

"... the states' 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."

hatchery fish, why, then the states would be able to exclude them from the total numbers. You have to go on a formula basis, because obviously once the fish are in the water you can't tell a hatchery from a non-hatchery fish; you'd have to do it in terms of numbers. If it turns out, for instance, that 40 per cent of the run is hatchery, the the entitlement of the Indians would, presumably, be reduced by that amount.

Q. Okay, conversely, would that restriction then apply to fish raised in National Fish hatcheries on reservation lands?

Q. Again this would depend on what kind of order the states were able to get out of the court. My own feeling is that - with some limited exceptions - the courts are going to declare that hatchery fish are included under the treaty, and certainly that is the position of the United States. Those issues are going to be tried in both Judge Boldt's court and in Judge Belloni's. I suppose that because I believe that hatchery fish are excluded, that applies to both state and federal hatcheries. If the court were to say that state hatchery fish are excluded, I don't think it necessarily follows that the federal ones are: but, on the other hand, the federal government pays for a lot of the state hatchery fish, too, so it's a little hard to see where any kind of distinction would come about. I just don't look for any order excluding hatchery fish..., with the possible exception of a hatchery that is provided solely or predominately to increase over what it was in early times, rather than to make up for losses that have occurred because of things that happened on the river. On the Columbia River, for example, most of the hatcheries are to make up losses caused by the dams: I don't look for those to be excluded from the treaty.

Q. Could you give a rough breakdown of the percentages of the fish run taken by the various user groups? That is, the offshore commercial trollers, the gillnetters at the mouth, and the Indian fishermen above the Bonneville and in the tributaries.

A. We don't have as complete and reliable data on this as I think we are going to need, principally as regards the ocean catch. In the ocean they are fishing on mixed stocks, some of which come to the Columbia, some of which goes to Puget Sound, Oregon coastal streams, Washington coastal streams, and so on. We don't have a precise breakdown as to how many of those are Columbia River fish. The

states do have some data based on studies done a number of years ago, which give them an approximation of the percentage of those runs that are Columbia River. Some of the evidence that has been introduced into the court is that some 70 to 75 per cent of the Chinook that are caught off the Washington coast are Columbia River Chinook. Some say that those figures are out of date and unreliable.

Once the fish are in the river a more accurate count is possible; we know how many are caught in the Indian area and how many are caught in the lower area. Now the states claim that they don't have complete figures on the Indians because they're not reporting subsistence catches, but our feeling is that the unreported catches are so small as not to be that significant in terms of the total and that you can make estimates that'll put you within the range that you need.

Q. Are subsistence and ceremonial fish included in the allocation formula percentages?

A. Under the Boldt decision they are not; the Belloni court has not addressed that question yet. As far as how they are applying it at the moment, I'm not sure because we haven't come that close to the 50 per cent that it has made a difference. Again, I think that the subsistence and ceremonial catch on most runs is small enough as to not make a difference. In some cases, like the summer chinook - and in the last couple of years, the spring chinook - the ceremonial catch takes a larger percentage because you're dealing with a smaller catch to begin with. But even there, when you compare it with what is taken out in the ocean, I don't think it has made that much of a difference.

Q. In the past, the state has even talked about buying out the Indian treaty fishing rights. What possibility is there of this ever happening?

A. Well, it's a little risky, I suppose, to say that it will never happen. My own feeling is that if the tribes don't want to sell, it won't happen. I have yet to hear of an Indian tribe that has expressed any interest in selling its fishing rights. Every time the question is brought up to me, my answer is, 'you got to talk to the people who own it. If they want to sell, we're certainly not going to stand in their way, but I haven't seen any indication that they do want to sell, and we're certainly going to resist efforts to compel them to sell.

Q. Why would the state suggest such a thing when their figures clearly show that the Indian fishermen take a lesser percentage than the ocean trollers, the lower Columbia gillnetters and the sports fishermen?

A. A lot of the state agency people psychologically just don't like the concept of this Indian fishery that is not subject to the same full control by the state that other fisheries are, and they look upon it as an annoyance at best, and sometimes as even worse than that. I think they want to find any way that they can get rid of that annoyance. If they can't regulate it, then they turn to such talk as buying it out. I

have noticed that none of these agencies have proposed that the state buy out the right. They always want someone else - namely the United States - to buy it, then they want to regulate it.

Q. A few months ago you appeared on a television program with Tom McCall and state fish and game officials. At that time you suggested that a commission be established on which Indian fishermen would be represented. How was that idea accepted?

