ORIGINAL

In the

Supreme Court of the United States

WASHINGTON ET AL.,
PETITIONERS,
V.
WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, ET AL.,
RESPONDENTS:
WASHINGTON ET AL.,
PETITIONERS,
V.
UNITED STATES ET AL.,
RESPONDENTS;
AND
PUGET SOUND GILLNETTERS ASSOCIATION ET AL.,
PETITIONERS,
V.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON)UNITED STATES ET AL., REAL PARTIES IN INTEREST)
RESPONDENTS.

Numbers 77-983
78-119: and
78-139
(Consolidated)

Washington, D. C.
February 28, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON ET AL., Petitioners, v. WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, ET AL., Respondents; WASHINGTON ET AL., Petitioners, v. UNITED STATES ET AL., Respondents; and PUGET SOUND GILLNETTERS ASSOCIATION ET AL., Petitioners, v. UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES ET AL., REAL PARTIES IN INTEREST), Respondents.	Numbers 77-983; 78-119; and 78-139 (Consolidated)

The above-entitled matter came on for argument at 10:05 o'clock, a.m.

February 28, 1979
Washington, D. C.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice

BEFORE: (Cont'd)

THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

SLADE GORTON, ESQ., Attorney General, State of Washington, Temple of Justice, Olympia, Washington 98504, on behalf of the Petitioner State of Washington.

PHILIP A. LACOVARA, ESQ., Hughes Hubbard & Reed, 1660 L Street, N.W., Washington, D. C. 20036, on behalf of Petitioners Puget Sound Gillnetters Association, Et Al.

MASON D. MORISSET, ESQ., 208 Pioneer Building, 600 First Avenue, Seattle, Washington 98104, on behalf of Respondent Indian Tribes.

LOUIS F. CLAIBORNE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, on behalf of Respondent United States.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Washington and others against Washington State Commercial Passenger Fishing Vessel Association and the consolidated cases.

Mr. Attorney General, you may proceed whenever you are ready.

ORAL ARGUMENT OF SLADE GORTON, ESQ.,

ON BEHALF OF THE PETITIONER STATE OF WASHINGTON

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

Mr. Claiborne has just delivered to the Clerk a large set of maps of the case area which may aid in your understanding of this argument, and to which we have no objection.

The central issue in this litigation, the issue to which every other question is subsidiary, is the meaning of the phrase, and I quote, "In common with all citizens," found in each of the treaties with which we are concerned.

Very little of the record and only a few paragraphs of the original District Court decision are relevant to this central issue.

The answer to the subsidiary questions is relatively easy, once this Court construes the "in common with" language. But, without a decision on that point, answering the other questions is unlikely to resolve the controversy.

The United States and the tribes seek to fragment the controversy and delay its ultimate resolution.

QUESTION: What if we thought the question had already been answered and it wasn't open here?

MR. GORTON: If you felt that the question had already been answered or that it were final in some respect or another, we would not be able to bring it here in this litigation.

QUESTION: I take it, you are going to indicate why you think it is open here.

MR. GORTON: Yes. The United States says it may come up here in connection with some other case later.

The crux of our position is --

QUESTION: Those aren't the only words of Article III.

MR. GORTON: They are not, and I will deal with the usual and accustomed --

QUESTION: Well -- and also the right of taking fish.

MR. GORTON: Yes. The entire phrase speaks of fish --

QUESTION: The right of taking fish.

MR. GORTON: The right of taking fish, usual and accustomed stations and in common with the citizens of the territory.

QUESTION: The District Court, in its original

opinion and the Court of Appeals in its original affirmance thought that the phrase "in common with all citizens of the territory" was the key and critical phrase, but it may not be.

MR. GORTON: Exactly. The crux of our position here, Mr. Justice Stewart, is that the District Court's decision mandating a 50% allocation of anadromous fish to treaty Indians is without support, either in that treaty language or in the circumstances surrounding the execution of the treaties.

Our view is that the treaty language secured for the Indians the right to participate in a common fishery from which they might otherwise have been excluded. In other words, the treaties guaranteed in perpetuity an equal opportunity fishery.

But before discussing that discussion of the treaties, let's reflect for a moment on the actual impact of an equal opportunity fishery on Indians, should that be your holding. Would such a holding deprive treaty Indian fishermen of a reasonable participation in the fishery?

Not at all. The contrary. In an equal opportunity fishery, Indian participation will continue to be substantial, out of all proportion to their share of the population of the Puget Sound region. In fact, the percentage of all commercial fishermen who are Indians is likely to continue to increase, and for a number of reasons.

First, the states began to limit the number of licenses to engage in salmon fishing five years ago. That

program has resulted in a reduction in the number of non-Indian commercial fishing licenses.

Indians, on the other hand, are not required to obtain state licenses. Indians, in addition to that, are not required to pay for those licenses.

Thus, the major limitation --

QUESTION: How about season limitations and catch limits on Indians?

MR. GORTON: That's the crux of the case, as to whether or not that type of regulation can be imposed on Indians equally with others. It is clear that they do not require licenses. So the major limitation on the number of treaty Indian fishermen at this point, leaving aside their catch, is their own interest in the business.

Second, Indians are not subject to the financial burdens of either state licence fees or landing taxes. They are, nevertheless, the beneficiaries of the hatchery programs which are financed by those taxes.

Third, the Indian capability to fish competitively has been increased greatly by federal and tribal financial assistance in the purchase of sophisticated boats and gear.

At the same time, the state has been buying up and retiring non-Indian boats and licenses. The state has also assisted Indian hatchery operations and fish farming enterprises.

Fourth -- and we get to the treaty at this point -- the District Court has determined the -- and I quote from the treaty -- "usual and accustomed grounds and stations of the Indians are not restricted to small areas near the reservations." For one tribe or another, those grounds include all of Puget Sound, as we have there on that map, all of the United States' portion of the Strait of Juan de Fuca and the State's portion of the Pacific Ocean two-thirds of the way down the coast.

In summary, they include all of the state's marine waters in the case area, together with portions of the Pacific Ocean beyond the state's jurisdiction. Every mile of water shown on that map in the United States is a part of the usual and accustomed grounds of some Indian tribe under the District Court's decision. And we do not object to that characterization.

The District Court, as its rationale for the 50%-plus allocation, extracted a part of an 1855 dictionary definition of the word "common." That rationale has long since been abandoned. The Ninth Circuit and the Respondents have continued to search unsuccessfully for a rationale on which they could agree and which will support that rigid allocation. Most of their substitutes, and the original decision itself rest on the characterization of the fishing right as tribal rather than as individual. But all references to treaty fishing rights, in every treaty save one, secure those rights

specifically to individuals. While the other articles of the treaties refer to and deal with the tribes as entities.

Governor Stevens, of course, included the "in common with" language -- as a matter of fact, all of the fishery language -- in treaty drafts which he presented to the tribes. He explained the provision as expressing his view, and we quote from some of the treaty minutes: "He wanted them to fish, but the whites should fish also."

That treaty language, thus explained, is apparently the source of the equal protection guarantees for individuals found to be implicit in the treaties by this Court in Puyallup I and Puyallup II.

The treaties do, of course, secure certain rights to the Indians not possessed by other citizens. They are contained largely in that Usual and Accustomed Grounds and Stations Clause.

A Mr. Simmons, an Indian agent present at the negotiations, explained to the Indians that -- and again I quote the minutes -- "The privilege was given of going wherever they pleased to fish."

And this Court, in its first decision on the treaties, Winans in 1905, distinguished clearly between the right to fish, which the Court characterized, and I quote, "as a mere right, not exclusive, and which citizens might share," from what this Court called the "special means for its exercise."

The special right is the right of access. The state can regulate the right to fish, under circumstances which you have set down, but it may not exercise the right of access.

Excuse me, regulate the right of access.

The fallacy of the 50%-plus allocation is, perhaps, most graphically illustrated by its own logical result. There were five treaties affecting the Puget Sound fishery, not one. There were scores of quasi-sovereign Indian bands on Puget Sound whom Governor Stevens consolidated for treaty purposes. But if the treaties mandate a 50%-plus allocation to all, the single treaty with the Makahs, the tribe located where the Strait of Juan de Fuca meets the Pacific Ocean, would guarantee that tribe a 50%-plus allocation of the fish passing through their grounds.

Next, the grounds of the tribes which signed the Treaty of Point No Point, at the point where Puget Sound meets the Strait of Juan de Fuca, span the entrance to Lower Puget Sound totally. They would thus be authorized to take 50% of all of the salmon which could escape the Makahs, cutting in half all runs destined for the grounds of the Indian beneficiaries of three more treaties farther south on the Sound.

By the time the few remaining fish reach the last in line, the Yakimas, theirs is an entitlement to 50% of almost nothing. And if non-Indians take their 50% at Point no Point, the Lower Sound tribes would have literally nothing.

After all, if the Indians are entitled to have a 50% return of fish to their normal and accustomed grounds, the articles in the treaty which give them exclusive fishing rights on their reservation, must guarantee a 100% return of fish to those reservations and, thus, leave nothing for anyone else.

