

BEFORE THE INDIAN CLAIMS COMMISSION

MAKAH INDIAN TRIBE, a corporation,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 60

Decided: April 15, 1959

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. The petitioner herein, the Makah Indian Tribe, is an identifiable group of American Indians residing within the territorial limits of the United States within the meaning of section 2 of the Indian Claims Commission Act, and as such has the capacity to maintain this cause of action. (60 Stat. 1049)

In 1937 the Makah Indian Tribe was incorporated under the provisions of the Wheeler-Howard Act, and presently resides as a tribal organization at the Makah Indian Reservation, Neah Bay, Washington.

2. From the earliest times there has always existed a tribe of Indians, popularly known as the "Makah" Indians who have lived in and are identified with the extreme northwest section of Washington State, in the general area around Cape Flattery and southern shore of the Juan de Fuca straits. These Makah or "Cape Flattery Indians" have maintained a tribal organization from earliest days up to and following the Makah

Treaty of January 31, 1855 (12 Stat. 939) when they ceded all their right, title, and interest to these lands and removed to the reservation at Neah Bay, Washington, which was set aside for them pursuant to said treaty. The petitioner herein is the successor to and representative of those Makah Indians whose descendants negotiated the Makah Treaty of 1855.

(a) Earliest recorded white contact of any reliability occurred during the 1780's and 1790's when English and Spanish explorers visited the general area around Neah Bay and the entrance of the Juan de Fuca straits at Cape Flattery. (Tr. 65)

In 1792 a short-lived Spanish military outpost was established at Neah Bay and records kept by a Spanish naval officer named Quimpor, shows early contact with the Cape Flattery Indians. (Tr. 64)

During this same period, famed explorer Captain George Vancouver, visited this area and left accounts of his explorations.

The frequency of white contact with this group increased toward the middle of the nineteenth century when they were visited by Hudson Bay men, American government officials and ethnologists. (Tr. 65)

(b) George Gibbs, the noted ethnologist, who served Governor Isaac Stevens as secretary to his treaty commission and who participated in the 1855 Makah Treaty at Neah Bay, made repeated pre-treaty contacts with Makah groups of Indians and wrote extensively on their culture, habits and general existence.

In 1877 Gibbs published a report and identified the Makah Indians by the following description:

* * * Of all the tribes west of the Cascades, the Makah exhibit the most marked and characteristic traits, differing from the Sound Indians in features and habits as much as language. Their intercourse with the whites has been very limited, and that not of a kind to make much change in their original customs. Physically they have the type of the Nutka Indians. * * *

* * * The tribe had considerable infusion of white blood, a Russian vessel having been cast away near here, as it is supposed, some thirty five or forty years since, and the crew, being strong enough to protect themselves, having lived among the Indians for some time before they were relieved. Several individuals were present at the council who in their features, complexion, and yellow hair bore the strongest proof of their Slavonic origin. They have four principal or winter villages: Neah, at the site of the old Spanish fort on Neah Bay (Port Nunes Gaona); Waatch, on the south side of Cape Flattery, Tsu-yess, in a cove or indentation a few miles south of it; and Osett, at the Flattery rocks. * * *

* * * *

On occasion of the treaty made with them by Governor Stevens in January last, the Makah were first brought into official intercourse with the whites. Previous to that time, they had declined to receive papers from the agent Colonel Simmons, being under apprehensions that they would bring back the smallpox. (Pl. Ex. 41 - Gibbs 1877, pp. 173-177)

(c) James Swan, noted ethnologist and authority on Puget Sound Indians, spent a great deal of time with the Makah Indians during the 1860's and taught for several years at the Makah Indian Reservation at Neah Bay. In 1868 he prepared and published under the direction of the Smithsonian Institute a comprehensive study of the Makah Indians entitled, "The Indians of Cape Flattery." In connection with this undertaking, it is noted that George Gibbs contributed some editorial assistance. (Pl. Ex. 17) Swan identifies the Makah Indians in the following manner:

