carry out the mandate of this Court that this Court in Puyallup II sent this case back to the Supreme Court of Washington and through them to the trial court to do three things:

First of all, to determine whether hatchery fish, which are paid for by sports fishermen, are excluded from the treaty and from the treaty fishery.

Secondly, to determine a plan for implementation and a plan for regulation.

And third of all, to determine a fair allocation of the fish between the sports fishermen and the treaty Indians which in your words in Puyallup II accommodated the rights of the Indians with the rights of the other people. And it is our position that is exactly what the Supreme Court of Washington did through an extensive trial, through a decision of that court, and we are here seeking affirmance.

Now, I should briefly state who I represent before I --

QUESTION: Before you proceed, it seems to me that the question presented by the petition for certiorari in this case is a question that exists quite apart from the existence of any treaty or the meaning of any treaty. It simply has to do with whether or not the State of Washington or any State may adjudicate on-reservation fishing rights of an Indian tribe. Isn't that right?

MR. WILLNER: Your Honor, it's our position that if You look at that question, that everything we want to discuss with this Court flows from that single sentence. That sentence talks about tribal immunity. We propose to talk about that. That deals with the question of whether the State was regulating the rights of individuals. It talks about on-reservation treaty fishing rights. And, of course, it is our contention that the hatchery fish were excluded from the treaty, that they are entitled to --

QUESTION: Go through the reservation --

MR. WILLNER: Even if there is a reservation.

QUESTION: -- unimpeded.

MR. WILLNER: They are entitled to get through unimpeded just if they were domestic cattle straying on the land of the Puyallups. It talks about Indian tribe, and it talks about who this action is against. It talks about

allocation. That again deals in matters we want to talk about.

So essentially what I am saying in response to your Honor's question is in our effort to defend the decision of the Supreme Court of Washington, everything we want to talk about is raised in this single sentence, and also -- now, I respectfully suggest to the Court that we would very much like to get these matters decided. These are the issues that the Supreme Court decided. These are the issues that have been the subject of an incredible amount of litigation in the State of Washington. They are fairly here. They are here on the record. They are raised in the questions presented. And --

QUESTION: Aren't they also at issue before Judge Boldt?

MR. WILLNER: Your Honor, they are at issue before Judge Boldt in what I respectfully suggest is a very strange way. This case started in 1963. It has been up here twice. These question have been in this case.

QUESTION: I am very much aware of that.

MR. WILLNER: Yes. Thereafter, Judge Boldt, in a case in which my clients are not parties -- incidentally we sought intervention and were denied. After the remand of this case in Puyallup II, Judge Boldt has gone into some but not all of these questions. When I say some but not all, Judge Boldt in that decision in February 1974 said that he would initially defer to the State court on this question of exclusion of

hatchery fish, because of the mandate of this Court. And then after the decision of the State Supreme Court in our favor, Federal Judge Boldt in a case in which we were not a party, issued an injunction against the State of Washington enjoining them during the pendency of his case from distinguishing hatchery fish and said that he would not give res judicata effect to the decision of the Supreme Court of the State of Washington on the very issue before some of the same parties.

QUESTION: The United States brought the action before Judge Boldt and the United States wasn't a party in the Supreme Court of Washington, was it?

MR. WILLNER: No, your Honor. The United States defended the Puyallup Tribe throughout the later part of this litigation. If we get into technical res judicata areas, we contend had the laboring oar. But no, they were not parties. The United States represented the Puyallup Tribe in this case in the trial court, through the United States Attorney, but, no, they were not parties.

I think, your Honor, just a couple of things I do want to say preliminarily.

QUESTION: I wonder if you would say --

MR. WILLNER: I beg your pardon?

QUESTION: I started to say whom are you representing?

MR. WILLNER: I am here, your Honors, for the sports fishermen of Washington. I represent the largest sports fishing

group in the State. There are 150,000 sports fishermen in the State of Washington. Their interest in this case is primarily in the areas I am going to discuss, which are conservation of the fishing resources and the exclusion of the hatchery fish from the treaty fishery.

Now, I think the Court -- we are long way from the rivers of the State of Washington and from anadromous fishery. I think the Court understands from the previous cases that basically steelhead are anadromous fish, that many of them are propagated in hatcheries, artifically propagated in hatcheries, something that was unknown at the time of the treaty of 1855, that on this river -- and this is something that has been developed in this record, which you sent us back to determine -- on this river, on the Puyallup River, almost the entire cost of the hatchery operation is paid for out of dedicated funds of the Department of Game, earmarked or dedicated funds, and the finding is virtually entirely all of those funds for the steelhead operation came from the sports fishermen. The sports fishermen not only paid for these hatchery fish with their license fees and tags, the record also shows we have gone out and done voluntary work, we have planted fish, we have enhanced the run, we have worked on the habitat. We have done many things. It's our basic contention, and the reason why my clients have sent me on the plane to come back to Washington, D. C., is to essentially respectfully say to this Court that we

really have an equitable interest in these hatchery fish along the lines of the concurring opinion by this Court in this case in Puyallup II, which has now been amply demonstrated by the record that has been made through a 10-day trial, and this was one of the bases of the Supreme Court of Washington's decision. It had several bases. It said first of all that the hatchery fish equitably belonged to those who paid for them with earmarked funds.