Clearly, the treaties don't mandate a 50%-plus allocation. But what do the treaties mean in that case? Their language implies an equal opportunity fishery, by the "in common with" language, with special Indian rights of access.

So did Governor Stevens' explanation to the Indians.

So does your finding of implications of equal protection in the Puyallup series.

But there is more. Let's look at the jurisdictional status of Puget Sound in the years surrounding 1850, before the treaties were signed. United States sovereignty over what is now Washington State was perfected by an 1846 treaty with Great Britain. That sovereignty brought with it the Common Law and the Statutes of the United States. That Common Law, in turn, included the concept of a common fishery for the benefit of all, except as expressly limited by statute.

So, American citizens had the right to fish in Puget Sound before the execution of the Indian Treaty. The record reveals that they did fish in Puget Sound then. The treaties didn't create that right.

QUESTION: When you say they had a right, was it a

different right from the right of the Indians?

MR. GORTON: No, it was the same right. At that point, everyone shared a common fishery. What the treaties secured for the Indians was the continuation of that right free from interference by the Territorial Legislature, which might very well have passed a law saying the common fishery is for citizens only. Without treaties and without citizenship, the Indians could have been excluded from that fishery by the Territorial Legislature or by private action.

And the tribes admit as much themselves. On page 248 of their brief, they state the obvious, and I quote from that brief: "Indian fishermen who are not members of treaty tribes enjoy no special rights; their fishing is subject to the same limitations placed on all non-Indian fishermen."

Now, why do non-treaty Indians enjoy no special rights? If Indians brought exclusive fishing rights to the treaty negotiations and merely relinquished a portion of those rights, non-treaty Indians would still have exclusive rights at their usual and accustomed places today.

But this Court has already affirmed a decision which is consistent with that concession in the tribal brief.

QUESTION: General Gorton, in that connection, Article III refers to "said Indians." What does "said" mean?

MR. GORTON: "Said" refers to Indians who are members of the tribes which signed that particular treaty.

You will note the structure of the treaty in the Articles and the different verbs which -- the different phrases which are used. In the beginning of the treaty, the Indians grant their claims to lands to the United States.

QUESTION: The Indians or the tribes do?

MR. GORTON: The tribes, and they are spoken of as tribes.

QUESTION: That's what I thought.

MR. GORTON: There is reserved to the tribes, out of those grants, land as reservations. But what about fisheries? There is secured to said Indians the right to fish at their usual and accustomed stations in common with the citizens of the territory.

QUESTION: And what do you think "said Indians" means?

MR. GORTON: It means the Indians, as individuals, who were members of the tribes which signed the treaty, just as "citizens" referred to citizens who were part of the corporate body of the United States itself.

QUESTION: General Gorton, does the state take any position as to whether the treaty was or was not self-executing?

MR. GORTON: The state has not taken an explicit position on that treaty. I think it relates to whether or not you can order the State Department of Fisheries to carry out the mandate of the treaty, or whether or not that depends on

state legislative authorization. Since we feel and will say that the state courts would acknowledge that state legislation now gives to the Department of Fisheries the right to manage the fishery consistently with the treaties, it --

QUESTION: Well, ordinarily, a non-self-executing treaty requires legislation by Congress, not by the state.

MR. GORTON: I was directing it, however, at the right of the state agency to enforce those treaty obligations as you may interpret them. From the point of view of securing or guaranteeing the rights outlined in the treaty, we would agree that the treaties are self-executing. They did not require legislation by Congress.

QUESTION: What in 1979 "said" means? "Said" Indians.

MR. GORTON: Exactly what it meant in 1854.

QUESTION: No, because those people are all dead.

MR. GORTON: The successors, their decendants.

QUESTION: Present tribal members or any decendants of people that were tribal members in 1955? There is a difference.

MR. GORTON: The complexity of who is a tribal member is turgid and perhaps too difficult for me to go into because the Indian tribes, by and large, set their own membership. And people are often granted membership in various tribes who have an extremely tenuous blood relationship with

the Indians who signed the original treaty.

QUESTION: I was wondering about the concession that you quoted to us on the part of the tribes who said that Indians, generally, didn't have any treaty rights at all, unless they were present tribal members.

MR. GORTON: Not unless they were present tribal members, unless they were members of treaty tribes.

QUESTION: Yes, present members of treaty tribes. And I wondered whence that concession.

MR. GORTON: The concession simply recognizes the fact that the special rights of treaty tribes stem from the treaty and not from something preceding the treaty.

QUESTION: Your submission is it is not the rights of the treaty tribes, at least under Article III, it is the rights of Indians, individual Indians; isn't it?

MR. GORTON: Yes, but by reason of their status, by reason of their membership in certain tribes.

QUESTION: And in 1979, what status? Direct decendants of those who were tribal members, or present tribal members?

MR. GORTON: Members of the tribes.

QUESTION: Present members of the treaty tribes?

MR. GORTON: Present members of the treaty tribes. There might conceivably some day be a contest as to whether or not a particular Indian was properly a member of the tribe, but

that contest has not yet taken place.

QUESTION: But if his great grandfather was a member of the tribe and he now works in a filling station in Seattle he has no rights under the treaty?

MR. GORTON: Oh, yes, he does.

QUESTION: But he is not now a member of the tribe?

MR. GORTON: Yes, he is.

QUESTION: Well, let's assume he resigned.

MR. GORTON: Then he would lose those rights. There is not much reason for him to resign. But only if he took himself affirmatively out of the tribe would he find himself in that status. Many of these treaty Indians do live off the reservation and in cities, perhaps the majority of them.

The court recognized this distinction between treaty and non-treaty Indians in U. S. v. McGowan, in a long opinion in 2 F. Supp. 426 in 1932, which was simply affirmed by this Court without opinion in 294 U.S. 592.

Now, I don't use this line of reasoning of the status of the non-Indian in 1850 as conclusive proof of our construction of the "in common with" language in the treaties. The language itself, Governor Stevens' explanation of it and your Puyallup decisions, it seems to me, lead to that conclusion.

That line of reasoning, based on concepts of sovereignty and what actually was the situation in the mid-19th

Century argues very powerfully that the United States, whose citizens possessed the right to a common fishery in 1850 and which planned for vast increases in the non-Indian population by the very treaty negoiations themselves, did not casually treat away in perpetuity more than half of the fishery resource.

Now would come the logical question. Even if the 50%-plus allocation is not required by the treaty, isn't the lesson of your three Puyallup decisions that some specific allocation is required?

Our answer to that is no. And the distinctions between this case and Puyallup are vital. The Puyallup cases dealt with a discriminatory fishery. That is one which you have characterized as totally preempted by non-Indians. To justify such a discriminatory fishery, if it could be done at all, the state at least had to prove that its system was absolutely necessary to conservation.

QUESTION: You are referring to a fishery as a commercial fishery?

MR. GORTON: Yes.

QUESTION: In that case, there was no commercial fishing allowed.

MR. GORTON: The entire fishery was preempted by non-Indians by your decision in Puyallup.

QUESTION: But commercial fishing was absolutely prohibited.

MR. GORTON: Commercial fishing was absolutely barred. No one could engage in a commercial fishery.

Since we could not prove that that regulatory system was absolutely necessary for conservation, it fell. After Puyallup II, however, it seems that the state had two possible courses of action, not one, either an equal opportunity net fishery, commercial fishery, for everyone, or an allocation between treaty net fishermen and non-treaty sport fishermen.

The state chose the latter and you approved it in Puyallup III, and permitted the tate even to regulate an on-reservation fishery to see that the non-Indians got their allocation.

But the Marine Water --

QUESTION: Those cases involved -- at least Puyallup I and II -- sport fishing for steelhead. And this case involves, primarily at least, commercial fishing for salmon.

MR. GORTON: That's exactly right. And there is, in addition, a major distinction between those two. Steelhead can only be caught in fresh water. By the time fish get to fresh water, conservation policies -- It is very simple. The only conceivable conservation policy is one which will get enough fish upstream to spawn. When one is dealing with a marine salmon fishery, however, conservation has necessarily got to be a much broader concept.

If you will look at the map on page 348 in the Joint

Appendix, which is referred to in a brief of the tribe, you will note major areas in Puget Sound denominated "Salmon preserves." The tribes characterize those as areas which are permanently closed to commercial fishing. That is an error as far as the South Sound preserves are concerned. There are frequent commercial fisheries there.

It is a perfect characterization along the shores of the Strait of Juan de Fuca in what are called Areas 1 and 2. No commercial fishing for salmon is permitted there but a sport fishery is. That brings those areas precisely into your Puyallup II situation, since they are usual and accustomed grounds and stations.

We simply cannot ban entirely a commercial fishery there and the District Court has permitted Indian fisheries there. But the state can permit non-Indian fisheries there. If conservation is the only way that we can control the fishery and if conservation is only letting enough fish escape to spawn, inevitably the whole commercial fishery is going to get driven out there, so that both sides can get their share. Because it can't be closed down as to non-Indians until you've gotten down to just the number of fish necessary for escapement.