The tribe of Indians who inhabit the region about Cape

Flattery is known among the whites and the Indians who reside further eastward, on the Straits of Fuca, as the Makah, or more properly speaking, Mak-kah, the word being strongly accented on both syllables. They are also called by the tribes on the western coast of Vancouver Island, 'Klas-set,' and by those tribes residing between the Columbia river and Cape Flattery, 'Kwe-net-sat'h.' The tribal name among themselves is 'Kwe-net-che-chat.' All these different names have the same meaning, and signify 'the people who live on a point of land projecting into the sea,' or as we term it, the 'Cape People.' There are other tribes who reside on promontories, but the Makahs appear to be the only ones who are particularly called 'Cape Indians.' (Pl. Ex. 17, p. 1)

(d) Edward S. Curtis, who labored some thirty years in completing his famous twenty volume series, "The North American Indians," had occasion to visit the Cape Flattery area in 1914 and describes the Makah Indians as those people who live at Neah Bay and are called "the Makah, so named (Maka) by the Clallam. They call themselves Quidich-chaatl. Tlaasutka is the name applied to them by the tribes of the west coast of Vancouver island." (Pl. Ex. 41, p. 22 - Curtis, Vol. XI, 1916)

(e) According to Dr. Herbert Taylor, petitioner's expert witness, the historical references to the Makah Indians go back to about 1789. He states that "1789, 1790-1792 are our earliest historical records and all of them list the area as Classett or Cape Flattery Indians, describing the Indians who are in the area today, who were in the area when the white man first came." (Tr. 122)

3. The Makah Indians are singularly identified linguistically as the only tribe of American Indians within the continental limits of the United States who belong to the Wakishan linguistic and to the Nootkan linguistic family. Thus they are readily distinguishable from other

northwest coast tribal groups because of their linguistic and cultural differences.

(a) Dr. Herbert Taylor, ethnologist and petitioner's expert witness, testified as follows:

They (Makah) belong to the Waukishan linguistic stock of the Nootkan linguistic family. They are the only tribe in the United States that belong to the Waukishan Linguistic stock, and the only one that belong to the Nootkan Linguistic family.

* * *

* * * So that linguistically they are very identifiable.
(Tr. 118)

According to Dr. Taylor the "Makahs" originally came over onto Washington territory from Vancouver Island about five hundred years ago. (Tr. 120)

(b) Hodge, "Handbook of American Indians", (1905) lists the Makah Indians as "The southernmost tribe of the Wakashan stock, the only one within the United States. They belong to the Nootka branch." (P. 791) According to Swanton, "Indian Tribes of North America" (1952), the connection in which the Makah have become most noted, they and the Ozette "are peculiar as the only tribes of the Nootka group and Wakashan stock in the United States." (P. 428)

(c) Dr. Phillip Drucker, "Cultural Element Distributions Northwest Coast" (1950) describes Makah tribal affiliation in the following manner: "On the 'west coast' of Vancouver Island from Cape Cook down to the vicinity of modern Port Renfrew lived the Nootkan tribes. Across the Straits of Juan de Fuca on storm-lashed Cape Flattery was an outlying

division of the same people, the Makah. There were no other members of this nation." (Pl. Ex. 41, p. 29)

4. Population wise, the Makah Indian Tribe was estimated in 1805 by Lewis and Clark to approximate 2000 souls. Smallpox decimated this area toward the middle of the 19th century and cut down the Makah Tribe to about one quarter of its 1805 estimate. Gibbs reported in 1852 that smallpox had reduced the total of both sexes and all ages to slightly more than 500 souls. (Pl. Ex. 41) Later in 1861, he completed a census which showed a total of 664 souls and again in 1863 he counted a total of 663 (Pl. Ex. 17, 41). Dr. Taylor estimates the figure at 880 at the time of the 1855 Makah Treaty. Other figures for the post treaty years show: 1905 a total of 403; 1900 a total of 360; in 1937 a total of 407; and in 1950 a total of 550. (Page 952, Bulletin 145 - The Indian Tribes of North America)

5. In the middle of the 19th century and at the time of the 1855 Makah Treaty the Makahs enjoyed primarily a maritime economy, and relied less upon the products of the soil. Their splendid reputation as whalers and fishermen was widely known and respected in comparison with the other northwest Indian tribes. They ranged far out to sea in pursuit of whale, seal and other mammals and they fished mainly along the Swiftsure Banks off Vancouver for halibut.