Secondly, it interpreted the treaty, and it said that in 1855 no one could have contemplated a hatchery fish operation, that it could not have been intended. And then it looked at a particular part of that treaty where the treaty talks about the exclusion from the treaty fishery of shellfish that are State or cultivated by citizens, and the Supreme Court of Washington said this is a very good indication that if anybody had known about hatchery fish, they would have excluded them because they excluded another form of marine life in which there was the effort and industry of citizens put into developing the resource.

So the first point that I really want to make to this Court is that the concurring opinion of this Court in Puyallup II which three members of the Court put in your opinion and the majority did not disagree with. The majority said this may be the issue that will be a basis for the remand.

We went back and tried that issue. We proved to the

satisfaction of the trail court, to the satisfaction of the Supreme Court of Washington that hatchery fish are identifiable. We proved also -- and this is something that my colleague tells me was not made as clear as it could be in the brief, and that is the only fish that we claim are hatchery fish are the first generation, those that are propagated in the hatchery, because they can be identified by dorsal fin damage; that all the progeny of the hatchery fish are counted as natural run and we are happy to have them counted as natural run. So no matter what you do, there is a subsidy that the sports fishermen are doing to help the treaty Indian fishery.

But in terms of the first generation hatchery fish, which are put in that river due to our money and our industry and our effort, our first point respectfully is that the Supreme Court of Washington should be affirmed when it says that those fish are excluded from the treaty fishery. And if they are excluded from the treaty fishery, whether or not there is a reservation, we should not be prevented from having them. And I gave the example earlier and I will say it again, it's as if they were domestic cattle wandering onto a reservation. They are entitled to get through the reservation to the sports fishermen who paid for them.

QUESTION: Factually, these hatchery fish are born in hatcheries. When are they put into the stream, into the river?

MR. WILLNER: They are technically put in the stream,

your Honor, after one year of life.

QUESTION: As parr or smolt?

MR. WILLNER: They are put in as smolt.

QUESTION: Smolt. And then they spend how long in the freshwater before they go out to sea?

MR. WILLNER: Very slight period of time. The findings say that almost instantly --

QUESTION: They are ready to go.

MR. WILLNER: -- they go down to --

QUESTION: They are ready to move downstream.

MR. WILLNER: Yes. And this is very important, because they don't compete for a food supply with natural run. They are out of there.

QUESTION: So they are smolt when they are put in and they are ready to take off.

MR. WILLNER: They are ready to take off.

QUESTION: And they are out in the Pacific for how long?

MR. WILLNER: Three or four years. Two or three years.

QUESTION: None come in as the equivalent of grilse, yearlings?

MR. WILLNER: I would say a steelhead's life is four or five years. A hatchery fish is put in as a smolt after one year. A natural fish is ready to go to sea after two

years. The hatchery fish are better fed. They are out in the ocean two or three years and then they come back.

QUESTION: They don't come back as yearlings ever.

MR. WILLNER: No, No.

QUESTION: Where do they come back to, the hatchery fish?

MR. WILLNER: The hatchery fish come back to the place where they were planted, interestingly enough. Their instinct is the first place they were put into that river, that's where they come back to.

QUESTION: So your hatchery is above the reservation.

MR. WILLNER: In this particular situation, your Honor, no. The hatchery was on Chambers Creek, which is not even on the Puyallup River.

QUESTION: Where were they planted -- upstream on the Puyallup?

MR. WILLNER: Upstream on the Puyallup.

QUESTION: Upstream from the reservation.

MR. WILLNER: Oh, yes. As a matter of fact, they are in the reservation maybe, nobody knows exactly, a week or 10 days going to the ocean --

QUESTION: Are they fishing for them then? No.

MR. WILLNER: No, not going down. And on the way back they are in the reservation, if there is a reservation, a very short period of time.

QUESTION: On their way upstream.

MR. WILLNER: On their way upstream.

QUESTION: And that's about a 7-mile stretch, is it?

MR. WILLNER: If there is a reservation.

QUESTION: But it's long enough to do a lot of fishing.

MR. WILLNER: Yes, it is, your Honor.

QUESTION: I suppose your opponents would contend that the State court isn't free to interpret the treaty. Even though you may be absolutely right as to your interpretation of the treaty, that the State court lacks jurisdiction to decide one way or the other whether hatchery fish are excluded.

MR. WILLNER: Well, if your Honor please, the basic answer to that question is, the reason why the State Supreme Court has jurisdiction, is this Court told us to answer those questions.

QUESTION: On remand in Puyallup II.

MR. WILLNER: Yes. In Puyallup II you said answer these questions. The State Supreme Court did, and we won. And basically what they want, is they want to try it again somewhere else.