So conservation in a marine area, in the commercial field, has got to include something else than pure escapement for spawning. It's got to include a concept of optimum yield

and of a fair distribution of the fishery among all types of fishermen, Indians and non-Indians, Purse Seiners, Gillnetters and the like.

Every one of your cases in which you have used the word "conservation," six straight cases, from Winans to Puyallup III, have all dealt with fresh water fisheries. This is the first time you are dealing with a marine salt water fishery.

QUESTION: Is there any fresh water fishing involved in this case at all?

MR. GORTON: Yes. These usual and accustomed grounds and stations go up the stream to their very sources, but the principal focus of the case is on the salt water marine fishery.

QUESTION: There is no indication on this map or any other map of these usual accustomed grounds and stations?

MR. GORTON: They are everything.

QUESTION: But you said some are upstream.

MR. GORTON: That's right. These maps do not show the upstream, the fresh water usual and accustomed grounds. They do show -- because all of the salt water are usual and accustomed grounds of one tribe or another.

QUESTION: The salmon deteriorate in quality as they go upstream, don't they?

MR. GORTON: Most of them do, yes. By the time

they've got to the spawning beds, they are much less valuable than they are further downstream.

QUESTION: There is commercial fishing of them by the Indians?

MR. GORTON: By the Indians, not by non-Indians.

QUESTION: In fresh water?

MR. GORTON: Yes.

QUESTION: And that is involved in this case?

MR. GORTON: Yes.

QUESTION: And their right to fish at those accustomed grounds and stations might be very ephemeral, if there were no fish there?

MR. GORTON: Pardon? Which would be ephemeral, if no fish were there?

QUESTION: What does the right to fish mean? I know when I go fishing nobody gives me the right to catch fish.

MR. GORTON: That is exactly right. And the logical answer to that is, if the Indians have a usual and accustomed right to fish where they historically fished, at the very top of the stream, there must be an allocation. It is clearly required.

It is, however, not only terrible management policy, but has also been abandoned by this Court as long ago as Winans and even by the way the United States manages its marine fisheries, for this reason:

One of those upstream usual and accustomed grounds and stations may well have only a single run with a few hundred fish coming back to it. But in marine waters, that run is mixed with many other runs, with hundreds of thousands of fish.

If the state has got to return those salmon -- plans to return that single run of salmon to that single upstream usual and accustomed grounds and place, there will be a tremendous wastage of fish in all of the marine water area.

Consequently, the District Court, itself, has found marine usual and accustomed grounds and stations for almost all the treaty Indians. One of the treaty groups of tribes, Point no Point, has now petitioned that the usual and accustomed grounds of each of those tribes are the usual and accustomed grounds of all of them.

We don't object to that. That's good fishery management.

In Winans, you dealt with an exclusive right of access, but also there is a cryptic note in that decision. There was a non-Indian fishwheel at a usual and accustomed --

QUESTION: What is a fishwheel?

MR. GORTON: A fishwheel is a method of taking fish which is now outlawed because it catches --

QUESTION: Some sort of trap?

MR. GORTON: Yes. It catches every fish that goes through.

It was on privately-owned land on an Indian station. So in dealing with the right to fish, as opposed to the right to access, this Court says in Winans: "The Solicitor General points the way."

We quote, at pages 85 and 86 of our opening brief, the way which the Solicitor General pointed. He said the Indians could be given more advantageous places, or advantageous places, upstream or downstream from that fishwheel.

This is what the United States does. It manages its ocean fishery primarily for non-Indians, and then says that the state must cut down non-Indian fishing in Puget Sound to account for all of the fish which Washington citizens have taken under federal licences in the open ocean.

And that's the reason for the great disparity in the Puget Sound allocations to Indians and non-Indians. So everyone really manages in the way of making that right at usual and accustomed stations real by a proper management of the fish and pushing the fishery out into marine waters or further downstream.

It can't be over-emphasized here that the District Court found a permanent and immutable right. It did not fashion a remedy for alleged discrimination. The tribes and their amici have attempted to characterize this as a discrimination case and to disguise the 50%-plus allocation as a remedy.

Perhaps the best illustration that that's not the

case is the IPFSC Fishery, the straits fishery and Canadian fish. That fishery, on Canadian bound salmon, occurs in the Strait of Juan de Fuca in the Northern Puget Sound in the usual and accustomed grounds of fewer than one-third of the tribes who are parties to this litigation. There is no significant non-Indian harvest before the fish reach those usual and accustomed grounds.

Even so, the District Court found that those eight tribes were entitled to 50% of the catch. A right, not a remedy.

We feel that the judgment should be reversed and remanded for a determination as to whether or not an equal opportunity fishery exists now or, if not, how the state can assure it.

QUESTION: You've never gotten around to my question.

MR. GORTON: I am sorry.

QUESTION: Why is that issue open here?

MR. GORTON: That issue is open here for the same reason that an issue is open whenever you have denied certiorari in earlier proceedings in the same case, and later accept certiorari in connection with later orders in the same case involving the same parties.

QUESTION: So it is open as a matter of res judicata, but the Government doesn't rely on the -- the Solicitor General doesn't rely on res judicata, but rather on more prudential--

MR. GORTON: The Solicitor General tells you that you should not judge this case on the merits because we are bad people, is essentially what it amounts to. It is rather like a father who leaves his wallet on his dresser and finds $20 missing the next morning and accuses his son of stealing it. The son curses and spits at him and the father later finds the $20 in his pocket.

Obviously, the son can be punished for contempt, but Mr. Claiborne would have you say that the father should not apologize for being wrong in connection with the $20 in the first place.

QUESTION: Well, in this case, who is the father and who is the son?

MR. GORTON: Exactly.

Thank you, very much. I will reserve the balance of my time.

MR. CHIEF JUSTICE BURGER: Mr. Lacovara.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,
ON BEHALF OF PETITIONERS PUGET SOUND GILLNETTERS ASSOC., ET AL.

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

This case, as the Attorney General, has emphasized, involves the question whether or not one group of commercial fishermen, Indians in this case, is entitled to a court-awarded perpetual guarantee of a competitive preferance over

non-Indian competitors.

The Attorney General has indicated that that result is wrong and we strongly support that aspect of the State's position.

Since my time, this morning, is brief, I must necessarily rely on the briefs that I have submitted, the salmon-colored opening brief and the yellow reply which discussed not only the substantive points, the historical points, questions of collateral treaties, but also some of the procedural obstacles that the United States and the tribes have attempted to erect in order to prevent this Court from resolving what everyone conceives of as an extremely important -- legally, practically, emotionally, culturally, politically -- question that has been plaguing the Northwest and will continue to plague the Northwest unless it is definitively set to rest by this Court.

There are four major concepts that I would like to emphasize this morning, and they all grow out of the same flaw that the Federal Courts below have manifested in the results that they have reached. And the flaw is a failure to recognize and fully appreciate the significance of the fact that non-Indian commercial fishermen also have rights which a Federal Court of equity must respect here.

There has been no recognition, no appreciation and no implementation of those rights of the non-Indian commercial

fisherman.

The first point is that the treaties protect to the non-Indian commercial fisherman a right of access to this fishery as well as a protection of the Indian's right of access to the fishery. This was to be a non-exclusive fishery from which neither Indians nor non-Indians could be excluded by the other group.

And secondly --

QUESTION: Would it be your theory, Mr. Lacovara, that in that treaty the United States, as one party, was the surrogate for all other than Indians?

MR. LACOVARA: In the treaty, it was guaranteeing the rights, the continued fishing rights of the citizens of the territory, now the citizens of the State of Washington, and the treaty so says.

The language of Article III of the treaties secures the rights of Indians in common with the right of the citizens of the Territory.

I think nothing could be more clear from the text of the treaties, as well as from the history of the negotiations, that there was to be a bilateral commitment that treaty-Indians and non-treaty citizens would have continuing access to these fisheries.

QUESTION: Is it your submission, Mr. Lacovara, that Article III doesn't give to Indians any superior or

special rights whatsoever?

MR. LACOVARA: It gives them superior rights only to the extent that the Court in Winans, for example, has said the state cannot legitimize a complete exclusion of Indians from the fishery through the medium of private ownership of the lands. What the treaties were to guarantee to the Indians was a right of access that they would not otherwise have had in 1855.

QUESTION: It gives them sort of an implied easement over private property to get to these places, doesn't it?

MR. LACOVARA: Winans so held.

QUESTION: Which citizens would not have?

MR. LACOVARA: Which citizens would not have, that's right.

In Tulee, for example, the Court said Indians under the treaty are also immune from licensing regulations, also a protection that citizens would not have.

QUESTION: So you concede that Indians are given superior and different and other rights than citizens by Article III, don't you?

MR. LACOVARA: No. I think the point, Mr. Justice Stewart, is that the Indians have certain protections as against state abrogation or interference with those rights.

QUESTION: Which citizens don't have.

MR. LACOVARA: That is correct.

QUESTION: So, Indians do have superior rights and different rights.