A. Well, so far it hasn't received a very favorable reception; again, you have to keep in mind that the states historically have maintained that the regulation of the fishery is their prerogative, that they won't yield or share any of that authority with anyone else, and they will resist efforts to do so. My feeling is, that if we're going to ultimately have a lessening of this tension and controversy on the river, we're got to bring the Indian tribes more into the management and rule-making functions than they have been up until now. This is, after all, their treaty right and what they, as tribal governmental entities, are concerned with. I think that in one form or another they are going to have to be heard and participate in the decision making to a greater

"... 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..."

extent than has been the case in the past. Now, whether that's to be done by putting them on the actual commission or by creating an advisory body on which they are prominently represented, or by some combination, I don't know. The recent councils that have been authorized for the offshore area, under the 200 mile law that becomes effective next March, will make rules for the offshore fishery. Each state governor - in our case we're talking about Washington, Oregon, California, and Idaho - have been asked to nominate persons to serve on this council. The council will be composed of certain state officials and federal officials by virtue of their office, and then there will be about eight public officials - two per state. The law says that at least one must be from each of the four states; it doesn't say where the other four can come from. The governors of Idaho and Washington did nominate Indians for some of those positions, Oregon did not. I would hope that when the final selection is made - they will be selected by the Secretary of Commerce - that some Indian representation will be included and provided for. It is certainly one of the interests that needs to be acknowledged and recognized in the management of that fishery.

Q. Since the Indians and non-Indians are to share the resource equally, wouldn't it then

be mandatory that Indians be represented on the council?

Q. Well it certainly seems to me that it would be highly desirable; I might stop short of saying it would be mandatory. Personally, I was very disappointed that the Oregon governor did not see fit to include an Indian nominee. I think that there will be a better understanding and less friction and antagonism if Indians are represented on that council, and I think that clearly they should be.

Q. What I was saying was that since the U.S. Government recognizes the Indians as being apart from the state, then an arrangement could be worked similar to the international treaty that regulates salmon running through U.S. waters to the Fraser River in Canada. Each side is represented equally in that council.

A. I think that it would have been appropriate for Congress, when they passed the act, to have provided for a certain amount of Indian representation - just as they provided that there be representation from each of the four states. They didn't do so, but neither did they prohibit Indian representation. So, in effect it's left up to the governors to make the nominations; the Secretary of Commerce can only select from those persons nominated.

Q. What do you think the ultimate goal of the recent court rulings should be? Obviously, one goal is to protect Indian fishing rights; on the other hand, there is the matter of conservation. Where do you draw the line?

A. Well, first off I think that all of these decisions stress over and over that necessity comes first; if we don't have a resource, the treaty rights don't amount to much. Conservation, regardless of whom it is prescribed by, comes first. As far as the goals of the decisions, they should be that the treaty rights of the Indians are protected and respected by whomever is the regulating authority in a manner that will assure that 1) they get to be enjoyed and 2) that in the process of enjoying them that the resource isn't harmed or destroyed. Preferably, they can be enhanced. Any programs that the courts can prescribe must go hand in hand with enhancement efforts that federal, state, and tribal authorities can prescribe by their own activities outside of court. I don't think the courts can order affirmative measures to increase the runs or restore the fishery resource. But, certainly other arms of government can and should. I think that all the bodies of federal, tribal, and state have roles that they can play. The exact relationship of those roles remains to be worked out. I don't have any precise blueprint to say where state authority should end and tribal authority begin.

Q. What role does the state play in the regulation of the Indian fishery? What, exactly, is their jurisdiction?

A. Let me try to express it this way: we have a treaty that was entered into by the United States and the Indian tribes. That treaty did not concern itself with what level of government within the

United States administered the particular activities that were entrusted to or authorized to be performed by the United States; that's a question of federal law whether we want the federal government to do it or the state government do it. You look to the Constitution for the division of powers between the state and federal governments. So, what we have here is a mixture of two things that are premised on different ground rules and consequently tend to clash with each other. That is, we have a rule that says for the most part, the administration of Indian affairs is a federal responsibility. On the other hand, the administration of fish and wildlife - except in some areas like national parks - is a state responsibility. So when you start talking about the impact of Indian fishing on the fish and the wildlife resource, there is this conflict between one segment that is under federal responsibility and the other that is under state responsibility. Basically, what the courts have said from the very beginning is that the states have the police power to control off-reservation activity that affects this segment of the resource that has been entrusted to state management. So they have the authority to regulate anyone, including Indians, where it is necessary to protect and preserve the resource. But in regulating they must apply whatever is the law of the land, and in this case it is the Indian treaty rights. The problem has been that the states have not done that, or have not done it the way we feel it should be done. But as far as their authority to arrest Indians off the reservation, yes they do have the authority. You then get to the next question: Did they make an arrest for the wrong reason? The courts have said that they can limit fishing only to the extent that is necessary to preserve the resource.

Q. Is the resource endangered?

A. There is no question that the resource is endangered; their question really is: From what? and it's endangered from a number of factors and I would say that Indian fishing is way, way down on the list. In the case of the Columbia River, I think the biggest danger is the changing of it from a free-flowing stream to a series of reservoirs and all the changes that has brought about. The fish have to get over those dams both going upstream and downstream - go over them or through them - and then are exposed to slack water, warm water, and their spawning beds are damaged in the course of this whole development.

I'm not convinced that Indian fishing has been any significant threat to the resource; I think the threat comes mostly from other causes.

"... there probably are more non-Indians who support the decision than those who oppose it."