QUESTION: Why is this matter of hatchery fish before the Court at all in view of the question presented on the petition for writ of certiorari?

MR. WILLNER: Well, if your Honor please, the reason why we think it's put in is because if we are defining their treaty fishing right, we say that their treaty fishing right excludes the hatchery fish, and they have asked this Court to define their treaty fishing right. Even if you are defining their on-reservation treaty fishing --

QUESTION: No. They have asked this Court to hold the State has now power.

MR. WILLNER: Will, they are asking this Court to say the State has now power because it's an on-reservation fishery.

QUESTION: Right.

MR. WILLNER: Incidentally, not all of these fish are on the reservation, caught on the reservation.

But going on --

QUESTION: Maybe none of them are because maybe there is not a reservation.

MR. WILLNER: We agree. We agree. But essentially what I am saying is if they say that what we are only concerned here with is what they can do on their reservation, we say that within that question is the question of whether we are entitled to hatchery fish which should be allowed to go through the reservation and that they are not included in their fishery even if it is a reservation because we paid for them and we think that fairly --

QUESTION: You are not talking about specific fish surely. You must be talking about a fair allocation.

MR. WILLNER: Your Honor, one of my clients claims that he can tell the difference between a natural fish and a hatchery fish by the fight on the line. Most of them won't go that far. But what's in this record is that the hatchery fish can be identified after they are caught, and they can be allocated by numbers because, after all, what the treaty Indians are concerned with -- it's a commercial fishery that they are concerned with, and you can make a fair allocation by numbers.

QUESTION: Exactly. So that's what you are really talking about.

MR. WILLNER: Yes, your Honor.

QUESTION: I had one question, Mr. Willner. After a hatchery fish is caught by a sports fisherman, he treats it just like any other fish?

MR. WILLNER: He certainly does, your Honor.

QUESTION: So there is no regulation in terms of whether it is hatchery or not when you are talking about your own people, the non-Indians?

MR. WILLNER: You say regulation, your Honor.

QUESTION: Is there any significance to the fact that a hatchery fish can be identified after it's caught?

MR. WILLNER: The significance which we think is --

and which is what most of the quarrel is about -- was it's a way of making a fair allocation, that if it can be determined, as the trial court did after 10 days of trial, that the hatchery fish are identifiable, you can therefore determine the percentage of the hatchery run and the percentage of the natural run. You can therefore make an allocation which is in accordance with the treaty. You can exclude the hatchery fish from the treaty and still give the treaty Indians a fair share of the natural run.

QUESTION: But by excluding them from the treaty, You are really excluding a percentage of the total run, rather than specific fish.

MR. WILLNER: Yes, we are, certainly. What we are excluding is a percentage of total run, that is the percentage that we paid for by paying virtually the entire cost of the hatchery program into the game fund and that paid for hatcheries.

QUESTION: But for purposes, once they are in the river they are treated as fungible fish and they are all alike after that.

MR. WILLNER: Yes, they are, your Honor.

A couple of things I do want to say to the Court on my time. First of all, on this question of just a few things that counsel said, though Attorney General Gorton will be talking more about the question of the contentions of the Puyallup Tribe.

Counsel for the Puyallup Tribe said here today in this courtroom this morning that the tribe concedes that for some purposes the Federal courts may regulate the reservation fishery, as if to say to this Court that the State doesn't have to, he concedes the Federal courts can do it. But unfortunately for his position, in a pending case before the Ninth Circuit in a brief written nine months ago, which has not yet been argued, the Puyallup Tribe, through the same counsel that just addressed you, has written a brief in which they take the position that the Federal courts cannot regulate what they call a reservation fishery. On page 30 of counsel's brief in this case of United --

QUESTION: You're not going to argue that case's res judicata, too, are you?

MR. WILLNER: I beg your pardon?

QUESTION: You're not going to argue that case's res judicata, too.

MR. WILLNER: No, your Honor. I am arguing that there is an inconsistency in his position here which I feel should be brought to the attention of this Court.

QUESTION: Well, there have been some inconsistencies on both sides, haven't there, since 1963?

MR. WILLNER: Your Honor, none on ours yet.

QUESTION: You haven't been in it long enough yet.

MR. WILLNER: I agree.

It's our hope that this Court in this case will kind

of give us some answers that are going to make sense in the State of Washington.

I want to talk briefly about a couple of things again on the facts. There is some implication, again, in the brief of counsel for the Puyallup Tribe, there is some implication that there is a heavy commercial fishery on these steelhead before they get to Puyallup River. Counsel says, for example, on page 10 of his brief, "Steelhead also are caught in Washington waters incidental to the commercial catch of salmon."

Well, the citation he gives for that statement deals with the Columbia River, not with Puget Sound, not with the Puyallup River which goes into Puget Sound. It deals with a totally different water system. The Columbia River is from Oregon and Washington. It has nothing whatsoever to do with Puget Sound. In Puget Sound the fact is that it's illegal under Washington law for a commercial fisherman to land a steelhead.