MR. LACOVARA: As against the state.

Certainly the right that the Indians obtained under the treaty can be qualified by federal legislation.

The question, though, is whether or not the right of access which Indians are to be given is one that can be turned from a shield, if you will, against state interference into a sword which allows the Indians to demand that the state keep non-Indians from fishing side by side?

That, we submit, is exactly what these treaties were not intended to do and the documents that bear on this span only a few pages in the records and every one demonstrates that the Indians were being told that, with respect to off-reservation fishing, they could not interfere with the settlers' equal opportunity to fish.

QUESTION: At the very least, Article III makes clear that the right secured or reserved to the Indians is not an exclusive right.

MR. LACOVARA: Yes, sir.

And that is one of the linchpins of our submission, that what Judge Bolt has done in this case is fundamentally erroneous, because as the orders that he has subsequently entered have achieved, the Indians have successfully insisted that the non-treaty fishermen stay on the beach and watch them

from the shore while the Indians have, in effect, a court-decreed oligopoly, an exclusive preserve in trying to catch these fish for commercial purposes.

There is absolutely nothing in the treaties or the history of their negotiations to support that kind of exclusivity of the fishery.

QUESTION: I suppose you would say that the state might be able to cancel all commercial fishing for salmon for several years, but not Indians?

MR. LACOVARA: If it were acting for conservation purposes, it would have the power.

QUESTION: Say it is not.

MR. LACOVARA: I am not sure what other aspect of the police power the state would be relying on, just willy-nilly to cancel commercial salmon harvesting, unless it were to be the conservation power.

QUESTION: You still don't meet my question.

Assume it could; it couldn't do it with the Indians under the treaty?

MR. LACOVARA: That is correct.

But if the state has the power to eliminate non-commercial fishing for non-conservation purposes, the Court's decisions in Winans, Tulee and Puyallup indicate the state cannot do that for Indians.

QUESTION: There is another one, Mr. Lacovara, down

in Virginia. They stopped fishing because of the poison, remember?

MR. LACOVARA: I would assume that the state would have that power, even as respects Indians, but that extraordinary --

QUESTION: At the same level as what you said before.

MR. LACOVARA: Yes, that kind of extraordinary development, I think, would give rise to police power, in the same sense that the Court held that there was an implied police power even as respects Indians under these treaties.

The second point is that when conservation becomes necessary that conservation can lawfully be imposed. Regulations of that sort can lawfully be imposed upon the treaty Indians, as long as it is done without discrimination against them. But, by the same token, there is nothing in these treaties or in this Court's earlier cases to indicate that conservation regulations must be skewed so that they, in effect, discriminate against the non-Indians. That, however, is the effect of the preferential rights that the District Court tolerated, on one theory or another, which two very dubious circuit judges this last time around have, in effect, allowed.

QUESTION: Mr. Lacovar, isn't it inevitable that there is some discrimination against non-Indians? For example, the Indians don't have to get licenses. I mean isn't that part of -- something we start from. And the

question is how much discrimination, not whether there is any at all.

MR. LACOVAR: Mr. Justice Stevens, it is not so much how much discrimination, but what type that is at issue here.

QUESTION: But don't you agree that there is sort of a given that we start with? There is some discrimination in favor of the Indians by virtue of the treaties.

MR. LACOVAR: Yes. There is no doubt, as to some aspects of treaty fishing, there are special benefits that were secured. What we are coming to, though, is whether or not --

QUESTION: There also is some discrimination against the Indians.

MR. LACOVAR: I think not.

QUESTION: Well, they took their land.

MR. LACOVAR: They didn't take it, Mr. Justice. If you read the full text of the treaties, you will find that in addition to these guarantees these tribes were paid what, in contemporary terms, would be considered many millions of dollars to extinguish claims of occupancy. And they were guaranteed and were provided with schools, doctors, blacksmiths, carpenters and farmers to teach them other trades other than fishing.

So, I think it would not be accurate to view these

treaties, in 1979, as a one-sided adhesion contract which the Indians had no choice about.

QUESTION: I don't think you need to say that it discriminated on either side.

MR. LACOVAR: Well, what we are trying to do, Mr. Justice, is to eliminate discrimination which is inherent, and this is my third point, in a 50-50 allocation.

The District Courts below did not find that there was discrimination against Indian fishing in the Puyallup sense. The only reference to discrimination in Judge Bolt's findings was the question-begging assertion that there was discrimination against Indians because the state conservation regulations did not actually permit them to catch 50% of the harvest.

That's the issue before us, whether or not the Indians are entitled to that. Our submission is that there is not anything of that sort happening here. The Attorney General referred, for example, to the Frazier River run of salmon, for which it is impossible to conceive of any kind of discrimination, because the Indians have and have always had contemporaneous access to those runs alongside the non-Indian fisherman.

So, it is impossible to talk about the state or non-Indian fishermen preempting the run and discriminating against Indian rights.

QUESTION: Mr. Lacovar, let's consider for a moment these upstream accustomed places and stations. Article III gives the Indians the right of taking fish there. Would you concede that if the State of Washington or any other government should, through its licensing and supervision of fishing, adopt such rules and regulations that would assure that there were no fish there, that that would be a violation of the treaty?

MR. LACOVAR: Mr. Justice, I think the key inquiry should be as it was in Puyallup II, whether or not the rights of those Indians, or the successors --

QUESTION: The right to take fish.

MR. LACOVAR: The right to take fish at usual and accustomed grounds, not necessarily each specific grounds. And the findings by the District Court in this case establish --

QUESTION: If you add up each specific ground, you come to all of them.

MR. LACOVAR: Yes, but the judge also found that at treaty time there were ebbs and flows of runs and it was common for the Indians to follow the fish and to abandon, temporarily if necessary, perhaps permanently, a usual and accustomed site and go elsewhere if that's where the fish were.

QUESTION: Well, that doesn't quite answer my question.

MR. LACOVAR: Well, what I am suggesting is that there is no discrimination against Indians --

QUESTION: No, no, I am talking about if there is a treaty violation if the State of Washington so operates its conservation rules and regulations as to guarantee that there are no fish at these upstream stations and grounds.

MR. LACOVAR: My answer would be that there is no treaty violation unless --

QUESTION: Because there is a right of taking fish there guaranteed to the Indians by Article III.

MR. LACOVARA: To the extent that fish are there, and there was no guarantee --

QUESTION: Doesn't that imply some kind of duty to allocate or to see to it that there are some fish there?

MR. LACOVARA: I don't think it does, Mr. Justice, but we are a long way from that. There is nothing in the treaties that guaranteed that the fish would continue to migrate all the way upstream. I think we could go as far as saying that there might be discrimination in the conservation system if the state imposed a structure that prevented fish from reaching any of the usual and accustomed grounds of treaty tribes. But I don't think there is anything in the treaty that guarantees that a run of some size or other must reach every site that a tribe fished at in 1855.

QUESTION: If there were, the District Court certainly

violated the treaty.

MR. LACOVARA: Yes, I think that is implicit in the 50-50 allocation, because this system itself creates the prospect, the legal entitlement, as the judge has ruled it, to have the Makahs take 50% of everything coming through the Strait of Juan de Fuca and the non-Indians take the other half.

The 50-50 allocation is utterly unresponsive to the problems here, and if anything is a gratuitous limitation. It has a superficial appeal, but it is not based on the treaties or in practice.

QUESTION: Do you think that there can be implied from the rights given to the Indians by Article III of these treaties any duty whatsoever, of any allocation whatsoever of fish to the Indians?

MR. LACOVARA: In the absence of discrimination, I would say no, discrimination in the Puyallup sense.

The treaties, I think it is important to emphasize, Mr. Justice, were designed to secure access to fishing sites, without a guarantee how productive --

QUESTION: Access to fishing sites, not access to a bathtub where you can fish all day and not catch anything.

MR. LACOVARA: That's correct, but as every fisherman knows, and as the Indians knew, there was no guarantee that there would be fish flowing by those scenes. The findings

say that because of floods, changes in the course of tributaries, many of the sites were no longer productive even in treaty time. So it should have been understood that at particular sites there might not be much fishing.

But that is -- with all due respect -- a very artificial assumption here. The state has been engaged, for years has been engaged in programs to plant hatchery fish in streams that would otherwise not receive an adequate flow of fish because of the commercial harvesting by Indians and non-Indians earlier on in the migratory flow.

So, it is also important to emphasize that the District Court hasn't found that even a single such site of the type that you are describing has been completely pre-empted. We are a long way, at this stage of this case, from a finding similar to the one in Puyallup.

My final point is going to be, Mr. Justice White, that the non-treaty fishermen are entitled to their own day in court and that there are no procedural obstacles to your hearing our claims on the merits, but my time has expired and I will have to rest on my briefs.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Lacovara.

Mr. Morisset.

ORAL ARGUMENT OF MASON D. MORISSET, ESQ.,

ON BEHALF OF RESPONDENT INDIAN TRIBES

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

I am Mason Morisset, appearing for the Respondent Indian tribes in this case.

