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f) Oyster: 100 oysters

4. Management provisions that govern the commercial fisheries can prevent the sale of non-commercial harvest. Commercial clam and oyster harvests are managed by specific beach openings and closures using emergency tribal regulations. Catch is accounted for primarily by an on-the-beach monitor who records information contained on the attached harvest monitor form. The tribe maintains all such records of commercial catch. At the time of sale, all tribal commercial catches are recorded on fish receiving tickets which are compiled, summarized and entered into a data base which is maintained at the tribal fisheries office.

CONSENT DECREE

Subproceeding No. 88-1

(November 28, 1994)

BARBARA J. ROTHSTEIN, District
Judge.

I. Nature of Dispute

In their Request For Determination Re: Regulation Of Boats Used In The Treaty Fishery, the Plaintiff Tribes claimed that their treaty fishing rights exempt them and their members from state taxation/fees and certain other regulation of their ownership and use of treaty fishing boats, specifically, the ad valorem (personal property) tax imposed on boats by Wash. Rev.Code § 84.40.065, the watercraft excise tax imposed by Wash. Rev. Code ch. 82.49, and the vessel registration and fee requirements of Wash. Rev.Code ch. 88.02. By regulation, Wash. Adm.Code 308-93-160, the State exempts from the excise tax imposed by ch. 82.49 RCW boats

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which are owned by Indians living on the reservation governed by the Tribe in which they are enrolled. However, the state law does not currently recognize an exemption for treaty tribe members whose principal residence is outside their tribe's reservation. The watercraft excise tax exempts watercraft exclusively used for commercial fishing purposes but is otherwise deemed applicable by the State to other treaty fishing activities. The State has also claimed that treaty fishing boats other than commercial boats documented by the Coast Guard under 33 C.F.R. § 173.11(e), or otherwise exempt by federal regulation, must be registered by state and federal regulation, display a state-issued number and decal, and that the state registration fee must be paid. Wash. Rev.Code § 82.49.030 currently provides that payment of the watercraft excise tax is a condition of obtaining a state vessel registration, number, and decal.

The Plaintiff Tribes impose, their own treaty fishing rights-related taxes and, consistent with various orders by this Court, maintain their own vessel registration requirements for boats used in their treaty fisheries. By the terms of the parties' Settlement Agreement, the State has agreed not to apply its personal property and watercraft excise taxes to boats owned by the Tribes or their members and used in the exercise of treaty fishing rights, as to each tribe that has a treaty fishing rights-related tax. The State will refund any state taxes paid on such boats as provided in the Settlement Agreement. In respect to boats used in the exercise of off-reservation treaty fishing rights, the Tribes and the State have agreed to an intergovernmental, cooperative registration procedure and to access by, or release

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to, specified state, federal, foreign, and tribal law enforcement of tribal and state registration data, consistent with confidentiality protections.

Without any of the parties conceding the merits of any contrary legal position in this dispute, it as agreed as follows.

II. Parties

A. This Consent Decree is entered into by and between the plaintiffs United States of America, Hoh Tribe, Jamestown S'Klallam Tribe, Lower Elwha S'Klallam Tribe, Lummi Nation, Makah Tribe, Muckleshoot Tribe, Nisqually Tribe, Nooksack Tribe, Port Gamble S'Klallam Tribe, Puyallup Tribe, Quileute Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Tribe, Squaxin Island Tribe, Suquamish Tribe, Swinomish Indian Tribal Community, Stillaguamish Tribe, Tulalip Tribes, Upper Skagit Tribe, and Yakama Indian Nation, defendant the State of Washington and defendant state officers ("the state defendants"), all of whom, plaintiffs and defendants, are referred to hereinafter as "the parties".

B. Plaintiff Tribes are federally-recognized Indian tribes. The Plaintiff Tribes, or other tribes or bands of which the Plaintiff Tribes are successors-in-interest, are parties to treaties with the plaintiff United States executed by their representatives in the 1850's, each of which reserves to the Tribes, in substantially identical language, "the right of taking fish, at all usual and accustomed grounds and stations . . ." See, e.g., Art. III, Treaty of Medicine Creek, 10 Stat. 1133; *Washington v. Fishing Vessel Assn.*, 443 U.S. 658, 662 n. 2, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

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C. The specific state tax laws at issue and the registration and registration fee provisions are administered by the Washington Department of Revenue and the Washington Department of Licensing, and enforced by the defendant State of Washington through the Departments of Revenue, Licensing, Fish and Wildlife, and local governments.

D. The interests of the United States, including the Coast Guard, have been represented by the undersigned attorney of the United States Department of Justice.

III. Covered Claims

A. As used in this Decree, "covered claims" means the claims set forth in the Request for Determination in this subproceeding No. 88-1. These claims are generally described in part I, above. Covered claims include claims and defenses to those claims. They include all claims and defenses which could have been adjudicated in this subproceeding as to the taxes, fees and registration requirements in dispute, had it been prosecuted to final judgment. For the purpose of determining whether claims could have been adjudicated, reference shall be made to the facts and allegations made in the documents filed with the Court in this subproceeding prior to the date of entry of this Decree.

B. Without admission or adjudication of any covered claim, and without waiving any objection, claim, or defense with regard to claims other than the covered claims, the parties have agreed that, in settlement of the covered claims, the state will not impose its ad valorem property and watercraft excise taxes upon the ownership or use of treaty fishing boats so long as the affected Tribe imposes a treaty fishing rights-related tax.