Counsel goes on to say in his brief on pages 9 and 10, "Steelhead destined for South Puget Sound waters of the Puyallup River are nonetheless subject to a heavy commercial fishery, principally foreign fishing on the high seas." He gives several record citations, and none support.

My time is up.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF SLADE GORTON ON BEHALF

OF THE RESPONDENTS

MR. GORTON: Mr. Chief Justice, and may it please the Court: I perhaps should address myself first to a question which Mr. Justice Stewart just asked of my co-counsel in this case.

Mr. Justice Stewart, the order of the presentation on hatchery fish would be this: First, that hatchery fish are not subject to treaty rights at all. Therefore, Public Law 280 does not save the reservation even if it exists from State jurisdiction because the State is prohibited jurisdiction on such a reservation only in connection with treaty fishing rights, and if these are not treaty fishing rights, they are not protected from State jurisdiction.

QUESTION: I seem to have missed it, but why are they automatically not included in the treaty?

MR. GORTON: That's the issue in this case, your Honor.

QUESTION: I mean, you state it as a fact.

MR. GORTON: My opponents say that you can't get to that question, that you shouldn't decide that question at all. We feel that it is a central point in this case. It has, of course, not been decided by this Court. Three members of this Court in Puyallup II had that as a part of --

QUESTION: You didn't have those fish when the treaty was --

MR. GORTON: Exactly.

QUESTION: The answer is suppose you get a brand new type of fish coming by.

MR. GORTON: If that is a natural fish, I think that the tribe has --

QUESTION: Suppose somebody makes a fish and puts them in the river.

MR. GORTON: If the State creates a new breed of fish, that would have exactly the same rights as the hatchery steelhead do. The treaty itself --

QUESTION: The treaty is limited to the fish that ran the river at the time the treaty was made.

MR. GORTON: The treaty is limited to natural fish.

QUESTION: And their descendants.

MR. GORTON: And their descendants. Moreover, the treaty itself includes language that implies this, Mr. Justice Marshall, because the treaty makes a specific exemption for cultivated shellfish which was something which was done artificially in 1854, and it excludes from the treaty the only type of marine life which was then cultivated. So the obvious intention of the treaty would be to treat something new --

QUESTION: (inaudible) generous says once you

exclude one, you meant to include the others.

MR. GORTON: If there was something else to include, your Honor, but not when that something else didn't exist until 1950, a hundred years after the treaty was written.

Throughout these entire proceedings the State has sought to control violations of conservation laws by individual fishermen, and that's exactly the way this Court characterized this case in Puyallup II. And the nature of the case has not changed since that decision. Individual defendants were involved in Puyallup II and in Puyallup III. One is named in the caption of the case. He was also in Puyallup II. Is shown by the record to have engaged in fishing activities. As a matter of fact, he is present in court here today.

Counsel for other individual members of the tribe who were involved in Puyallup II were served with the initial petition at the beginning of Puyallup III, but failed to appear, evidently feeling that the tribal attorneys and the United States would defend their rights.

No general form of relief was sought in Puyallup III which was not involved in Puyallup I. We simply seek a definition of the conservation rights which the State has with respect to migratory steelheads and the means by which the State may enforce those rights.

QUESTION: May I ask you a question about the hatchery fish that Mr. Justice Marshall's question prompts.

It seems to me there are two quite independent theories which might justify excluding the hatchery fish. One is that they weren't there at the time of the treaty. An independent reason is that they were paid for by the license fees. Would you contend that if the license fee money had been used to improve water quality in some way which enlarged the run that a portion of the fish would not be covered by the treaty?

MR. GORTON: Enlarged the natural run?

QUESTION: Yes, enlarged the natural run.

MR. GORTON: I would not make that contention.

QUESTION: So it is not a question of where the funds come from; it's a question of it's fish that are artificially added. It doesn't really matter how they are paid for, I guess, then.

MR. GORTON: Well, it's a question of where the funds come from in the sense that these funds were used to create a run which is an addition -- it is shown by the record to be an addition to the maximum natural run. If it were simply State funds to improve river quality, no.

QUESTION: What if they were simply general revenue funds that were used to subsidize a new development of a breed of fish, or something like that. You would still say --

MR. GORTON: Under those circumstances, we would make the same claim.

QUESTION: So the point I am trying to identify is

it is not critical to your argument that they are license fees being used. The critical point is it's a brand new batch of fish.

MR. GORTON: It's not critical to my argument. It might have been to Mr. Willner's. He emphasizes that because he represents the people who pay the fees.

QUESTION: May be critical to his standing to be here,too

MR.GORTON: It may.

We have asked in Puyallup III for a declaratory judgment stating our authority to enforce reasonable conservation regulations upon individual members of the tribe. Now, in addition, the trial court did grant two elements of limited relief against the tribe itself, and this seems to be the whole basis of the claim that you must dismiss the entire litigation.

First, it required the tribe to file a list of the names of authorized tribal fishermen, hardly an onerous task. And, second, that it supply weekly catch figures during the course of the season. It's really only on the basis of these additional elements of relief that the tribe seeks dismissal of the entire action on sovereign immunity grounds, claiming that this is destructive of tribal self-government.