It will come as no shock to you that I disagree with Attorney General Gorton, as to virtually everything he said concerning the facts and the nature of this case, the nature of the dispute.

The District Judge, in a related case, U.S. v. Oregon, Judge Belloni once said, when these arguments were made to him, "These arguments might make some sense" -- I am paraphrasing -- "if we ignore all history, law, facts of the case and the behavior of the States of Oregon and Washington."

We cannot ignore the facts of this case. We cannot ignore that the District Court found that the State of Washington had preempted Indian fishing. And, as the Ninth Circuit put it in its original decision -- it is now three years old -- "The State of Washington has 'rendered the treaty guarantee nugatory.'"

To remember what the state has done here is important. The State began in 1890 by outlawing salmon fishing during certain times of the year. They continued in 1915 to

outlaw fishing by gaffing and spearing, traditional Indian methods. In 1897, the Legislature started closing fresh water fishing to commercial salmon fishing on an ad hoc basis, and that was continuous from 1900 on. That had the effect of precluding much Indian fishing. By 1940, we find the salmon preserves which, if you will examine the map in the Joint Appendix at page 348, effectively closed most of the Indian areas.

QUESTION: But the essential question is what, under the treaty, the state had the right to do and what it didn't; is it not, Mr. Morisset?

MR. MORISSET: That's the essential question, yes. And it is clear, as the District Court found, in going through this litany of state actions, that the total effect of this was to preclude a treaty fishery, for all practical purposes.

You have to put together all of the things the state did. I am only up to 1915 and we've got quite a few things. If you continue with the pattern, you will find no fishing --

QUESTION: It is conceivable that everything it did before 1915 was barred by the treaty, and nonetheless the District Court order might not be in accordance with the treaty; is it not?

MR. MORISSET: That's certainly conceivable, but the judge had to decide or have some basis for his finding that there, in fact, had been a preemption of the treaty rights. And this is what he found, that all these actions had the

cumulative effect of ending any treaty right whatsoever.

Given that, he had to move on --

QUESTION: Isn't your opponent correct, though, the first thing we have to decide is what is the treaty right? What does it mean "in common with"?

And I am just wondering, how do you deal with the argument that, say, at one point in a river the Makahs get 50% and the non-Indians get 50%, and they take it all? What happens to another Indian tribe upstream or downstream that wants its 50%? What's the answer to that problem?

MR. MORISSET: First of all, as a practical matter, that virtually can't happen.

QUESTION: Assume it could happen, under the District Court findings.

MR. MORISSET: The answer is very simple. If the State of Washington does not preempt the fishery -- the Indian share of the fishery -- and the Makahs catch all of the Indian opportunity, that ends the State's obligation vis-a-vis the Indians. It becomes an intertribal problem for --

QUESTION: Doesn't another Indian tribe have a legitimate complaint in that situation?

MR. MORISSET: Undoubtedly against the Makahs, not against the State of Washington.

QUESTION: They have a right under the treaty, if the District judge is correct. Not just a right against the

other tribes, they have a right against the United States, the other signatory to the treaty.

MR. MORISSET: That's right, they probably do. That's not this case. No one has sued the United States --

QUESTION: Well, it does test the validity, as my brother Stevens suggests. It tests the validity of the district judge's construction of the treaty.

MR. MORISSET: Well, it may test it, vis-a-vis an action against the United States or tribes, but it simply proves the point that the State of Washington has met its obligation, if it has not preempted the Indians' share.

QUESTION: But it has permitted a certain group of fishermen to take all the fish. They just happen to be Indians. But the state has failed to prevent exhaustion of the run.

MR. MORISSET: The District Court found that the State of Washington had prevented any tribes anywhere, basically, from taking its share of the catch.

QUESTION: Well, suppose it permits one tribe to take all the Indian share. Isn't it in just as much trouble?

MR. MORISSET: No, it isn't, under the decision. It is not required to make allocations between the tribes.

QUESTION: I know it would be consistent with the decree, but how about under the treaty? How about all the other treaties?

MR. MORISSET: No. I don't believe that the State

of Washington has an obligation under the treaty to allocate fish among the tribes. That's a matter for them, between themselves, or for them and the United States Government. The State of Washington doesn't have that obligation.

QUESTION: It's in trouble if it fails to provide the Indians' share of the fish, but it is not in any trouble if it deprives all but one tribe of the fish.

MR. MORISSET: No. You are misstating what it is in trouble in what it does.

It is in trouble if it allows a fishery to be pre-empted by the non-union fishermen, which is what it has done in this case.

QUESTION: But it can be preempted by one tribe without the State being in trouble?

MR. MORISSET: That's right.

Of course, we have a major battle over that between the tribes and the United States Government, but that's not the state's obligation under the treaty.

QUESTION: Mr. Morisset, putting the same problem in a little different framework, let's put ourselves back in 1854 and '55 and say there are three or four tribes on the same river.

Is it reasonable to assume that in using the word "common" in four or five successive treaties, affecting the same run of fish, that Governor Stevens intended to give 50%

of that run to four or five different groups of Indians?

MR. MORISSET: Well, he intended to allow the signatories to any one treaty -- and there are five major ones and a sixth that has a peripheral interest here -- to receive, the District Court found, 50% of the harvestable share, or an opportunity to catch 50% of the harvestable share of fish reaching their usual and accustomed places.

They did not guarantee that any fish would reach there.

QUESTION: But is that a reasonable interpretation of the situation at that time, if there were more than one tribe on one river affected by two successive treaties?

MR. MORISSET: Well, maybe I don't understand your question, Mr. Justice Stevens, but certainly the Indians and Governor Stevens knew that there were a lot of Indians from different tribes and bands that would all be fishing together. He knew there would be other tribes and bands that would be intercepting fish before they got there. They simply were talking about what was going to be left when it got to their place, understanding that there would probably be preemption by other Indian tribes before it got there, or some fishing on those runs.

We are not talking about that kind of a situation. We are talking about a situation in which the state, through this long history of legislative action, has allowed the non-

treaty fishermen to essentially preempt the entire fishery.

We are not talking about a situation where one tribe or the other may catch most of the tribal share before it gets to a particular river.

QUESTION: Well, the state is obligated, then, I gather, from your point of view, to make sure that some fish reach Indian fishing grounds?

MR. MORISSET: No, not in the sense that they must guarantee freedom from Acts of God and freedom from interceptions by other Indian tribes. This is not an affirmative duty to guarantee that fish get back to the river or the marine areas which this side of the table sometimes claims.

QUESTION: But it has a duty not to -- If the reason is that non-Indian fishermen have taken it, the state is in trouble?

MR. MORISSET: That's right, because of the history of how they have done it.

I got up to the salmon preserve area and I could have gone on for another eighteen points about how the entire regulatory scheme has essentially preempted the fishery to a particular segment of the population, namely, the high-technology, motorized vessels. And that is what the state has done through a pattern of laws and regulations that the court found to be wrong.

QUESTION: I think the state concedes that it has a

duty to provide what it calls an "equal opportunity fishery." And if, in fact, these present laws don't, I think it concedes that they should be modified because of that duty. That was my understanding of its submission.

MR. MORISSET: That's correct, although I am not sure how they are using the phrase "equal opportunity." They seem to be using it in the old hackneyed version, the same as everyone else, which I thought we had gone through since Winans, on to Puyallup and Antoine and these various other cases. And if they are using it in that sense, that in effect is no treaty right at all. We are simply back to the beginning point again. If that's what the Attorney General means, I disagree with that.

I would like to move on to discuss the question of what "in common with" means, and once again to disagree with how the question was put.

We don't view this as a question of what "in common with' means by itself. This is, among other things, a contract and it must be construed as a whole to all its parts and certainly the entire phrase, "the right of taking fish," which is the first right; "at certain places," which is the second right; as limited by or explained by the phrase "in common with."

And we think it is a hopeless quagmire to focus solely on "in common with," although we played the game in our

briefs, too, and got into all sorts of esoteric British Treaty cases, and so on, none of which, I think, anyone can understand.

QUESTION: And certainly Indians didn't know anything about in 1855.

MR. MORISSET: That's right. And I think someone made the point that we probably are viewing Secretary Gibbs, who was a lawyer, as having a much more erudite education than he probably had. Maybe he did know about these things. Those are helpful. But I think the important thing for us to get across is that we must construe the treaty as a whole. It was designed to guarantee that the Indians would continue to make a good livelihood fishing. The record is full of evidence and there are findings of fact which support that.

QUESTION: Let's say one agreed with you. Didn't then Judge Bolt err in his first decision by thinking almost that he had no discretion, that "in common with" meant 50%?

MR. MORISSET: No, I don't think he erred. I think that it is a little dangerous to try to pigeonhole this whole process that the state has, and try to say this was purely a legal decision or purely an equitable decision. I think it was a mixture and there are elements of both. I think he exercised more equity in deciding whether or not it was necessary to have an allocation at all, in which he looked at all the facts. Once he decided that, he decided more or less as a matter of law that's what it was.