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C. The parties agree that the covered claims raise matters of sovereign interest, and that their settlement of the covered claims as set forth in this Decree is fair, adequate, reasonable, equitable and in the public interest and is made in good faith after arms-length negotiations, and that entry of this Consent Decree is the most appropriate means to resolve the matters covered herein.

NOW, THEREFORE, before the taking of any testimony, before the adjudication of the covered claims, and without admission of any issue of law, fact, or liability by the parties, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

IV. ORDER

A. The Court has jurisdiction over the subject matter of the covered claims and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1362. Plaintiffs assert that the Court also has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and this Court's continuing jurisdiction as declared in ¶ 24 of the Declaratory Judgment and Decree of February 12, 1974, 384 F.Supp. 312 at 408, and ¶ 25 of the Court's March 22, 1974 Permanent Injunction, 384 F.Supp. at 419, as modified by the Court's Order Modifying Paragraph 25 of Permanent Injunction (August 23, 1993). All parties to this Decree, for purposes of the entry and enforcement of this Decree, waive all objections and defenses they may have to the jurisdiction of the Court, or to venue in this District, or to service of process prior to the entry of this Decree but not afterwards.

[11] B. The provisions of this Decree shall apply to and be binding on the parties, their agencies, subdivisions, boards, and commissions, all agents and officers

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thereof, and all successors and assigns of all such entities and individuals; and each of them are hereby enjoined to comply with the provisions of this Decree.

C. The attached Settlement Agreement is hereby incorporated by reference and made a part of this Decree as if fully set forth herein.

D. Except as specifically provided for otherwise in the Settlement Agreement, the plaintiffs covenant not to sue or to take any other judicial or administrative action against any state defendant, and the state defendants covenant not to sue or to bring any type of judicial or administrative action against any plaintiff, or against any member of a Plaintiff Tribe, for covered claims or for any claims relating to or arising from the filing and litigation of the covered claims and the negotiation, terms, approval and implementation of this Decree. Should a state or tribal governmental entity, or a federal agency, enact, revoke, or amend a statute or regulation which action a party deems to be inconsistent with this Consent Decree or with the Plaintiff Tribes' treaty fishing rights as they pertain to the issues in this subproceeding, then, after complying with the dispute resolution process of § VII of the Settlement Agreement, any party may seek judicial relief to determine whether such change violates the Consent Decree and/or the Tribes' treaty fishing rights. The parties acknowledge that Congress may alter the law from that in effect at the time of entry of the Consent Decree. If it is claimed by a party that Congress, subsequent to the entry of this Decree, has effectuated a change in the jurisdictional relationship of the parties so as to extend, limit, or otherwise modify the Tribes' treaty fishing rights or the author-

Attachment I—Continued

ity of any other party as to the covered claims, then, after complying with § VII, the party may seek a judicial determination from this Court of whether the Congressional action or any proposed action of a party based thereon would be permitted by law notwithstanding the provisions of this Consent Decree, and whether rescission or modification of the Consent Decree is accordingly required.

E. Each undersigned representative of the parties certifies that he or she is fully authorized to enter into the terms and conditions of the Decree and to legally execute, and bind such party to, the Decree.

F. Except as provided in ¶ IV. D. of this order, the terms of this Decree may be modified only by a subsequent written agreement executed by all the parties and approved by the Court. The Settlement Agreement portion may be modified as provided in ¶ IV. D. of this order, or as provided in the Agreement.

G. This Consent Decree shall be effective upon the date of its entry by the Court.

H. The Court shall retain jurisdiction for purposes of entering such further orders as may be appropriate for the construction, implementation, enforcement, or modification of the Decree. In the event that the jurisdiction retained in this paragraph, or the continuing jurisdiction of the Court over Civil No. 9213 or over this subproceeding, is terminated, this Decree shall be enforceable in the same manner as any final judgment and order of the Court.

By signature below all parties consent to entry of this Decree as an Order of the Court.

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Stillaguamish and Upper Skagit Tribes

/s/

Jeffrey O.C. Lane

Karl Hausmann

Assistant Attorneys General for the State of Washington, Representing the State

/s/

Daniel A. Raas

Attorney for the Lummi Nation

/s/

Annette M. Klapstein

Attorney for the Puyallup Tribe

/s/

Mason D. Morisset

Attorney for the Tulalip Tribe

/s/

Richard Berley

Attorney for the Makah Tribe

/s/

Sharon I. Haensly

Attorney for the Swinomish Tribal Community

/s/

Kathryn Nelson

Co-Attorney for Port

Gamble, Jamestown and

Lower Elwha S'Klallam

Tribes and the Skokomish Tribe

/s/

Peter C. Monson

United States Department of Justice

/s/

Nettie Alvarez

Attorney for the Hoh Tribe

/s/

Jack Fiander

Attorney for the Yakama Indian Nation

/s/

Richard Reich

Attorney for the Quinault Indian Nation

/s/

Robert L. Otsea Jr.,

Attorney for the Muckleshoot Indian Tribe

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/s/
John Sledd
Attorney for the Suquamish Tribe
/s/
Bill Tobin
Co-Attorney for the Nisqually Tribe
/s/
Steven G. Lingenbrink
Attorney for the Quileute Tribe
/s/
Jeffrey Jon Bode
Co-Attorney for the Nooksack Tribe
/s/
Kevin Lyon
Co-Attorney for the Squaxin Island Tribe