Even if the Court finds that this rather incidental, specific relief is barred by sovereign immunity, it is certainly not precluded from dealing with the merits of the

decision which it directed the Washington Supreme Court to make and from affirming the enforcement of those decisions against individual tribal members, it seems to us.

QUESTION: Mr. Gorton, do you understand your opponents' sovereign immunity contention to be that you simply cannot bring the tribe into court, the Superior Court of the State of Washington, for whatever purpose, or more like an NLRB preemption type of thing where because Federal law, such as the Treaty of Medicine Creek, is involved, a State court can't pass on it?

MR. GORTON: It is clearly the former, your Honor, by reason of the argument which Mr. Willner referred to that these same counsel are now making in the Ninth Circuit that Federal courts have no jurisdiction either. In other words, in direct defiance of the 9-judge opinion in Puyallup II it is the essential legal claim of the tribe that they do have the right to pursue the last living steelhead into their nets and that no court, State or Federal, has any right to interfere with that activity.

QUESTION: Well, they concede that the United States could bring a suit against them.

MR. GORTON: No, they do not concede that the United States could bring a suit against them. They concede only that the Congress can change the law. But their position today is that you cannot control their fishery, even if the United

States has sued them, and that's exactly what my brother counsel was reading --

QUESTION: Me and my colleagues, I take it.

MR. GORTON: No. My colleague here was reading from that brief. I am sorry.

The question of the existence and extent of the reservation has been raised. I wish to preface my comments on that subject by stating that it has been the consistent position of this Court, and may very well be the strongest single law of the case argument that the existence or non-existence or extent of this reservation is simply irrelevant.

If you will look --

QUESTION: That is perhaps a misapprehension. The court in Puyallup I which in the course of its opinion said we don't need to be concerned with the existence or non-existence of the reservation because this case involves fishing by Indians off the reservation.

MR. GORTON: I think your decision in Puyallup I, Mr. Justice Stewart, went considerably further than that.

QUESTION: Didn't the Court say something along those lines in the course of its opinion?

MR. GORTON: It did so. But it also said something else. It dealt with the fact that the Washington Supreme Court had found the reservation to be terminated and even set out some of the reasons which the Washington Supreme Court

utilized. It then went on to say that you did not need to get to that question because the only fishing rights which the Puyallup tribe had were those which it had received under Article III of the treaty, which is the usual and accustomed places in common with all citizens of the territory language. And, therefore, the implication was that it didn't make any difference. Their on-reservation rights and their off-reservation rights were the same.

Now, in the first two cases which this Court considered on this kind of treaty -- remember there are a dozen or so treaties in Washington and Oregon with similar language, all made in the same year or year and a half period -- dealt with the Yakima Tribe in both the Winans case and the Tulee case. The treaty in those cases has a separate and explicit exclusive on-reservation fishery right in it, which the Puyallup treaty does not and which presumably was the reason that Mr. Justice Douglas, writing for this Court in Puyallup I, stated that only Article III was relevant.

QUESTION: Why do you suppose -- what was the purpose, since I have already interrupted you, of the first large section of the opinion of the Supreme Court of Washington in this case giving its view of how the treaty ought to be construed, a view in conflict with the construction of Puyallup I?

MR. GORTON: You effectively have three allocation formulas that are involved with fisheries on the Puyallup at

this point. You have Judge Boldt's, which has been described here by the Solicitor's Office. You have the trial court's distribution, 45 percent to the relative handful of Indian fishermen, 55 percent of the natural run to the other citizens of the State, which our Supreme Court has affirmed. But it affirmed that with a troubled mind. It felt that it had misled this Court in Puyallup II in indicating that there was any apportionment required at all. You found in Puyallup II that in the portion that was required because a non-Indian sports fishery entirely preempted the run, that wasn't true then, and it's certainly not true in the record now. The Indians have the right to a sports fishery, a slightly better right than non-Indians because they need not buy a license for it. In fact, they engage in the sports fishery.

So the State Supreme Court is asking you in addition to tell whether or not the language, the right-to-fish language in common with all citizens requires an apportionment at all when there is no discrimination and when the access to and the rights to the fish are the same for the Indian group as they are to the non-Indian --

QUESTION: Under its construction of the treaty no net fishing would be permitted at all by the Indians.

MR. GORTON: That, of course --

QUESTION: What was the function and purpose of that law and the interesting part of the Supreme Court of

Washington's opinion, do you suppose?

MR. GORTON: I think in order to persuade you that your decision in Puyallup II was incorrect because you didn't have the facts in front of you.

QUESTION: Or Puyallup I.

MR. GORTON: In Puyallup I you did not require an apportionment. It was not until Puyallup II that you --

QUESTION: But it did construe it to allow net fishing, didn't it?

MR. GORTON: I am sorry, I missed your question.

QUESTION: Didn't Puyallup I construe the treaty to allow Indians to fish by net?