(a) James Swan wrote the following in his 1868 treatise of Makah Indians:

The principal subsistence of the Makahs is drawn from the ocean, and is formed of nearly all its products, the most important of which are the whale and halibut. (Pl. Ex. 17, p. 19)

Excerpts from an article written by Swan for the Seattle Post Intelligence in 1870 on Makah life reflects the following:

Their means and subsistence were almost entirely drawn from the ocean, and at that time their principal food was dried halibut, dried whale blubber and oil, salmon, true cod, Gallus morhua, cultus cod, etc. * * * The Makahs are particularly dextrous in handling their canoes, and proceed in them fearlessly many miles from land in pursuit of whales or seals, or for fishing in the halibut banks fifteen miles northwest from the Cape. (Pl. Ex. 41, p. 15, 16)

(b) In his "Tribes of Western Washington and Northwestern Oregon," Vol II [published by the Department of Interior in 1877], George Gibbs wrote the following:

"The Makah are, as has been mentioned before, almost exclusively maritime in their habits; their country being very small, broken, and rocky. They pursue the whale in their canoes even out of sight of land and attack him with a daring that would not disgrace New England fishermen." (Def. Ex. 6)

Gibbs also notes that the halibut season is from March to May when the Makah then devote themselves to salmon fishing (ibid, p. 115).

(c) M. T. Simmons, Indian Agent, Washington Territory, reported on July 1, 1860, among other things:

"The treaty of Neah Bay with the tribe of Makah Indians comes next under consideration. Living as they do, on the straits their characteristic traits, their habits, and pursuits are the same as their neighbors the Clallams. They are bold and experienced pursuers of the whale, and carry on a considerable trade in oil with Victoria and Port Townsend. * * *"

"* * * Halibut are taken in great quantities by this tribe, and I would recommend that, in addition to the farming operations that should be commenced on their reservation, houses for salting and drying these fish should be erected and that they should be taught to cure them after the fashion of the whites. These fish command a good price and ready sale and I think a lucrative trade in them can be established." (Def. Ex. 8c - Ex. Doc. 1 - 36th Cong., 2nd Sess. (1860))

(d) In testifying in petitioner's behalf Dr. Taylor stated that the Makah halibut fishing area was the Swiftsure Banks off of Vancouver. (Tr. 103) As to the extent of Makah sea operations he testified that "seventy-five to ninety per cent of their dependency for subsistence was on the sea. Part of this was clamming and taking of mussels. But the Makah were sometimes at sea as much as two weeks. They would go out in a canoe and harpoon a whale, and the whale would drag them sometimes for a day, sometimes for a week, until it died. * * * so they went out a considerable distance to sea. I have no way of knowing how far out to sea, but out far enough to be gone two weeks sometimes." (Tr. 105) According to Dr. Taylor, La Perouse Bay was whaling territory and lay some fifty miles off shore. (Tr. 106) Swiftsure Bank is located about seventeen or eighteen miles off of Cape Flattery (Tr. 317).

(e) Makah Indians testifying for petitioner relative to seal hunting state that it was necessary to go twenty or thirty miles and sometimes further out to sea before contacting the animals (Tr. 315).

6. On January 31, 1855, the United States, through the efforts of Governor Isaac I. Stevens, Superintendent of Indian Affairs, concluded a treaty of cession with the Makah Indian Tribe at Neah Bay, Washington. Under the terms of said treaty, the Makah Indian Tribe for a stated consideration, "cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it * * *."

Under Article IV of said treaty the Makah Tribe of Indians reserved

unto itself,

"The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privileges of hunting and gathering roots and berries on open and unclaimed lands, provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens."

In addition the Makahs, among other things, acknowledged their dependence on the United States Government. (12 Stat. 929, Art. I, IV, and IX)

Sealing

7. At the time of the Neah Bay Treaty of 1855, and for many years thereafter, the Makahs, as did others of the Pacific Coast Indian Tribes, engaged in pelagic sealing, the prevailing and customary method of taking the seal. Having gained peculiar knowledge of the migratory habits of the Alaskan fur seal, in which annually they would pass in great numbers off the west coast northward toward their breeding grounds on the Pribilof Islands in the Bering Sea, these Indians would put out to sea in their canoes at distances of from ten to fifty miles and upon interrupting the moving herd with great stealth they go amongst them, killing them with spear and harpoon as they slept on the ocean surface.