QUESTION: That "in common with" meant 50%, and then the Court of Appeals in affirming it said, well, it is a tenancy in common, and that means 50%.

MR. MORISSET: That's one of the rationales they used.

I think all of the facts in the case support that finding, that there was a substantial amount of understanding on the Indian side of equality. I don't know if that meant 50%, but it certainly meant no restrictions on either side.

QUESTION: Do you agree with the Attorney General's reading of your brief that non-treaty Indians are like the non-Indian fishermen?

MR. MORISSET: I don't ever agree with Mr. Gorton too much. He doesn't quite understand --

QUESTION: Well, would this be too much, or not?

MR. MORISSET: He doesn't quite understand Federal Indian Law. One reason we have the entire Indian Claims Commission is because of the problem that treaties were not signed with many Indians, and the courts have generally held that aboriginal claims, of what he was really talking about, have been extinguished either by conquest or political action of the United States. And those people don't have rights because there has been essentially a taking of them. And they have been paid for them. And that's one reason they don't have rights. It doesn't mean they didn't have them at some point.

QUESTION: Well, are there some non-treaty Indians in Washington?

MR. MORISSET: There are some in the Southwestern part of the state.

QUESTION: Do they have any fishing --

MR. MORISSET: They are citizens, as far as --

QUESTION: So, you would say if there had been a treaty with only one tribe that had this fishing allocation, Judge Bolt would still have been right in giving 50% to that one tribe, and none of the other tribes would have any fishing rights?

MR. MORISSET: At its places only, and none of the other tribes would have rights. They would have had a claim for a taking, which is what all the pages and pages of Claims Commission cases are about, as well as the land claims. But there also are claims for taking of aboriginal fishing rights.

Now, finally, I would like to point out the "said Indians" problem which several Justices -- Mr. Justice Stewart is concerned about, and ask you to read, if you get a chance, the entire Treaty of Point Elliott that's in our big red brief.

You will see that "said Indians" and "said tribes and bands" are used interchangeably.

Article IX, which is the Deliver Up provision, jumps all over the place between "said tribes and bands" and "said Indians."

Article II says, "We reserve as reservation for said tribes and bands the following land." That's a reservation for the said tribes and bands.

Article V says, "to help the said Indians remove there, we are going to pay them" so much money.

And if you go on through the treaty, contrary to what the Attorney General says, you will see "said tribes and bands" and "said Indians" being used both ways. And I think the only fair discussion of what that means is that they were interchangeable phrases. "Said Indians" meant the "tribes and bands" and "tribes and bands" meant the "said Indians." There is really no other way to get at what that phrase meant.

My time has expired.

QUESTION: You will, of course, say that Article III was a reservation, although, by its terms, unlike Article II, for example, it certainly is not; is it? It doesn't say, "It is hereby reserved," but "is hereby secured," which could lead to the argument that it wasn't a reservation, that there was a conveyance of it and then an agreement that, none the less, these rights would be secured.

MR. MORISSET: Article II of the Point Elliott Treaty reserves certain land --

QUESTION: It is, by its terms, a reservation. Article III is not, by its terms, a reservation.

MR. MORISSET: Article III doesn't have -- I am sorry,

it's a different article.

Article V in this treaty says "secured to said Indians."

QUESTION: I think most of them do, if not all.

MR. MORISSET: I think you are right.

The answer, I think, again, there -- that's use of terms interchangeably -- and certainly this Court has always said before -- I see no good reason to change it -- that it was a reservation of rights that the Indians had before the treaty.

MR. CHIEF JUSTICE BURGER: Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.

ON BEHALF OF RESPONDENT UNITED STATES

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

Perhaps, I ought to begin by trying to identify the central issue as we see it.

This is not unlike previous cases before this Court, a case about whether the Indian right to fish can be regulated by state law. That point is conceded at the outset.

QUESTION: Now, it is conceded which way?

MR. CLAIBORNE: That the state may regulate the Indian fishing rights, provided --

QUESTION: It may and it may not, both. It can't require licenses, isn't that right?

MR. CLAIBORNE: It may regulate it in the interest of conservation when that is necessary.

QUESTION: But certain things it may not apply. Certain of its conservation laws it may not apply to the Indians; isn't that right?

MR. CLAIBORNE: The question, Mr. Justice Stewart, is yes, which it can and which it cannot.

QUESTION: But in any event, it is all conceded one way or the other. That's your point?

MR. CLAIBORNE: There is no -- I mean only to say this. There is no claim of immunity from state conservation laws. That is not the issue in the case. The issue in the case is how those conservation or allocation laws ought to be accommodated to respect the treaty right. And that leads us to look to the treaty right not as to whether it immunizes the Indian fishing right from all state regulation, but what the character of it is.

Nor is the case, as the State now seeks to make it, the question of whether the Indians can today so effectively compete that they no longer need the protection which the treaties afford them.

If the treaties afford them protection, they are entitled to it, whether or not they presently need it or will for some years to come.

We turn then to the character of the right which is

secured by these treaties. And the issue here seems to be whether it is a mere right of access -- a sort of limited go off the reservation and go fishing if there are any fish to find there -- a right which it was quite unnecessary to provide for. Even then, there was no thought that the Indians were confined to the reservation -- or whether, rather, the right secured by these treaties is a property right, a share in the fishery.

QUESTION: Mr. Claiborne, is it correct that it would have been totally valuless? Wasn't there an easement problem? I mean isn't it possible their usual and accustomed banks and streams could have all been bought up by private owners and without this right they wouldn't have had access?

MR. CLAIBORNE: Mr. Justice Stevens, in that respect alone, that is, that the peculiarity of the right of access granted by the treaty is said to be, as Winans held, that it includes a right to cross private property, a right not otherwise available to citizens.

QUESTION: It could be quite vital, could it not? It is not just a matter of wandering around in open land.

MR. CLAIBORNE: It could, but when we are speaking of fishing in Puget Sound that is, of course, a meaningless aspect of the right. When we are talking about the Columbia River, as was the case in Winans, the right of access to the river banks is important because that river could not be fished

from the water. They could only fish from the bank.

But with respect to the treaties governing Puget Sound, that aspect, that easement, would be for the most part of no value whatever.

QUESTION: But the treaty, itself, then spells out the right to build structures, and so forth, so it does seem to be thinking, at least in part, about access.

MR. CLAIBORNE: The treaties are all of a pattern, Mr. Justice Stewart. No doubt, some of them had in mind the situation on the Columbia, as did the treaty with the Yakimas and some had in mind the situation in Puget Sound. But the language was not varied in accordance with the circumstances.

QUESTION: I am referring to the "erecting temporary houses" language, which does seem to be thinking in terms of access.

MR. CLAIBORNE: Mr. Justice Stevens, I suggest that that language is of not much value in Puget Sound. It is of some value along river banks.

QUESTION: I understand, but at least it was considered valuable some place.

MR. CLAIBORNE: Indeed.

QUESTION: When you talk about that not being of much value, if the State's map at page 348, of Areas 1 and 2 along the Straits of San Juan de Fuca, means anything, there is a very substantial stretch of land where access rights to

the strait would mean something, I would think.

MR. CLAIBORNE: But, Mr. Justice Stevens, those banks, those areas are fished by boat, not from the bank, and as long as there is a place where there is a public access to the strait it matters not whether it's adjacent to the usual and accustomed fishing ground.

QUESTION: That's strictly boat fishing in the strait?

MR. CLAIBORNE: I think that's so.

Now, as to which it is, whether it is a mere right of access or whether it's a share of the fishery --

QUESTION: It is at least a right of access. Winans holds that. It is not an alternative. It is this or that. Because it clearly and concededly is a right of access.

MR. CLAIBORNE: Yes. Mr. Justice Stewart, I meant to suggest that it is more. It is a share in the fishery. It is not a mere right of access.

And as to resolving that question, we look first to the language of the treaty itself. And as has been sufficiently pointed out, the language of the treaty does not give a right of access to water. It gives a right of taking fish. That is at least suggested. We are talking about a right in a fishery, not a means of getting there.

The other word which is, in my submission, significant, on the wording of the treaty itself, is the word "secured."

It has been suggested that that may suggest that there was a grant from the United States, rather than a reservation by the Indians.

I had viewed that question as foreclosed by the decisions of this Court, beginning in Winans, where that was very expressly held, down to the most recent in Puyallup III, in which that same view of the Article III language was taken, that it was a reservation of former exclusive rights which the Indians enjoyed, which the tribes enjoyed, not a grant by the United States of a fishing right to them.

But turning to the word "secured," the significance of that language, it seems to us, is that it promises the protection, the security of the United States Government, to assure that the right of taking fish will not in future be interfered with. Not an insignificant promise.

QUESTION: Do you sort of construe that as a guarantee of the right of catching fish, not just of the right of fishing?

MR. CLAIBORNE: I go by stages.

QUESTION: I must say, that's a right I would have greatly enjoyed many times, but then I am not an Indian.

MR. CLAIBORNE: We say it's a guarantee against encroachments or interferences, with the right to fish in particularized locations. Encroachments can come in many sizes. The most obvious is that which the Court confronted in Winans, that is the ousting of the Indians by the implacement

of a fish wheel, or the building of a fence which prevents their access to the site.