MR. GORTON: Puyallup I did not construed the treaty in that respect at all, because the State Supreme Court in Puyallup I had already vacated the trial court's judgment on allocation. And so you had no allocation in front of you in Puyallup I, and you quite specifically stated that you were not going to attempt in Puyallup I to say whether an allocation was required.

QUESTION: All right, now --

MR. GORTON: In Puyallup II you did so.

QUESTION: You have explained now your understanding of why the Supreme Court of Washington wrote that part of its opinion. Are you trying to persuade us along the same lines?

MR. GORTON: I am. And there is a considerable

section of our brief which is devoted very precisely to that argument, because we feel, as the Supreme Court of the State of Washington did, that our record was incomplete and our State Supreme Court made a misstatement in its decision in Puyallup II which led you to feel that there was discrimination, that only non-Indians could engage in the sports fishery and that therefore an allocation or apportionment was required.

That is simply not the case, and this record shows that not to be the case. They do in fact engage with others in a sports fishery.

The next that I was going to before your series of questions began was the question of the reservation itself. Now, the question of the reservation itself is a somewhat more narrow one than you have been led to believe by counsel on the other side of this case. Even if we don't concede that you can't even deal with the termination question at all because of what the Ninth Circuit said, all the Ninth Circuit said was that the reservation hadn't been terminated. In spite of the statements by counsel on the other side, there was no fishing rights issue in that case whatsoever. It was solely on whether or not there had been termination. As it started there was an alternate claim by the State that there had been termination or diminishment. The district court ruled that there had been termination. Three years ago the Ninth Circuit reversed and said there had not been determination and

sent it back to the Federal district court in Tacoma.

The United States has not pursued that case. It doesn't even have a judgment on it yet. But it certainly has not pursued any attempt to say what is included within the reservation. This Court in Puyallup I effectively said what is included in the reservation -- 20 acres of the cemetery. Mr. Justice Marshall asked about where the reservation is, and the former, or the supposed reservation is shown in the map which is at the back of our brief. The lines on that map -- unfortunately since it's a transcription of a color map there is some difficulty with it, but all the lines that are lightly cross-hatched is the some 18,000 acres which was originally in the reservation back in the middle of the 19th century. The heavier lines are the city limits of the City of Tacoma, the City of Fife, and there is a portion of the City of Puyallup and other suburban areas within that supposed reservation.

But there has been no determination in the Ninth Circuit that the river is in the reservation or that anything is in the reservation.

QUESTION: There is a description of the Ninth Circuit opinion the brief of the United States. It says the Ninth Circuit concluded that the reservation was in existence. On page 5. "As a result, the Court indicated, tribal members had a continuing right to fish free from state interference on

that portion of Puyallup River." You say that was not a genuine issue in the case?

MR. GORTON: That was in the introduction to the Court's opinion.

QUESTION: It was not an issue.

MR. GORTON: It was not an issue in the case.

I see. Excuse me. I am sorry. The complaint of the United States in the case did raise that issue and the quotation in the petitioners' brief here quotes its complaint in front of the --

QUESTION: I thought the claim was that the Indian fishing rights were not subject to reconsideration in this case because of the decisions in two other cases.

MR. GORTON: Yes, but, I think that claim is based most heavily on the decision by Judge Boldt rather than this, because the Ninth Circuit in a very, very short decision simply stated that the reservation had been terminated. It did not go into the extent of the reservation, it did not discuss --

QUESTION: Well, was there a decision on fishing rights or not?

MR. GORTON: There has been a decision --

QUESTION: Was there a decision by the Ninth Circuit on fishing rights?

MR. GORTON: Yes. The Ninth Circuit in another case --

QUESTION: No. In the case they are talking about.

MR. GORTON: No, I do not believe that there was. There has been in the appeal from the decision by Judge Boldt, but in that decision, of course,Judge Boldt had specifically reserved the question of whether or not hatchery fish were within the treaty rights. Judge Boldt had the benefit of this Court's decision in Puyallup II before he made his decision.

QUESTION: He says on the reservation the State cannot limit their fishing. Judge Boldt.

MR. GORTON: I am sorry. Who --

QUESTION: Judge Boldt.

MR. GORTON: Oh. OK.

Both cases that came up did not concern itself with on-reservation fisheries. Judge Boldt has concerned himself from the beginning of this case with off-reservation fisheries. I am sure that he did make that remark in passing, but --

QUESTION: The United States gives a jump cite to it here that he decided that on-reservation fishing is not subject to State regulation.

MR. GORTON: I believe that that is correct, that he made such a decision, though that was not a matter which was argued before him, it was not a general subject of that set of proceedings. But nonetheless, this Court, before he made that decision, remanded this case to the State court to make just such determinations, which it has, of course, gone on and done. Judge Boldt, incidentally, if you read his

entire decision, takes the Puyallup I and Puyallup II cases and says in effect that you were wrong, although he gives lip service to following it, and uses a totally different apportionment formula than that which you set out in Puyallup II.