(a) Pelagic sealing as the term is defined in Webster's International Dictionary means,

"The act or occupation of killing, capturing, or pursuing fur seals in the ocean, as distinct from killing them at their breeding places on land."

(b) Pelagic sealing grew out of a custom of ancient origin, as practiced by the Northwest Coastal Indians:

"Going out from the shore in the vicinity of Cape Flattery and Vancouver Island in their canoes they captured with the spear such stragglers from the migrating herd as came within their reach." (The Encyclopedia Americana - 1944, p. 484, Def. Ex. 10)

(c) The Alaska Fur seal, indigenous to the North Pacific Ocean and the Bering Sea is a highly gregarious and polygamous mammal and remarkable in that it only touches land for a brief period during each year in order to breed and raise the young pups. The remainder of the time is spent entirely at sea. The breeding grounds, known as rookeries are fixed areas, so that each year the seal undertakes a long migration to reach the rookeries. In the case of the Alaskan fur seal, the common breeding grounds are the Pribilof Islands located in the Bering Sea.

"Practically all the individuals of the herd during some part of the season from May until December make the Pribilof Islands their home. The winter and early spring months are spent entirely at sea. The migration route in general is southward to the passes of the Aleutian Islands, then eastward and southeastward along the coast of Alaska, British Columbia, and the United States to the latitude of southern California." (The Fur Seals And Other Life of the Pribilof Islands, Alaska, 1914, pp. 18-19, Def. Ex. 34)

The Pribilof Islands are the home of the greatest seal in the world today. In 1875 this herd was estimated at from $2\frac{1}{2}$ to 5 million seals.
(Def. Ex. 35)

8. On March 30, 1867 Russia ceded Alaska to the United States (Treaty with Russia - 15 Stat. 539). With this cession Russia not only gave up the Aleutian and Pribilof Islands but its then unchallenged

dominion over the Bering Sea. With this acquisition it became apparent that the fur seal industry represented a considerable source of government revenue if properly exploited. Beginning in 1870 the Government let the fur seal industry under two consecutive 20 year leases, first to the Alaska Commercial Company and then to the North American Commercial Company. (Def. Ex. 10, 34)

9. In spite of congressional action extending the laws of the United States over the recently acquired Alaskan territory, and in spite of the exclusive leasing of the entire Alaska fur seal industry to private enterprise, other independent factors contributed to the rapidly diminishing yield of seal skins. The principal offender was the growth of pelagic sealing utilizing firearms and conducted from large vessels. Coupled with this and the steady increase of foreign sealing ships principally from Japan and Great Britain, further governmental control over the sealing industry was lost when in 1893 Great Britain successively challenged the right of the United States to exercise dominion beyond the accepted three mile limit. Free of any real restrictions the pelagic sealers began to decimate the once vast seal herds to such an extent that unless immediate corrective action was taken, ultimate extinction of the species was foreseeable within the near future.

(a) Around 1879 independent pelagic sealers, comprising chiefly Canadians, Americans, and Japanese, began to operate extensively and without restriction in the Bering Sea area. Up to this period the government's first lessee, the Alaska Commercial had not experienced

too much difficulty in taking its set yearly quota of 100,000 seal skins. The effect of unrestricted pelagic sealing on the sealing industry was adequately reported as follows:

For some years previously an additional catch was obtained by independent operators who killed seals at sea during their migrations and fishing excursions to and from the islands. These pelagic sealers originally comprised chiefly Canadians and Americans, but in later years many Japanese engaged in the business. Beginning to operate extensively about 1879 they rapidly increased in number and in 1889 their recorded catch was 29,850 seals. In addition as became evident from later investigations, they killed many seals which could not be retrieved and still more important from 60 to 80 per cent of their catch were females whose death involved the loss of their unborn pups, or the starvation of newborn ones left on land, or both. (Def. Ex. 34 - The Fur Seals and Other Life of the Pribilof Islands, Alaska in 1914, p. 22)

(b) By 1890 the fur seal breeding stock had suffered a serious decline.

The cause of the decline was found in the development of a rival sealing industry, the hunting of the seals in the open sea while on their migrations and feeding excursions.

