

Interview: George Dysart

ASSITANT REGIONAL SOLICITOR George D. Dysart. Mr. Dysart has been associated with Indian fishing since 1961, and with the Warm Springs case since it was filed in 1968. The interview was conducted on the same day Judge Robert Belloni issued a restraining order, shortening the fishing season of lower Columbia (non-Indian) commercial gillnetters. The first question deals with that issue:

Photo by Olney Patt, Jr.

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Q. Do you foresee any legal action by non-Indian Columbia River gillnetters in response to Judge Belloni's ruling shortening their fishing season?

A. There was some indication at the state regulatory hearing, that came before Judge Belloni's decision, that the non-Indian fishermen might go in to court if their season were curtailed, but I don't know if that will develop or not. They were present in Judge Belloni's court and they argued against the curtailment, but he issued his order notwithstanding that. I don't foresee any successful legal action, but they may feel that they have to at least try.

Q. If they do take legal action, will it affect the Indian fishery in any way?

A. I don't see how it can, other than if they somehow are able to keep fishing, that would presumably mean fewer fish reaching the Indian area and that would of course affect it. But if by 'affecting' you mean 'would it stop the Indian fishery' or put a legal barrier to it, I don't see any way that would happen.

Q. Could you explain the 50 per cent allocation formula of Judge George Boldt?

A. Okay, this has been, in my judgement, one of the most misunderstood parts of his whole decision. A lot of people seem to think that this means he said that the Indians and the non-Indians are each entitled to 50 per cent of the fish, and you take the total catch and divide it by two, and somehow have to guarantee that each side is going to get that 50 per cent. That is not what is meant by the rulings

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of either Judge Boldt or Judge Belloni. What they say is that the treaty requires that each side - that is the treaty Indians on the one side and the non-Indian fishermen on the other - are to have an opportunity to take up to 50 per cent, and any state regulatory program must be such as to not interfere with that opportunity. Now whether they actually take that amount of fish depends on a lot of factors, including such factors as how many Indian fishermen there are as compared to non-Indian fishermen. I would expect that, in many cases, the non-Indian will continue to take more fish, simply because there are more of them. But, the key to the whole thing is whether the Indians are accorded an opportunity by having a certain amount of fish available in their fishing area: the opportunity to take up to 50 per cent. This 50 per cent is of the harvestable number of the fish that would reach the Indian fishing places. There has been some confusion here, of people saying that it applies to the total catch in the whole area. On the Columbia, for example, a lot of the fish don't go to the upper river. They turn off at the Willamette, or the Cowlitz, or one of the lower streams. At the present time, they only determined Indian fishing places are above Bonneville Dam. Indians claim fishing places below the dam, and there may come a time when that may be litigated in court, but right now we're talking about above Bonneville Dam. So the fish that never would go above Bonneville Dam, that go to lower tributaries, would not be included in this 50 per cent opportunity, because it's the opportunity to take 50 per cent of the fish that would reach the Indian fishing places if they weren't first intercepted by somebody else along the way.

Q. Do you think there has been some overcompensation in favor of the Indians, and that some backlash might occur as a result of it?

A. Well, I'm sure there is probably going to be some backlash; I think we've some parts of it already. As far as whether there has been overcompensation, this is certainly one of the debatable points throughout this whole controversy. The non-Indians feel the courts have been too generous with the Indians in fixing the formula. The Indians obviously don't, and the United States'

"... we've got to bring the Indian tribes more into the management and rule making functions than they have been up until now."

position is in support of the court decision that the Indians, under the treaty, are entitled to take up to 50 per cent. So I'm not sure that I'd say that there has been overcompensation, particularly when you consider that there have been a lot of obstacles placed in the way of the Indians actually achieving that. But, there's no doubt that the feeling on the part of a great many non-Indians that there has been overcompensation is one of the factors that makes this area very difficult.