QUESTION: What is the basis of the 45 percent allocation of the non-hatchery fish? What was the basis of the 45 percent allocation of the non-hatchery fish?

MR. GORTON: I have some difficulty in answering that question precisely --

QUESTION: Was it to protect the Indians or protect somebody else?

MR. GORTON: It would be to protect the Indians, because it would give them a considerably larger percentage of the natural run --

QUESTION: It may also be a limit on what they could take.

MR. GORTON: No. It was only a limit of what they could take in a net commercial fishery. It did not limit --

QUESTION: when I say it was a limit, it was a limit on what they could take by a net fishery.

MR. GORTON: By a net commercial fishery. And the judge decided that --

QUESTION: But also an allocation that they could take at least that much.

MR. GORTON: At least that much, because they could

then go on and take whatever they could get in a sports fishery in common with all of the non-Indian sportsmen.

QUESTION: That is de minimis almost. You don't have many Indians, and sports fishermen get a steelhead every two or three days of hard fishing.

MR. GORTON: Some of them get better --

QUESTION: On the average.

MR. GORTON: -- than others. Although there may not be a record on this, I suspect that these professional Indian fishermen are better than the average amateur sportsman --

QUESTION: Well, not necessarily better with a hook and line.

MR. GORTON: I don't think it is de minimis. They have caught some fish in a sports fishery. It is not a productive use of one's time from the point of view of hourly pay, however, to fish for steelheads on a hook-and-line basis.

QUESTION: How much riverfront trust property do you suppose there is?

MR. GORTON: I don't think there is any.

QUESTION: You mean the river doesn't actually run through any property --

MR. GORTON: The river is on a new alignment now from what it was at the time the treaty was signed. It was realigned in the 1920's by the Corps of Engineers. The trust property is shown --

QUESTION: Assume the reservation is not in existence.

MR. GORTON: If the reservation is not in existence, I don't believe that there is any Indian property or any Indian trust property on the river at all. The 22 acres are a cemetery which were located off the river.

QUESTION: What is this thing between the two state highways? It says "river."

MR. GORTON: Yes. The Puyallup River runs --

QUESTION: Isn't this the reservation?

MR. GORTON: That's one of the questions, your Honor. That is what was the original reservation, but Mr. Justice White's question to me was what Indian-owned land or Indian trust land is on the banks of the river. And my answer to that question was to the best of my knowledge none.

QUESTION: And how much is there within the limits --

MR. GORTON: Twenty-two acres, according to Puyallup I, and I think they bought a few acres since the time of that. Two and a half percent of the people who live within those exterior borders are Indians, and 97.5 percent are non-Indian.

In connection with the reservation question, of course, is your decision two weeks ago on the Rosebud case. We have analyzed the question of the existence of the reservation in connection with the DeCoteau case, which came out after the Ninth Circuit case on this.

QUESTION: What is the State's position with respect

to the reservation question, Mr. Attorney General, in terms of whether it was raised and decided below, whether you conceded it away?

MR. GORTON: The question was raised in Puyallup I, was decided by the State Supreme Court in Puyallup I. The other Federal court case intervened in that. We lost that case. The trial court in this case acknowledged what the Ninth Circuit had decided. I think it resisted it, didn't believe that that was a correct decision, but both the trial court decision and the State Supreme Court decision proceeded as if the Ninth Circuit decision on lack of termination was correct. And we can argue that case here. It was an issue, it was brought up at both points. And we can raise that issue here only in respect that we have a right to raise any issue which is in the record which would tend to affirm the decision below.

QUESTION: Does that reach issues that were not decided by the state court?

MR. GORTON: No, it reaches an issue that was decided.

QUESTION: You didn't present that issue to the Washington Supreme Court.

MR. GORTON: No, we did not.

QUESTION: It was neither presented nor decided by the Washington Supreme Court.

MR. GORTON: I think that it was presented by the United States in both cases. It had to be. They couldn't have come up with any answers. They wouldn't have known what had happened under any other circumstances.

QUESTION: Is there any evidence on it?

MR. GORTON: There was not any evidence on it later than Puyallup I, but this is all the same case, of course, as Puyallup I. Essentially --

QUESTION: I understood you rightfully to say you use whatever you have to support the judgment. But you have to have some evidence, don't you?

MR. GORTON: Oh, I think if we go to the record in this case, there is evidence on it. That evidence takes place back in Puyallup I, and there is the evidence in the decisions of the U.S. district court and the court of appeals.

We feel that this case being here for the third time, that all of the issues involved in a decision of the Court are properly before you and that you ought to decide it.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Rodgers?

REBUTTAL ARGUMENT OF WILLIAM H. RODGERS, JR.

ON BEHALF OF THE PETITIONERS

MR. RODGERS: May it please the Court, in direct response to Mr. Justice White, the position of the State with

regard to the reservation question is as follows. I am reading from pages 20 and 21 of the Appendix. "We take the position first that we have to operate on the premise that there is a reservation unless the United States Supreme Court grants certiorari on that decision and reverses the same. And that question can only be resolved by that format. And the failure to take certiorari or taking so failure to overturn the Ninth Circuit the reservation is there and we must observe it. But what we are asking is, first" -- I am reading further to indicate to the Court --

QUESTION: What are you reading from?