**UNITED STATES V. WASHINGTON,
NO. 9213, SUBPROCEEDING NO.
88-1 STATE TAXATION AND REG-
ULATION OF TREATY FISHING
BOATS**

SETTLEMENT AGREEMENT

**I. Nature Of Dispute/Scope Of Agree-
ment**

A. The below signatory parties hereby agree to settle this subproceeding subject to the terms and conditions herein.

B. The Plaintiff Tribes claim that the state tax/fee and registration requirements, which are the subject of their Request For Determination Re: Regulation Of Boats Used In The Treaty Fishery, unlawfully infringe upon their federally secured treaty fishing rights. The State does not concede that the imposition of such requirements upon the subject boats constitutes such an infringement. Nothing herein shall be deemed to adjudicate the merits of the claim that the Tribes' treaties and other federal law immunize members of tribes with federally secured fishing rights from state taxation and vessel

Attachment I—Continued

registration. No provision of this Agreement shall be construed to concede the correctness of any argument, claim or defense in support of state authority over the Tribes and their members, or to constitute consent to any state jurisdiction. Similarly, the State's agreement to settle shall not be deemed an acknowledgment by the State of the correctness of the Tribes' claims. Nothing herein shall be deemed to adjudicate the merits of the State's claims that it has the jurisdiction and authority to impose a tax upon vessels used by the Tribes or their members, off reservation within the State, even if used in the exercise of tribal treaty fishing rights and to require registration of all such vessels used within the State. The State does not concede that it lacks jurisdiction to register and otherwise regulate treaty fishing boats. For purposes of this settlement, the terms "boat(s)" and "vessel(s)" have been used interchangeably and shall be considered synonymous.

C. The State recognizes that Tribes who are parties to *United States v. Washington* currently impose various taxes related to treaty fishing and that Tribes also require their members to register their boats for use in the treaty fishery.

II. Taxation

A. The State agrees that state ad valorem property and watercraft excise taxes shall not be imposed upon any boat owned by a tribal member(s) and used in connection with the exercise of federally secured fishing rights, so long as the member's tribe imposes a treaty, fishing rights-related tax. The taxes also shall not apply to tribally owned boats used in connection with or in activities related to the exercise of tribal fishing rights, including but not limited to, management, regulation or enforcement thereof. The State shall direct that no action be taken by the State, coun-

Attachment I—Continued

ties or other subdivisions to collect the subject taxes, including interest and penalties thereon which may have been deemed to accrue, from members of Tribes holding adjudicated treaty fishing rights and imposing a treaty fishing rights-related tax. If a signatory Tribe determines to discontinue imposing a treaty fishing rights-related tax, and the State thereafter attempts to assess a state tax, the Tribe may challenge in this Court the taxation as infringing on its treaty rights.

B. This settlement shall be retroactive in its effect. The State, including but not limited to its counties and other political subdivisions, shall not attempt to collect, enforce, or otherwise give effect to any prior alleged obligation, claim, assessment, or assertion by the State that a tribal member was required to pay the subject state taxes during any year in which that member was authorized by his or her Tribe to use his or her boat in connection with the exercise of the Tribe's adjudicated, federally secured right and when the Tribe had a treaty fishing rights-related tax.

C. Within 45 days of the Court's approval of this Settlement Agreement, each Tribe shall provide the State with a list of fishers (including owners) and their boats against whom or which any tax that is the subject of this Agreement has been assessed or levied. The Tribe shall certify that the boats on the list are subject to this Agreement. Immediately after the State has received a Tribe's list, the State shall determine whether there is information in its possession, other than the off-reservation residence of an owner or vessel, which is at variance with information on the Tribe's list. The State shall then forthwith cause all assessments or levies issued against the listed fishing boats owned by members of any Plaintiff Tribe,

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with respect to which no pertinent conflict in information exists, to be withdrawn and abated. If information in the possession of the State conflicts with information contained in a Tribe's list, the State and the Tribe shall immediately confer to resolve the conflict. In the absence of resolution, the matter shall be referred for dispute resolution pursuant to § VII. of this Agreement. The State shall also review its records using its best efforts to identify whether there are any additional, identifiable tribal members or treaty fishing boats against whom a tax subject to this Agreement was levied or assessed. The State shall withdraw and abate all such additional assessments and levies upon determining that such tribal members or boats are not subject to tax under the provisions of this Agreement.

D. The State shall with respect to any taxes for which the levies or assessments have been withdrawn or abated, cause to be withdrawn or released any recorded liens evidencing such outstanding taxes and will record that documentation as is permitted to confirm such withdrawal or release.

E. The State shall proceed in like manner upon the receipt of an additional list(s) from a Tribe or upon request of a boat owner or fisher who is a tribal member.

F. Notification to the State for purposes of this provision shall be made to:
Special Programs Division
Washington State Department of Revenue
P.O. Box 47472
Olympia, WA 98504-7472

G. Tribal members shall be entitled to a refund from the State of any tax paid pursuant to Wash. Rev.Code ch. 84.40 or Wash. Rev.Code ch. 82.49, upon submission of evidence that the person seeking the refund paid the tax or is a successor or

Attachment I—Continued

assign of such person. Additional evidence shall be submitted which establishes that at the timer of payment, the member's Tribe had a treaty fishing rights-related tax and the member was authorized by the Tribe to fish in accordance with the Tribe's treaty right. Refunds shall be payable with respect to (1) ad valorem property taxes paid pursuant to Wash. Rev.Code ch. 84.40, for 1988 and any tax periods subsequent thereto; and (2) watercraft excise taxes paid pursuant to Wash. Rev.Code ch. 82.49 for 1984, and any tax periods subsequent thereto.