* * *

Pelagic sealing was necessarily indiscriminate, as the sex of the animal could not be distinguished in the water and the hunter tried to kill every animal found. * * * The killing of the female seal on the spring migration involved the death of her unborn offspring. When killed in Bering Sea in August and September her dependent young was left to starve on the rookeries. Investigations of the pelagic catch in 1895 and 1896 showed the percentage of females in the pelagic catch for these years to be 63 and 84 per cent respectively. In the latter season 20,000 starved pups were counted upon the rookeries of St. Paul and St. George, their mothers having been killed at sea. (Def. Ex. 10 - Encyclopedia Americana, p. 484)

(c) The Indian Agent's report from the Neah Bay Reservation in

1888 reflected the effect of indiscriminate commercial pelagic sealing on the usual take of seal by the Indians.

The catch of seals the past season was small. The Indians attribute this to the schooners that came from San Francisco and Victoria having introduced shooting instead of spearing, which they say scares the seals away. If this is the case, the Indians will have to shoot seals in the future. (Def. Ex. 13 - Fifty-Seventh Annual Report of the Commissioner Of Indian Affairs (1886))

(d) In 1889, the House of Representatives published a lengthy report covering its extensive investigation of the "Fur-Seal Fisheries of Alaska." That Congress was well aware of the impending destruction of the Bering Sea seal herds through unrestricted pelagic sealing is adequately demonstrated by the following excerpt from this report:

The testimony discloses the fact that a large number of British and American vessels, manned by expert Indian seal hunters, have frequented Bering Sea, and destroyed hundreds of thousands of fur seals by shooting them in the water, and securing as many of the carcasses for their skins as they were able to take on board. The testimony of the Government agents show that of the number of seals killed in the water not more than one in seven on an average is secured, for the reason that a wounded seal will sink in the sea. So that for every thousand seal skin secured in this manner there is a diminution of seal life at these rookeries of at least 7,000. Added to this is the fact that the shooting of a female seal with young causes the death of both; if after, the young seal dies for want of sustenance. (Def. Ex. 35 - House Report No. 3883, 50th Cong., 2nd Sess. (1889))

(e) Thereafter the United States began to seize those vessels, both foreign and domestic, engaged in pelagic sealing in the Bering Sea. The government claimed absolute dominion of this area as a result of the Alaska purchase from Russia. Great Britain challenged this contention and in 1892 the dispute was submitted for arbitration

whereas on August 15, 1893, the arbitration board ruled adversely to the United States and held that American jurisdiction did not extend beyond the customary 3 mile limit. (Def. Ex. 20, 21, Convention-Great Britain, February 29, 1892)

10. Having accepted the decision of the Paris Arbitration Board on the extent of American jurisdiction over the Bering Sea waters, both Great Britain and the United States sought by subsequent conventions implementing statutes and regulations to restrict the area and the quota of seals taken. Notably exempt from the agreed restrictions by specific language was the Pacific Coast Indians. As it turned out merely restricting the number of seals and the area in which they could be taken did not stem the decline of fur seal population. Subsequent investigation confirmed that pelagic sealing had to be abolished. After repeated negotiations and conferences with the interested foreign powers, the first real step toward reconstituting the declining seal herds was accomplished when a treaty suspending pelagic sealing for fifteen years was signed by the United States, Great Britain, Russia and Japan on July 7, 1911. Congress implemented the treaty provisions by the Act of August 2, 1912. In the years that followed other international seal agreements were concluded, and in each and every agreement as well as in the implementing legislation as passed by Congress, provision was made reserving unto the coastal Indians their right to engage in pelagic sealing as historically practiced.

(a) The Act of April 6, 1894, was passed to give effect to the decision of the Arbitration Board and provided that it shall be unlawful

for the citizens of Great Britain and the United States to kill at any time and in any manner fur seals "within a zone of sixty miles around the Pribilof Islands, inclusive of the territorial waters." (28 Stat. 52, Act I)

(b) The following exception was contained in Article 8 of said Act:

The regulations contained in the preceding articles shall not apply to Indians dwelling on the coast of the territory of the United States or of Great Britain, and carrying on fur seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars or sails and manned by not more than five persons each in the way hitherto practiced by the Indians provided such Indians are not in the employment of other persons and provided that when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for delivery of the skins to any person. (Def. Ex. 22-28, Stat. 52 - Act 8)