Q. Since the order (shortening the season) was issued by a federal court, is there any possibility of a state court or state regulatory agency intervening in behalf of the lower Columbia gillnetters?

A. Well, it's not a matter of intervening because they're a part of the case already. The defendants in the case are the states of Washington and Oregon, and that includes all of the agencies of those two states, including their fishery agencies.

We have insisted from the beginning that the state be the defendant, and not just one of its agencies. When Washington

tried to intervene in the case, they initially tried to have only the Department of Fisheries intervene, and we resisted that because, we didn't want the Department of Fisheries coming in and saying, 'we, as a department, don't have the authority to do this, our legislature hasn't given it to us.' The United States' position on this is that the defendant is the State of Washington and it doesn't make any difference whether the legislature has given the Department of Fisheries the authority or not; the state may not restrict the Indian fishery.

Q. Concerning the two treaties signed by the bands of Warm Springs and Wascoes; to what extent were the rights guaranteed in the Treaty of 1855 affected by the Treaty of 1865?

A. This was one of the issues that was raised at the beginning of this lawsuit back in 1968, when it was filed, wherein it was argued that the Warm Springs fishing rights were either given up or taken away from them, depending on how you view it, by the 1865 treaty. The Warm Springs Tribes argued very strongly that that was not the case; they argued that the 1865 treaty was forced upon them, that the Indians didn't understand that they were giving up any rights. The court at that time held that the Warm Springs Tribe still has fishing rights under the 1955 treaty. Now a necessary element of that holding is a finding - although it was not expressly stated as such - that the 1865 treaty did not diminish or did not affect it. There are various ways that you can look at the 1865 treaty; one is that it required a permit from the superintendent to leave the reservation. Requiring and Indian to get a permit to leave his reservation must mean that somehow he is subordinated, this has had the affect of diminishing his treaty right to leave and go to his usual accustomed place. Now that permits are no longer

required to leave the reservation, there is no further limitation, as a practical matter, on that right. But once he got the permission to leave the reservation, then once he got to the fishing area, he still has the fishing rights that he always had. Probably this is the way the court viewed that, although as I say, the only actual holding in the case is that the tribes still have the rights that were reserved and secured by the 1855 treaty.

Q. Though Indian fishing rights have been upheld by courts in the past, those rights are still resisted by State Attorney General Lee Johnson. Why, when the courts interpret Indian treaty rights one way, does he interpret them in another?

A. I think, initially, the states had genuine concern and felt a need for judicial ruling. Judge Belloni himself recognized that when he said in his first opinion that the construction that the states were urging might have made some sense if you were starting off with just the treaty with no study of the background of it, the intent of the parties, or the history subsequent to it. So, there was probably a need for the litigation to begin with. The continued resistance to it after the court has spoken - it's hard for me to say what is in the attorney general's mind, I guess you'll have to ask him - but, it strikes me at least that this can only be something that is being influenced by political considerations. That is, I feel that the decision is unpopular with a great many non-Indians, and political officials have to give some attention to what they think is public sentiment. My own feeling is that they are continuing this largely for political reasons. I'm not using political now in a partisan sense, I'm using it in the sense of a body politic. They are just doing what they feel the non-Indian segment of the population expects of them. I think they misread what the non-Indians want because I think there probably are more non-Indians who support the decision than those who oppose it, but they just haven't been as outspoken.

Q. The states of Washington and Oregon have brought action in the courts to prevent Indians from catching that portion of the fish run that is hatchery-propagated. How can this be fairly enforced?

A. That is the issue before the court, to the extent that the court rules that the Indians are entitled to take a certain percentage of the total fish run, whether it be hatchery or non-hatchery. In both the Boldt case and the Belloni case, the states have asked the courts to exclude the hatchery fish from that. Now if the court were to do that, if they were to say that the treaty did not apply to

"The courts have said that they (the states) can limit fishing only to the extent that is necessary to preserve the resource."