III. Boat Registration

A. Certain tribal and treaty fishing boats are not subject to state registration as a matter of state law because they are documented, primarily commercial vessels, or otherwise exempt, although such boats may be subject to tribal registration and numbering requirements under applicable tribal law. *See*, Wash. Rev.Code § 88.02.030. Nothing in this Agreement shall act to affect any boats or the owners of any boats which are not the subject of this proceeding, including boats or owners to the extent they are exempt from the state tax and/or registration provisions at issue based on use exclusively within a Plaintiff Tribe's reservation.

B. State registration, numbering, and fee requirements otherwise applicable to a non-treaty boat, also shall not be applied to any other tribally owned boat and any boat owned by a tribal member(s), which is used in the exercise of treaty fishing rights and tribally registered as provided in this Decree. As required by this Decree, a vessel number conforming to the specifications of 33 C.F.R. §§ 173.27 and 33 C.F.R. 174.23, and a certificate of number conforming to 33 C.F.R. 174.19, shall be assigned, and a "decal" [i.e., annual registra-

Attachment I—Continued

tion sticker] shall be issued for such boat and displayed provided that, upon agreement of the Coast Guard and Tribes, different specifications may be established for the treaty fishing vessels.

C. Each Tribe shall be entitled to a block of numbers with a unique tribal suffix. Each Tribe may select a unique, three letter suffix for its state or tribally produced vessel number, which conforms to 33 C.F.R. 174.23, unless otherwise agreed by the Coast Guard. The vessel numbers shall otherwise be of the same size and placed in the same location as specified for those boats registered under RCW ch. 88.02. The decal may also be unique to each Tribe or group of Tribes, so long as otherwise conforming to Coast Guard specifications regarding size and color now contained in 33 C.F.R. § 174.15. Other than a decal, the State does not issue a plaque, sticker, or other form of number or annual registration to affix to a numbered vessel. Such items are privately manufactured. Any or all of the Tribes may produce their own vessel numbers and/or decals, provided that each vessel number shall have a "WN" prefix and conform to Coast Guard specifications as to the form of numbering, number placement, and decal placement, except as otherwise agreed to by the Coast Guard and Tribes. A Tribe may choose to use state decals, issued by the State. Within 90 days of the signing of this Agreement, or by January 1, 1995, whichever comes first, and prior to June 1st of each year for which new or renewed registrations are required by the terms of this Agreement, the State will provide each Plaintiff Tribe a list of vessel numbers, and state decals if the Tribe so requests, in the quantity, and with any particular three-letter suffix specified by the Tribe conforming to 33 C.F.R. 174.23 or as otherwise agreed by the Coast Guard. Such quantity shall be sufficient

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to enable each Tribe to issue a vessel number to each of its tribal fishers for the boat(s) they use in the treaty fishery, when required by this Decree or tribal law. Notwithstanding the foregoing, the State need not provide a Tribe the list and decals sooner than thirty (30) days after the Tribe has advised the State of its number and decal requirements.

D. Tribal and treaty fishing boats shall be deemed by the State and Coast Guard to be properly registered so long as the following conditions are met:

1. the individual tribal member has provided the Plaintiff Tribe of which he or she is a member, on forms to be satisfactory to both the Plaintiff Tribes and the State, information listed below in § P; and

2. the appropriate Tribe has approved registration of the boat and so advised the State on agreed forms which shall contain all the information about the vessel and its owner which the Tribe is required to collect under § F of this Agreement.

E. The registering Tribe may issue a vessel number from the list obtained from the State, upon tribal approval of a tribal member's registration application; and such registration, which shall be for a term of one year, shall be in immediate effect and remain in effect until suspended or revoked by the Tribe, or until it expires, unless through dispute resolution and/or the processes in § H below, it is determined that the registration should be withdrawn. This shall not preclude the issuance of additional numbers by a tribe for a treaty fishing vessel, consistent with number placement limitations. A record of the registration shall be entered as soon as possible into the agreed computer data base, as provided in § K below.

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F. Each Tribe shall collect the information listed in 33 C.F.R. § 174.17, for each boat registered by it. A copy of that list is appended and identified as Attachment A.

G. Each Plaintiff Tribe shall forward the agreed upon forms and documentation to the State along with the necessary documents within five working days after approval of the registration. The State shall designate one office in the Olympia office of the Department of Licensing which shall process all forms under this Agreement.

H. The Department may object to and/or seek revocation of tribal issuance of a registration only if it appears that (1) inaccurate or false information has been submitted; (2) information listed in § F has been omitted; (3) or the Department obtains information that the vessel is stolen or otherwise not beneficially owned by the registrant(s). The notice shall be served personally or sent by certified mail, return receipt requested, from the state to the appropriate Tribe. The Tribe shall within thirty days of receipt, provide the information requested, take the requested action, clarify any misunderstanding or inform the State that the Tribe does not intend to take the action requested or provide the requested information. Nothing in this Agreement shall bar the State from requesting correction of inaccurate information or revocation of a tribally issued registration and number at any time should information demonstrate that the information originally submitted was false or inaccurate, or that the vessel is stolen or not beneficially owned by the registrant. The registrant and Tribe shall have a reasonable opportunity to correct inaccurate information.