(c) Because of the continued decline of the fur seal herd, Great Britain and the United States re-examined the problem of conserving and protecting the species, and after joint studies had been completed in 1898, it was decided that pelagic sealing had to be abolished. With the advent of Japanese sealing in these waters in 1903, it was apparent that only through cooperative international control would the diminishing seal herd be protected. Accordingly in 1911, Great Britain, United States, Russia, and Japan concluded an agreement which was duly ratified the following year and had for its avowed purpose "the preservation and protection of the fur seals which frequent the waters of the North Pacific Ocean." (Def. Ex. 31 " International Convention - Fur Seals, July 7, 1911" - 37 Stat. 1538-1547)

Article IV of the Convention exempted the coastal Indians who carry

on pelagic sealing in the customary manner in open canoes without fire-arms. (Ibid Art. IV)

(d) Implementing legislation passed by Congress in 1912 " * * * to give effect to the convention between the Governments of the United States, Great Britain, Japan, and Russia for the preservation and protection of the fur seals and sea otter which frequent the waters of the North Pacific Ocean * * *," contain the exemption for the coastal Indians who conducted pelagic sealing in the customary and historical method. (Def. Ex. 32 - 37 Stat. 499, Sec. 3)

(e) The Canadian-American Provisional Fur Seal Agreement of 1942 (58 Stat. 1379) and the implementing legislation of 1944 (58 Stat. 100) each contained exemptions for the coastal Indians permitting them to engage in pelagic sealing in the historical manner as heretofore described. The same provision permitting the coastal Indians to engage in pelagic sealing has been continued and is in effect today (16 U.S.C. Sec. 634).

11. By suspending pelagic sealing through international agreements, there has taken place a remarkable improvement in the growth of the Pribilof seal herds since 1911. At that time best estimates indicated a total population of 125,000 fur seals while the latest average population approximates $1\frac{1}{2}$ million animals producing an annual sustained yield of between 65 and 70 thousand seal skins. These international agreements and controls have proven through the years to be not only reasonable but absolutely necessary to preserve the species from absolute extermination.

(a) Dr. Victor B. Scheffer, biologist for the past twenty-two years with the U. S. Fish and Wildlife Survey, testified that in 1910 the Pribilof seal herd had been reduced to about 125,000 animals which would represent about five or ten per cent of the original size prior to the era of unrestricted pelagic sealing with firearms. Since the suspension of pelagic sealing by international agreement in 1911, the Pribilof seal population level has risen to about $1\frac{1}{2}$ million animals reaching an optimum harvest level in 1940 of sixty-five to seventy thousand seal skins annually (Tr. 408-410, 418).

(b) The effects of suspending pelagic sealing on the restoration of the Pribilof seal herds was reported in the Encyclopedia Americana (1944) as follows:

This law was enacted 24 August, 1912, and while it caused a temporary loss during the five years in which sealing was suspended, its beneficial effects were apparent when it was resumed. Every year brought an increase in the number of seals. In 1924 the Pribilof herd contained 697,178, in 1925, 723,050, and in 1926, 761,281. In 1930 42,000 pelts were taken, the largest killing in over 40 years. (Def. Ex. 10, p. 485)

12. By entering into international agreements and enacting reasonable implementing legislation designed to conserve, protect, and restore the once vast Pribilof fur seal herd from the disastrous effects of pelagic sealing, the United States has not abrogated or denied to the plaintiff tribe, any right to take seal as guaranteed under Article IV of the 1855 Makah Treaty.

(a) Specific exemption in the laws and regulations controlling the sealing industry has always been made for the benefit of the Pacific Coast Indians, and even today the Makah Tribe of Indians may

engage in the practice of pelagic sealing as conducted in the traditional and historical manner of their ancestors at the time of the 1855 Treaty. (16 U.S.C. Sec. 634)

(b) According to Plaintiffs' witness the traditional method of taking the fur seal was by stealth, approaching silently in canoes and spearing the animal as it lay on the surface. Frank Smith, an elderly full-blooded Makah Indian living on the reservation testified as follows:

Q. Tell the Judge how you used to catch seal.

A. Seal run clean in Straits of Juan de Fuca. We go out from Neah Bay right straight out to the Straits and we just start hunting seal. And we spear them.