But it can come in other ways. One need only think of a dam created downstream which prevented the fish from reaching the usual Indian fishing place. That, it seems to us, is the sort of encroachment also which the United States was securing the Indian right to fish against.

And the same is true with respect to state regulations which have precisely that effect. One such regulation was the one that this Court confronted in Puyallup II, in which albeit the Indians, like everyone else, were free to catch steelhead by hook and line downstream, they were prevented from doing it in their usual and accustomed way at their usual and accustomed place by nets upstream. And the court said this preventing the fish from reaching them in harvestable numbers is an interference with their treaty right.

That is precisely what this case is about.

The fact that the treaty language itself suggests --

QUESTION: Mr. Solicitor General, the accustomed fishing ground for these tribes, I take it from the Attorney General's statement, is the entire Puget Sound?

MR. CLAIBORNE: If one puts together the separate accustomed fishing grounds --

QUESTION: The state doesn't suggest that any tribe is precluded from fishing anywhere in Puget sound; do you?

MR. CLAIBORNE: The state may not suggest it, but I suggest --

QUESTION: Well, what about the treaty? Do you think the treaty gives any particular tribe the right to fish anywhere in Puget Sound?

MR. CLAIBORNE: No.

QUESTION: Why doesn't it?

MR. CLAIBORNE: Because the individual treaties give individual tribes particularized locations, and beyond that area they are not protected by the treaty.

QUESTION: Are they protected in the treaty -- Does the treaty give them a right that you speak of to take fish in Puget Sound?

MR. CLAIBORNE: It gives some tribes a protected right to fish in some parts of Puget Sound. It gives other tribes rights elsewhere, and so on.

QUESTION: I suppose, then, you could think of a tribe that if it were found fishing in the straits, that some of them might have the right to do that and some might not have -- a treaty right to do it.

MR. CLAIBORNE: Yes. And, indeed, the District Judge, very particularly identifified the usual and accustomed fishing grounds of each of the tribes, not only those conferred by each treaty, but each of the tribes covered by the five treaties. And they overlap. They don't all cover the

entire area by any means.

The tribes, such as the Nesquale and the Puyallup at the bottom of Puget Sound, have no rights in the strait, nor even in the upper part of the sound.

It may happen, and perhaps the District Judge was over-generous in defining usual and accustomed places, that when you add all of these rights together you cover the entire area. But the state makes no objection to that. The reason they do not is that they want to be able to say these Indians can compete quite adequately with us, in effect, everywhere.

QUESTION: So, you would say that the state would still be violating the treaty if it said, "The only place we are going to allow fishing is out here in this particular four-mile square area of Puget Sound and we are going to allow six Indians and six white commercial fishermen."

MR. CLAIBORNE: Yes, Mr. Justice White, I would say that.

QUESTION: And each of them can take as many as they want, as long as they leave enough for conservation.

MR. CLAIBORNE: I would say that the tribes of the lower sound had been promised, had been secured, the right which they reserved and which is always there to fish in their rivers, at the mouths of their rivers and nearby.

QUESTION: The right to take fish?

MR. CLAIBORNE: The right to take fish. But in

Mr. Justice White's example, they would even be prevented from attempting to take fish, and that unless that were essential for conservation, which your example does not suggest, it would be a violation of the treaty.

QUESTION: Do you agree with counsel that the state would be in no trouble if it permitted one tribe to take all the fish?

MR. CLAIBORNE: Mr. Justice White, I think I have to differ with him on that point. It seems to me that there are two ways of looking at it. Of course, it is an accident of history that there were five treaties rather than one. It is simply the fact that Governor Stevens couldn't bring the Indians into one location at one time. But, nevertheless, we are faced with five different treaties in immediate sequence, but still one before the other.

I think, perhaps, the proper way to look at it is to say that the 50% share which we say is simply a limit on the Indian right, not the definition of the right. It is the consequence of the "in common with" language.

That 50% share applied only to so much of the run as in those days, after Indian fishing further out, reached that location. In that way, one confines the Makah at the head of the strait to a proportion that must allow a reasonable share to reach those at the end of the ladder, for instance the Nesquale.

Now, the District judge did not attempt to make those allocations and, as it happens, the Indian tribes of the area are in a cooperative spirit. They have formed a fisheries commission of their own, and they, themselves, police these allocation problems to the extent that they exist. And they exist to a very minor extent because the capability of any given tribe to catch the numbers of fish that would prejudice their neighbors is not yet, at least, serious.

It may also be that Governor Stevens over-promised and we must accommodate for that today. No one suggests that one should add 50% shares so as to leave non-Indians less than half of the total.

QUESTION: Maybe it is the District Court that over-promised.

MR. CLAIBORNE: Mr. Justice White, District Court merely said that the total Indian share ought not exceed 50%.

Now, if I may turn to the consequence of this being a reservation of a right, rather than a grant by the United States. It seems to me that helps us in determining what is really the next question. Assuming the Indians have a share in this fishery, what sort of share?

QUESTION: I understood you to say that you did not rely on the word "common" as creating the 50% figure, but rather that the right you described ultimately leads to an allocation of 50%. What is the justification for 50% under

your view of the treaty?

MR. CLAIBORNE: Mr. Justice Stevens, I obviously misspoke. I meant to say that the "in common with" language is precisely how we get 50% language. But in this sense, that what was promised to the tribes was the right to fish as they used to, basically without limits, for commercial and other purposes, so much as was necessary to satisfy their reasonable needs. But they were required to share the fisheries with non-Indians. And that, of course, is indicated by the words "in common."

We say it may be right, indeed, probably is right to read that "in common with" language as placing a 50% limit on the Indian share. They may satisfy their needs, but no more than 50%.

QUESTION: But that assumes that the Indians had 100% before the treaty.

MR. CLAIBORNE: And that is precisely what this Court explicitly said in its most recent decision in Puyallup. These former exclusive rights of the tribes must now be shared with non-Indians because the treaty -- they gave that much away.

QUESTION: Exclusive rights in all the waterways out to the three-mile limit?

MR. CLAIBORNE: I am only quoting this Court's decision in Puyallup, which of course involved the river, well

inland.

QUESTION: I don't remember that quote.

MR. CLAIBORNE: Mr. Justice Stevens, I believe it occurs on page 176 of the 433rd Volume of the United States Reports, 433 U.S. p. 176, Footnote 16, in referring to Article III, which is quoted. After the quotation of the treaty, the opinion goes on to say: "As to the treaty fishermen," this sentence -- the sentence securing 'in common with' -- "affects a reservation of a previously exclusive right."

That is, in our submission, the exactly accurate characterization. It is a reservation and it is a right which was previously exclusive to the tribes of the area.

They might have retained their exclusive right. They were persuaded to share it. When one looks at it from that starting point, it is not surprising that one may be entitled to conclude that they didn't give away at least more than half of the right which they previously enjoyed alone.

QUESTION: What did the tribes give up in the Treaty of Medicine Creek?

MR. CLAIBORNE: They gave up most of their land --

QUESTION: Was that the whole State of Washington?

MR. CLAIBORNE: It was all of the State of Washington west of the Cascade Mountains -- these particular tribes that we are concerned with in this case. They received some payment, but primarily and as Dr. Lane who, as an anthropologist,

wrote a report fully accepted by the District judge, accurately summarized those treaty negotiations, the Indians were talking not about the usual things, about farm implements or even about money. They kept on talking about their fish. That was their concern. It was well known to both Governor Stevens and Mr. Gibbs that they had to be satisfied that they would keep their fisheries. Governor Stevens said in so many words, "This paper secures your fish." That is the text on which we rely.

QUESTION: Mr. Claiborne, going back to that footnote, suppose there was no footnote in the opinion, the observation you read. Does that concept reflect anything more than the historical fact that before the white man came the Indians had exclusive possession, unless there were some Eskimos, or some other people around there? They had exclusive rights until others came along and began to compete with them, did they not?

MR. CLAIBORNE: Mr. Chief Justice, to some extent. The historical assumption must be qualified by the fact that there were, indeed, other people already who had come there. The Donation Act in 1850 had invited settlers to come into the Oregon Territory, which included all of Washington and much else.

QUESTION: But clearly it was once an exclusive right. Then you put it in another time frame, the date of the

treaty. That's another problem, though at one time it was an exclusive right.

MR. CLAIBORNE: Exactly so, Mr. Chief Justice.

But what is important is that the Government of the United States recognized that the Indian title, the Indian occupancy, was exclusive and ought to be ended by a treaty. It is not as though by gradual process the white man had pushed the Indian aside. It was a deliberate determination on the part of the United States to buy what was, for the purposes of the treaty, recognized to be an Indian claim of exclusive occupancy of both land and rivers, and of course the fish that migrate there.

Now, as I say, the Indians might have reserved their right there altogether, as indeed they did in Alaska, or as this Court found that they had in Alaska. Whether they reserved 90% of it, 60% of it, 10% of it, cannot invoke any questions of discrimination or equal protection or fairness. They were entitled to keep it all. They conceded the right of others to fish with them.