I. Nothing herein shall act to revoke, nor shall any Tribe be required to revoke, the registration, number and boat decal issued by the Tribe to the tribal member

Attachment I—Continued

until the State has exhausted all dispute resolution procedures under this Agreement. If the State establishes that the registration is improper, the Tribe shall revoke the registration, plaque, and decal.

J. Failure of the State to provide a list of boat numbers requested by a Tribe in the time frames outlined in this Agreement shall not preclude the Tribe or tribal fishermen from lawfully fishing pursuant to the treaty fishing right, and shall be a complete defense in any action by the State to enforce its tax or boat registration laws until the State complies with the terms of this Agreement.

K. The registration data shall be stored utilizing a computer system, with twenty-four hour availability, and procedures which will limit access to civil or criminal law enforcement entities seeking information for law enforcement purposes. The parties agree that unless ordered by a court of competent jurisdiction, no access by business persons or other private individuals shall be permitted unless the treaty fisher or Tribe has authorized such release of information in writing. Release of information may be made to other persons or groups when specifically authorized in writing by all persons identified in the information to be released. The particular computer system and procedures may vary over time. However, the parties agree to use initially the Washington Department of Licensing system, so long as access by other than law enforcement entities is prohibited. The State shall defend against any private party's attempt to establish a legal right to obtain tribal registration data, shall notify the affected Tribe of any such private party claim at the time the claim is made, and shall keep the Tribe informed as to the status of the matter. Access to the tribal information shall be available via a modem, or other suitable

Attachment I—Continued

electronic format, to all state, tribal, federal, and foreign law enforcement agencies. Information available by computer shall not be considered in the possession or control of any other party.

The State and the Plaintiff Tribes will also allow on-line access between and among all parties' vessel registration information systems to permit state, tribal, and federal enforcement personnel to directly obtain vessel registration information from the various governments' vessel information systems, regarding treaty and non-treaty boats. No altering of another party's information shall be made without that party's consent. The parties shall review after the first year, and annually if any of the parties deem that appropriate, the suitability of the state system and procedures to address the parties' various concerns. The parties shall investigate and consider other systems and procedures if any party so desires. The parties agree that alternatives that may prove suitable include, among others, a federal system, or a tribal system, which system may be organized, at the Tribes' sole discretion, by an individual tribe or by more than one tribe acting together. Like the initial system, an alternative system or network shall provide, at a single point of contact, twenty-four hour on-line access to all the information for all the Plaintiff Tribes required to be available under § F.

L. If a Tribe becomes aware that information regarding a boat authorized by that Tribe to participate in the treaty fishery, and contained in the state boat identification system, or the boat identification system of another Tribe, may be erroneous or incomplete and should be corrected, that Tribe will promptly notify the State or the Tribe which operates the identification system. The notice to the system operator shall state the reasons why it is believed the system information is incorrect or in-

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complete. The notifying Tribe shall also identify the correct or additional information the Tribe believes should be entered into the system. The system operator shall respond promptly to each such notice regarding inaccurate or incomplete information, explaining what, if any, changes or corrections have been made.

M. The State shall advise and direct state and local enforcement agencies not to enforce state vessel registration requirements as to boats owned by Tribes with treaty secured fishing rights, or their members, and registered and numbered as required by tribal law and this Agreement for use in the treaty fishery. The State shall also notify the appropriate enforcement agencies of other states and the federal government that these state requirements should not be enforced except in accordance with the terms of this Agreement.

IV. Enforcement of Vessel Registration And Identification Requirements

A. The provisions of this section are intended to provide procedures for cooperative, state/tribal enforcement of the requirements of this Agreement relating to vessel registration and identification. In furtherance of this objective, the parties agree to the following acts and forbearances which allow for cooperative, enforcement protocols. Except as specifically provided in this section, this section is not intended to relate to enforcement of any other laws. Nothing in this Agreement shall be deemed to be a concession by any party as to the existence or lack of jurisdiction over the Plaintiff Tribes or their members. Nothing herein shall act to expand, diminish or limit the Plaintiff Tribes', State's, or federal government's jurisdiction over tribal members nor be a grant of jurisdiction by the Plaintiff Tribes

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to the State or federal government or the State or federal government to the Plaintiff Tribes. Nor shall any provision herein be deemed to waive any defense, protection, or other right a member may have in regard to enforcement, under the rulings of this Court or other law. *See, e.g., United States v. Washington*, 384 F.Supp. 312, 408–409 (W.D.Wash.1974). “State” includes all subdivisions of the State and other enforcement entities bound, through the State, under the provisions of this Consent Decree.

B. Violations Within Indian Country

The State shall not take any action as to any violation by a member of a Plaintiff Tribe of vessel registration and identification requirements occurring within an Indian reservation, tribal trust lands, or other areas of Indian country of that Plaintiff Tribe. For purposes of this Agreement, “Indian country” shall have the definition set out in 18 U.S.C. § 1151, as interpreted and applied by the federal courts.