MR. RODGERS: I am reading from the Appendix, pages 20 and 21 -- the joint appendix, your Honor. I am reading further with regard to the natural hatchery issue. This is from counsel's opening statement before the trial court in Puyallup III.

"What we are asking,first, by this court is to determine that there is a distinction in terms of the treaty right between natively propagated steelhead and those which are hatchery planted. Now, that concept, since we only have jurisdiction off-reservation--is only material to the off-reservation fishery."

Here we have an on-reservation fishery; the natural hatchery question is not presented. The entire question of treaty entitlement to hatchery fish is presently pending

before Judge Boldt. My proof on this question, if I did bring it here, was curtailed repeatedly by exclusions of evidence in a non-jury trial dealing with competition between natural and hatchery fish, environmental damage. For example, the position of the State on this question is that if simply the run were destroyed, the natural run were entirely destroyed and replaced by a hatchery run, then basically there is no more treaty entitlement to that fish.

Secondly, on the sovereign immunity question, the Attorney General has understated the issue substantially. Basically on the sovereign immunity issue, if this Court affirms, you are opening up litigation against a tribe to allocate and apportion its natural resources in State courts throughout the State of Washington. The Congress has never Permitted such a lawsuit, and I submit that if there is an affirmance on that sovereign immunity proposition, the effects would be devastating.

QUESTION: Would that not be limited, even if we take your assumption, limited to cases where there is an artificial input --

MR. RODGERS: Absolutely not. Again in response to Mr. Justice White's question, I believe, the sovereign immunity defense would apply regardless of the nature of the claim. They are suing the tribe, and they have secured orders against the tribe. The so-called petty orders include directives

to the tribal council to close fisheries under threat of contempt.

QUESTION: What is the allocation now to the Puyallup Indians?

MR. RODGERS: The allocation issue is as follows: Basically , off reservation the Boldt decision indicates a 50-50 allocation question. The court below allocated on a 45-55 basis. For our purposes that's insignificant.

There is a further question of whether the hatchery fish are excluded. Presently, under a Federal court order, Pending adjudication of this entire question in phase two of United States v. Washington, the State is enjoined from excluding hatchery fish from its regulatory activity with regard to all runs, including the Puyallup River. Now, that meant, again in response to another question, that there indeed is a possibility of Federal-State injunctions. And this Court has looked with a lack of encouragement to that activity. And we have had alternatives and occasionally have gone before the Federal court to seek injunctive relief.

But on this question, on the question of State power to control on-reservation, we have come up through direct appeals --

QUESTION: At what point in the litigation did you first assert sovereign immunity as a defense?

MR. RODGERS: Sovereign immunity, your Honor, has

been asserted in this litigation ever since the case began. It was rejected in Puyallup I on the premise that we were dealing with an action against individuals off reservation. That premise is now dissipated. It has been urged throughout here and was decided against us on the merits by the Washington State Supreme Court.

QUESTION: That court thought it was doing no more than obeying the order on remand of this Court in Puyallup II.

MR. RODGERS: That is correct, your Honor.

QUESTION: So instead of their wide precedent that You indicated that affirmance here might mean, really this is just limited to the Washington Supreme Court's carrying out what this Court told it to do on remand of this particular and precise case, isn't it?

MR. RODGERS: But to do that, your Honor, as the concurring opinion below indicates, you have to read Puyallup II as contradicting 150 years of Indian law.

QUESTION: Yes.

MR. RODGERS: And we believe that you cannot do that.

In conclusion, let me --

QUESTION: Mr. Rodgers, let me ask you one more question.

I take it if you are right in this sovereign immunity should have been recognized far earlier than now that both of our decisions in Puyallup I and Puyallup II are

wiped out because if the Supreme Court of Washington had no jurisdiction, we surely had no jurisdiction.

MR. RODGERS: No, your Honor, because those cases, based upon the premises established -- and indeed they were facts -- and those cases were off-reservation cases involving individual Indians --

QUESTION: The same case as this case. It's the same litigation.

QUESTION: Where do the facts turn?

MR. RODGERS: But the reservation now exists, and the orders that initially ran against individuals now run against the tribe. The tribal council, the tribal governing body, its legislative body, has been ordered to enact closures, to enforce closures. The case has been transformed from an off-reservation individual case into an on-reservation suit against the tribe itself. And I would submit in conclusion that the history of this litigation has been determined by one overriding factor, and that is restrict the Indian fishery.

We have had in this case argued at various times that the tribe is defunct, that the treaty is a worthless scrap of paper, that the reservation doesn't exist, but that if it does, there is power to control as if it did not.

We urge the Court to go further and to dismiss on the ground we fear that the slightest ambiguity in its disposition will result in additional litigation.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:11 p.m., the arguments in the above-entitled matter were concluded.]