At worst, that ought to be viewed as conceding half of their previously exclusive fishery.

Certainly, we say, they did not buy a future in which they might be ousted or nearly ousted from their traditional fisheries simply because the white man, in greater numbers and with superior technology, would crowd out the Indian.

Now, it is perfectly true that, at the time, there was no knowledge of the future need for conservation restrictions. But what was anticipated, even then, or must have been, is first that the Indian might be fenced out of his fishing place because that had happened. White man had come and fenced out an Indian even before the treaties. And so the language which protects their fishing places through the easement.

QUESTION: What do you suppose Justice McKenna meant in his opinion for the Court in Winans, in that one sentence to which our attention has been called, kind of almost Biblical language, "And that there may be an adjustment, an accommodation of them" --"them" is the relative rights and obligations under the treaty -- "the Solicitor General concedes and points out the way."

Have you looked at the SG's brief in that case?

MR. CLAIBORNE: I have, Mr. Justice Stewart, and it gives me an occasion to correct an impression which has perhaps been left with the Court, I am sure inadvertently, by the Attorney General.

That is the Solicitor General was suggesting that they go fish elsewhere. Now, that is precisely what he was combating.

QUESTION: You say he was not doing that?

MR. CLAIBORNE: He was not doing that. In fact, he

devoted most of his brief to the proposition that the Indians had been promised a right to fish there, not elsewhere; whether they were other places was neither here nor there. And I quote language from page 16 of the Brief filed by the Solicitor General, in what was Number 180 of the October Term, 1904, "There was a general allegation in the answer," he says, "that there were fisheries at places where the title was still in the Government." But that suggestion was left vague and there was no proof on the subject.

In any event, the Indians have rights here or they have not. They cannot be shunted off to inferior places on the theory that it is a legitimate defense to say they will do well enough at other points.

QUESTION: This sentence has to mean something. You are telling us what it doesn't mean. What does it mean?

MR. CLAIBORNE: He did suggest -- and if I can turn to his precise suggestion -- There were four fish wheels in the case which monopolized the locations where the wheels were.

He says, "It certainly seems that four wheels in the space of a mile and a half are inordinate. If they ought to be maintained at all, there should be some restriction as to their number and method and daily hours of operation."

Restriction on the Winan Brothers in order to give the fish and the Indians a chance.

"Certainly the wheels should not be permitted to

create and maintain a monopoly until all the fish are gone. One at least of these wheels has been placed at a particular spot which was obviously a most advantageous place for the Indians to fish, because there was a great rock there from which their platform or staging projected, so that they could use their dipnets for the longest possible time without being driven back up the bank or bluff by rising water."

I skip a little.

And then, referring now to the Indians, "On the other hand, they cannot claim to have an exclusive right and enjoying their right in common with citizens and under the modified injunction in common with defendants, it may be just to restrict in reasonable ways their times and modes of access to the property and hours of fishing.

"It is not fair, under the present conditions, that they should enjoy, without restriction, their ancient right of camping and curing in temporary houses on the defendant's property.

"If it is unfair, a decree can indicate the proper limitation. It may be that there ought to be some composition of that right or some arrangement by the defendants or the United States."

That's as far as the suggestion goes.

But it clearly is a suggestion that fishing at that place ought to be in some manner divided in terms of hours

for the Indians to fish, hours for the wheels to operate.

Now, we say that that is the most obvious abuse, that involved in Winans. It is equally impermissible to prevent, not the Indians from reaching the fishing places, but the fish from reaching them, which empties the right to fish at those locations of any substance. And that is what the structure of the regulations which have been annulled in this case accomplished, to prevent a fair or equal share of the fish which through this funnel of the strait and then the sound eventually reach the majority of the fishing sites, the traditional sites, which are are in the sound at the mouths of the rivers.

To allow the fishery to be fished out before the fish get to the places is as much a violation of the treaty as to prevent the Indians from reaching it at all.

I leave it there.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General, you have three minutes left.

REBUTTAL ORAL ARGUMENT OF SLADE GORTON, ESQ.,
ON BEHALF OF THE PETITIONER STATE OF WASHINGTON

MR. GORTON: Mr. Justice Stewart, Mr. Claiborne in reading from the Solicitor General's instructions, said that he skipped a little bit. Here's what he skipped:

"In any case, it is true that if they can fish to advantage elsewhere than at the particular points where the

wheels are, they should be allowed to fish without undue restriction up and down the river and above and below the wheels throughout the entire waterfront."

That's exactly what my point to you was, as you asked these questions about the empty right, the right to fish in the bathtub, beforehand. They also answered that question as the United States has always carried on its own activities. When the United States builds or licenses a dam, Bonneville or otherwise, it destroys those usual and accustomed places and makes them bathtubs and gives them places elsewhere to make up for them.

My example of --

QUESTION: Is that generally done by negotiation and agreement?

MR. GORTON: I can't answer that question, specifically, but what I am saying is that that's exactly what the State proposes to do in managing the fishery properly.

Of course, if we must let those fish get all the way up to the source of the river, so that a hundred fish will get back to a usual and accustomed station and waste ten thousand fish in other runs, we should be permitted to say to the Indians, "If we give you a better right elsewhere in the marine waters and you have the capabilities of exercising your right better there, that is appropriate management." That's exactly what the United States does.

QUESTION: Maybe you would have the right to negotiate and agree to that and maybe you wouldn't have the right to do it unilaterally.

MR. GORTON: In any event, the thrust of my argument is that in Winans that's what you said, by asking them to follow the Solicitor General, could be done. It's what happens when dams are done.

You are correct, if we can't do that, if we must return those hundred fish to the head waters, then there must be an allocation.

QUESTION: Mr. Claiborne's concluding point was, if I understood him, that the Winans right of Indian access to these usual and accustomed spots is one part of the Article III guarantee. And another part of it is that there will be fish there when the Indians get there. It is sort of the freedom of the fish to get there.

If that's true, then that must imply some duty of allocation.

MR. GORTON: It clearly does. Or the Indians can be given an at least equally advantageous place. That's what the Solicitor General suggested in 1905. It's what the United States did when it built the dams and it's what an equal opportunity fishery, properly administered, will actually do.

QUESTION: But it's not what the Solicitor General says today.

MR. GORTON: It certainly is not.

QUESTION: Well, we are bound by what he says today, aren't we?

MR. GORTON: Mr. Justice Stevens, your Footnote 16 was correctly read. Remember, however, that every previous case dealt with a river fishery, where perhaps ownership of the bed or river might be included, and that in none of those earlier cases was that characterization of a reservation, versus being secured, remotely necessary to the decision of the case. They were all correctly stated.

I believe that conceptually there is no question but that the non-Indian citizens of the Territory of Washington had the right to fish in Puget Sound before the treaty.

QUESTION: Mr. Gorton, may I ask one last question.

Under your version of the treaty, your understanding of the treaty, assume there are, say, 6,000 Indians and 600,000 white people that want to fish on the river. Is it your view that they are entitled to one-thousandth of the fish?

MR. GORTON: No.

QUESTION: Say you win on the 50% claim, what do they end up with when we get all through with the whole thing?

MR. GORTON: They are entitled to an equal opportunity fishery, and whether or not they would be given an equal opportunity --

QUESTION: Well, that would be 10,000 --

MR. GORTON: No, it would not, I don't think.

Whether they have an equal opportunity fishery involves the consideration of many questions. In Puyallup II you listed some of those questions. The number of nets, the number of fishermen, is one thing. More Indians fish than non-Indians, so purely per capita would not necessarily recognize an equal opportunity fish for Indians. It might be one factor which was considered, but it would be only one factor among many.

I tried to point out that if the result of this Court's decision right now is an equal opportunity fishery, the Indian share will be infinitely larger than the non-Indian share.

QUESTION: That's because you've limited the number of non-Indian licenses. Supposing you took off the limit on the number of non-Indian licenses.

MR. GORTON: That might very well at some point bring us to a violation of the treaty because we are pre-empting the Indian fishery, as we were in Puyallup II.

We cannot make it an empty right. We are not required to allocate 50%-plus or any fixed number --

QUESTION: Or any other percentage.

MR. GORTON: -- or any other fixed number which is just set in concrete from now until the end of time.

QUESTION: When you say you cannot make it an empty right, that does imply a duty at some point to assure the presence of fish, by allocation or otherwise, or limitation.

MR. GORTON: Yes, or assure their presence where the fish are and where they can effectively compete.

Thank you.

QUESTION: Mr. Attorney General, you read, and I take it you were reading from your own brief or the quote from the 1904 Solicitor General's brief.

MR. GORTON: The Solicitor General's brief.

QUESTION: What page, so we don't have to go back to the original?

MR. GORTON: The bottom of page 85 and the top of page 86 of our initial brief, and it was from that quote that Mr. Claiborne was reading too, but he skipped the lines which I just read to you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:42 o'clock, a.m., the case was submitted.