C. Violations Outside Indian Country

1. The State may take action to enforce state vessel registration and identification requirements against any Indian where the violation occurs outside of any Indian reservation, tribal trust lands, or other Indian country as that term is used herein, of a Plaintiff Tribe in which the Indian is a member, in the following situations and subject to the following limitations:

a. if the vessel is not operated on behalf of a Tribe in connection with that Tribe's treaty fishing right and is not claimed by the owner or operator to be a treaty fishing vessel;

b. if an enforcement officer observes a vessel he or she reasonably believes to be without proper, current and effective state, federal, or tribal registration or identification, he or she may detain the

Attachment I—Continued

vessel regardless of ownership to determine if the owner or operator claims the vessel is a treaty fishing vessel and whether the owner, operator or other occupant has in his or her possession a currently effective tribal fishing identification card, a tribal fishing permit, tribal registration document for that vessel, tribal membership card, or other similar, written evidence that the vessel is a treaty fishing vessel subject to registration and identification requirements administered by a Plaintiff Tribe, provided that the state officer shall detain the vessel owner, operator, or other occupant no longer than is permitted under the search and seizure law of the state or federal constitution, whichever is more restrictive. If no such evidence is produced and the vessel is not then currently registered and numbered through the applicable Tribe (or the State), although claimed to be a treaty fishing vessel, the state officer may take enforcement action under state law.

2. Referral To Tribe

a. If such evidence that the vessel is a treaty fishing vessel is produced and delivered within thirty (30) days following the date of the citation or other enforcement action to the office of the enforcement agency issuing a citation or taking other enforcement action, by the person against whom enforcement action is taken or by the Plaintiff Tribe of which that person is a member, the matter shall be referred to the applicable Plaintiff Tribe within ten (10) days after such evidence is produced and delivered.

b. If the owner or operator of the vessel claims the vessel is a treaty fishing vessel covered by this Agreement and the owner or an occupant produces one or more of the items of evidence set out above in this subsection, then the

Attachment I—Continued

enforcement officer, as to the apparent registration and identification violation, may detain the vessel, subject to the same time limitation set forth in § IV.C.1.b. above, to obtain the information necessary for the issuance of a citation for that alleged violation and may take such action as is necessary to protect officer safety and to obtain or preserve any relevant evidence. Within ten (10) days after the stop, the enforcement agency responsible for the stop, shall refer the apparent violation to the applicable. Plaintiff Tribe.

c. Whenever a state: officer believes a violation has occurred by a tribal member under the circumstances set out in § IV.C.2.b., the officer shall, as soon as practicable, attempt to contact law enforcement of the Tribe in which the operator or occupant(s) claims fishing rights, using common means of law enforcement communication such as radio over common frequency, telephone, or a dispatcher utilized by that Tribe. The state officer, to the extent authorized under applicable law, may, when requested by a tribal officer, detain, or continue to detain the violator. A copy of any citation or other enforcement notice to a person claiming treaty fishing rights shall be sent to the Plaintiff Tribe in which treaty fishing rights are claimed, provided that sending a copy of such document shall not be considered a referral of the matter to the. Tribe under this § IV.

d. No state prosecution for an alleged vessel registration/identification violation by a member(s) of Plaintiff Tribes or by a tribal licensee(s) shall be initiated before the expiration of sixty days (60) days following the appropriate Tribe's receipt of a referral, to allow the Tribe to determine whether the incident also violates tribal law and whether the

Attachment I—Continued

Tribe chooses to prosecute in tribal court or another tribal governmental forum. If, following referral of a possible vessel registration or identification violation to a Plaintiff Tribe, the State commences a civil, criminal, or administrative enforcement action for such violation during the sixty day tribal review period, and if during that sixty day period the state or local enforcement agency receives written notice from the Tribe that the Tribe has commenced its own enforcement action against the same tribal member for the same incident, that state or local enforcement agency shall request that the prosecutor, or similar officer to whom it has referred the case for prosecution, withdraw the case to let the Tribe proceed instead. Nothing in this Agreement shall prevent a Plaintiff Tribe from requesting at any time that a state prosecutor, or similar officer, exercise his or her prosecutorial discretion to dismiss or defer a state action against a member of that Tribe for a vessel registration or identification violation when the Tribe brings its own enforcement action against the same tribal member arising out of the same incident.

e. Referrals shall be made by transmitting or mailing an incident report to the appropriate law enforcement office of the Plaintiff Tribe of which the person or persons alleged to have committed the violation is, or are, a member(s). The report shall contain a summary of the observations of the officer(s) detaining the vessel, the information taken by the officer(s) necessary to support the issuance of a citation and a summary of any other actions taken by the officer(s). Any evidence seized shall be delivered with the report.

Attachment I—Continued

f. Within sixty (60) calendar days following the date the Tribe receives the incident report and notice of the referral, the tribal enforcement entity shall notify the enforcement supervisor of the state agency making the referral whether the Tribe (a) has initiated an enforcement action under tribal law for failure to properly register or identify the vessel involved in the incident; (b) has determined not to initiate or pursue an enforcement action, although permitted by tribal law and the basis for that decision; or (c) has no basis to pursue an enforcement action under tribal law, in which case the matter shall be promptly referred back to the referring state agency which may then pursue enforcement under state law except in a situation covered by (b) involving the exercise of prosecutorial discretion. *See, § IV.C.2.i., infra.* The State may also proceed with enforcement action for possible vessel registration and identification violations if the Tribe does not respond within the sixty-day period following the date the Tribe receives the incident report and notice of the referral.

g. If the Tribe has instituted an enforcement action, the tribal enforcement entity shall notify the enforcement supervisor or equivalent officer of the state agency making the referral at least fifteen (15) calendar days in advance of any hearing or trial date in that tribal action. The State shall make its enforcement officers available for tribal hearings and trials, and shall provide reasonable cooperation in such prosecutions.

h. As provided in § III. J, failure of the State to issue a list of numbers and decals in the manner and time provided in § III. C above shall be a defense to any such violation occurring during the

Attachment I—Continued

period in which the numbers or decals have not been made available to the Plaintiff Tribe in which the alleged violator is a member. If the State has failed to comply with § III. C, and this failure is shown to be the cause of the alleged violation, the State shall withdraw its citation with respect to the vessel.

i. While it is expected that all parties will vigorously enforce their registration and identification requirements, this Agreement is not intended to inhibit the exercise of reasonable prosecutorial discretion by state or tribal prosecutors in regard to determining that a particular case should not be prosecuted or that lesser penalties or other resolution should be sought. Disagreements over whether prosecutorial discretion is being exercised reasonably shall be addressed as provided in § IV.D.4, *infra*, in the same manner as other enforcement concerns.

D. Other Cooperative Enforcement Measures

1. At least semiannually, each Tribe shall notify the State Department of Licensing of the status or disposition of all referred cases involving an alleged vessel identification violation, including the name of the referring agency, whether and what charges were filed, the amount of any fines, and the nature of any other penalties, including permit suspension or revocation, restrictions, probation or other disposition.

2. The enforcement supervisors of the State and Tribes shall meet as needed (at least annually for the first three years following the effective date of this Agreement, and thereafter at least every two years) to discuss matters related to implementation of this Agreement, including the exchange of information regarding viola-

Attachment I—Continued

tions, the training of officers, and the planning of joint patrols or other joint operations.

3. Within three months following the entry of this Consent Decree, the parties shall meet to discuss cross-deputization of state and tribal enforcement officers and the applicable procedures and criteria should the parties agree that cross-deputization is desirable.

4. If the State believes a Tribe has failed to enforce its registration and identification requirements or any Tribe believes the State is not complying with provisions for referral of incidents to a Tribe or otherwise failing to meet the terms of this Agreement, the State or Tribe(s) shall so notify the other parties, and provide the factual basis for their belief, in writing. If the matter is not resolved to the parties' satisfaction within a reasonable time, not to exceed sixty (60) days, unless the parties agree otherwise, dispute resolution may be pursued in accordance with § VII, below.

V. Consistency Of Agreement With Federal Vessel Numbering And Other Federal Boating Safety Requirements

In agreeing to this settlement, neither the United States, through the U.S. Coast Guard, Department of Transportation, nor the Tribes make any concession as to the applicability or inapplicability of federal laws dealing with vessel identification to treaty fishing boats. The United States confirms that, whether or not these laws apply to treaty fishing boats, the cooperative, intergovernmental vessel numbering and registration provisions of this settlement are consistent with and satisfy the federal requirements, contained in 46 U.S.C. § 12301 et seq.; 33 C.F.R. Part 173. Compliance with this Agreement will not jeopardize Coast Guard certification of the State. The Coast Guard specifically

Attachment I—Continued

agrees not to sanction the State in any manner for any difference in the way the State treats treaty or tribal and nontreaty boats, so long as such treatment is consistent with this Agreement.

VI. Alternative Tribal Registration Systems

Nothing in this Agreement shall preclude the Tribes and the United States from investigating, developing, and adopting an alternative system for vessel numbering and record-keeping for tribal boat and treaty fishing boat. Tribes, without affecting or waiving their legal position that the federal law and numbering system does not apply to their tribal and treaty fishing boats, may seek an exemption from the federal provisions or seek an amendment to those provisions.

VII. Dispute Resolution

A. Any party to this Agreement may invoke the jurisdiction of the federal court to resolve issues related to the implementation of this Agreement, other than the question of whether the terms of this Agreement are required by or consistent with the Tribes' treaty fishing rights unless permitted by § IV.D. of the Court's Order approving this Agreement. Prior to invoking federal court jurisdiction, the parties shall proceed to attempt to resolve such dispute in accordance with paragraph 25 of the Court's March 22, 1974 permanent injunction in *United States v. Washington*, 384 F.Supp. 312, 419, as amended by the Court's August 23, 1993. Order Modifying Paragraph 25 of Permanent Injunction, and any subsequent amendment thereto. Such procedures for resolution of disputes between the parties shall be employed toward the resolution of all disputes concerning violations of this Agreement and all other issues between the parties arising under this Agreement,

Attachment I—Continued

except as otherwise expressly provided herein. The parties will abide by the final adjudication of a dispute over boat ownership by a state or tribal court with jurisdiction over such dispute.

B. In the event of disagreement between the parties in regard to a vessel number or registration issued by a Plaintiff Tribe, no treaty fisher or Tribe shall be precluded from using a boat, which a Tribe considers in compliance with tribal registration requirements, for the exercise of treaty fishing rights, pending final disposition of a dispute affecting that boat, pursuant to the procedures required by the preceding paragraph.

C. At the request of a party after the first year of the operation of this Settlement Agreement, the parties will meet to review the implementation of the Agreement. Upon further request of a party, such other meetings may be held annually, unless the parties consent to a more frequent interval. Such meetings shall be in addition to, or held concurrently with, the meetings required by § IV.D.2. of this Agreement.

VIII. Notification

Each of the parties to this Agreement shall provide at least one name and one alternate contact, with their address, phone number, and fax number, for all notification. All notices which are not initially transmitted by mail, shall be followed by a mailed, written notice, unless the parties otherwise agree.

IX. Distribution To Enforcement Agencies And Personnel

Immediately after judicial approval of this Agreement, the State shall provide a copy of this Agreement and other portions of the Consent Decree to each and every county prosecutor, county sheriff, and law enforcement office of the State, including

Attachment I—Continued

its political subdivisions. The Plaintiff Tribes shall similarly distribute copies of the Agreement to their enforcement agencies and personnel. Each copy shall be accompanied by a notice reciting that the federal district court has approved a Consent Decree settling a dispute over the application of certain state taxes, fees, and vessel registration requirements to treaty fishing boats, that particular attention should be given to § IV on Enforcement Of Vessel Registration And Identification Requirements, and that all enforcement entities must comply with the Settlement Agreement.

X. Amendments

The parties recognize that individual tribes, groups of tribes, or the State may wish to amend this Agreement or to reach new agreements governing vessel registration and data sharing, and to that end, any of these entities or groups may propose an amendment for consideration by the parties. Unless the parties agree otherwise, or a compelling reason exists for more frequent amendment, proposed amendments shall be considered at an annual meeting to review the parties' progress in implementation.

Until an amendment or a new agreement is adopted by the parties, and court approval is obtained, this Agreement shall be binding.

XI. Judicial Approval

This Agreement shall become effective upon signature of the authorized representatives of the parties and approval of the Court in *United States v. Washington*, Subproceeding 88-1. This Agreement is not intended and shall not be construed as the admission of any party, as findings of fact, conclusions of law, or the interpretation or construction of the law applicable to this case. No party shall be considered

Attachment I—Continued

to have prevailed with respect to resolution of this issue or shall be entitled to its costs or fees.

If for any reason the Court should decline to approve this Settlement and Decree in the form presented, any statements made in negotiation and the terms herein may not be used as evidence in any litigation or administrative proceeding. If the Court declines to approve this Settlement Agreement and Decree in the form presented, the settlement embodied herein shall be voidable at the sole discretion of any party upon written notice to all parties and to the Court.

ATTACHMENT A

§ 174.17 **Contents of application for certificate of number.**

(a) Each form for application for a certificate of number must contain the following information:

- (1) Name of the owner.
- (2) Address of the owner, including ZIP code
- (3)-(4) [Reserved]
- (5) State in which vessel is or will be principally used.
- (6) The number previously issued by an issuing authority for the vessel, if any.
- (7) Whether the application is for a new number, renewal of a number, or transfer of ownership.
- (8) Whether the vessel is used for pleasure, rent or lease, dealer or manufacturer demonstration, commercial passenger carrying, commercial fishing, or other commercial use.
- (9) Make of vessel.
- (10) Year vessel was manufactured or model year.
- (11) Manufacturer's hull identification number, if any.
- (12) Overall length of vessel.

ATTACHMENT A—Continued

(13) Type of vessel (open, cabin, house, or other).

(14) Whether the hull is wood, steel, aluminum, fiberglass, plastic, or other.

(15) Whether the propulsion is inboard, outboard, inboard-outdrive, sail or other.

(16) Whether the fuel is gasoline, diesel, or other.

(17) The signature of the owner.

(b) An application made by a manufacturer, or dealer for a number that is to be temporarily affixed to a vessel for demonstration, or test purposes may omit items 9 through 16 of paragraph (a) of this section

(c) An application made by a person who intends to lease or rent the vessel without propulsion machinery may omit items 15 and 16 of paragraph (a) of this section.

[CGD 79-087, 47 FR 8176, Feb. 25, 1982]



UNITED STATES of America,
Plaintiff,

v.

State of WASHINGTON,
et al., Defendants.

Civil Action No. 9213.

United States District Court,
W.D. Washington,
at Seattle.

COMPILATION OF MAJOR
POST-TRIAL SUBSTANTIVE ORDERS
(January 1, 1995 through December 31,
1996)

Background: United States, on its own behalf and as trustee for various Indian

tribes, brought action for declaratory and injunctive relief against State of Washington and others concerning off-reservation treaty right fishing. Various tribes intervened.

Holdings: On various motions, the District Court, Rafeedie and Barbara Jacobs Rothstein, JJ., held that:

- (1) district court would not reopen 15 year old judgment;
- (2) preliminary injunction was warranted to restrict Quileute fishers from using no more than 100 pots to harvest blackcod;
- (3) district court would not condition dismissal of case on payment of defense costs and fees; and
- (4) previous ruling that Makah Indian Tribe's and other treaty tribes' treaty right of taking fish applied to all species of fish was law of the case.

Ordered accordingly.

See appellate decisions, 98 F.3d 1159, 141 F.3d 1355.

1. Federal Civil Procedure ⇄2651.1

Public interest in finality of judgments weighed against reopening judgment in United States' and Indian tribes' action against State of Washington concerning off-reservation treaty right fishing that tribes which had signed treaties relinquishing their aboriginal rights to land in exchange for right to take fish at all usual and accustomed places were entitled to take up to 50 percent of the harvestable fish passing through their off-reservation fishing grounds; passage of time had markedly changed landscape of case, state-tribal fish management plans had been drawn up and allocation decisions made in