Q. You used spears.

A. Yes.

* * *

A. They built them sealing canoes out of cedar, dug out boat. And it was made pretty smooth, so smooth that you couldn't make no noise, like in water you know. * * *

* * *

Q. Why was it so important for them to be smooth?

A. Because the seal has got good hearing in the water and this don't make any noise, and they sneak up on the seal. (Tr. 170-171)

And further on cross-examination:

Q. How did it happen that you speared seals in 1895 and '96 when everybody else was shooting them with firearms?

A. Well, we had the custom of using spear many times, always.

Q. Everybody else was shooting them with guns, weren't they?

A. They did and --

Q. But you didn't?

A. * * * There was no success in using the gun all the time. When you shoot the seal you wound it. You can't kill it because it travels fast and you can't keep up with it. That's the reason the Indians they don't use guns. (Tr. 273, 274).

Another eighty year old full-blooded Makah Indian by name of Alexander Green was even more explicit in his testimony as to merits of pelagic sealing without firearms:

Q. Did you use harpoons or guns to kill seal?

A. Harpoon and spears too. Spears and harpoons.

Q. Why did you use spears and harpoons instead of guns?

A. Oh, because it was too much noise and scare the seal away. If you shoot seal, you see, they get scared, too much noise. They could hear way out in the ocean. No talk in canoe. When they hear other canoe, will leave.

(c) The fact that the Makah Indians no longer take any seal in the traditional manner cannot rightfully be attributed to governmental restrictions upon a reserved treaty right but involves other completely independent factors as: (1) The Makah Indians today feel that pelagic sealing as practiced traditionally and at the time of the 1855 Makah treaty involves too great a personal risk since for the most part they lack the ancestral skill to take seal in this manner; (2) the tremendous growth of the commercial fishing fleets in the Pacific Coast waters has caused the migratory seal herds to lay off even further from shore; and (3) the palpable civilizing influence of the white man through the years following the 1855 Makah Treaty has lessened the desire of the modern Makah Indian to continue the ancestral skills along these lines.

(Tr. 265, 266, 343, 344, 351)

(d) The right reserved in treaties by the Makah Indians, as well as by many other Pacific Coast tribes, to fish and seal at their usual and accustomed places in common with citizens of the United States, is a superior right in many respects. The Supreme Court has passed upon this question in other instances where the extent of the right has been questioned. (1) United States v. Winans, 198 U.S. 371 (1905) - fishing rights secured to Yakima Indians at usual and accustomed places in common with the citizens of the United States by the 1859 treaty survives private acquisition of lands bordering Columbia river by grants from the United States or State of Washington. Said rights impose a servitude upon future ownership of lands. (2) Seufert Brothers Company v. United States, 249, U.S. 194 - upheld Yakima Indian's right to fish at usual and accustomed places which lay outside of any area ceded by these Indians to the United States.

(e) Such reserved fishing rights, however, are not so absolute, exclusive, and unlimited that they cannot be limited or accommodated to suit changing conditions where the circumstances are such that the government acting in its sovereign capacity must take reasonable and proper measures to conserve and protect our natural resources for the general welfare and benefit of all citizens. (1) Tulee v. State of Washington, 315 U. S. 1081 (1942). - Even though the Yakima Indians by treaty with the United States had reserved their right to take fish at their usual and accustomed places in common with the citizens of the United States, nevertheless the State of Washington was free to

impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing as are necessary for conservation of fish but they cannot charge a fee for a fishing license since it is more akin to mere charge on the exercise of a right reserved to the Indians and any regulatory purpose sought to be accomplished in this manner could be done otherwise.

(2) Makah Indian Tribe v. Schoettler, 192 F. 2d 224 (1951) - The United States Court of Appeals, Ninth Circuit, in applying the rule of the Tulee case (supra) passed upon the very treaty provision pertinent to the instant case and held that where the treaty guaranteed plaintiff the right of taking fish at accustomed grounds and stating the State of Washington had the burden of showing that regulation promulgated by it which limited the right was necessary for the conservation of fish.

Halibut Fishing

13. Up until 1868, Pacific halibut fishing off of Cape Flattery and the entrance to the Juan de Fuca straits was prosecuted primarily by the northwest coast Indians; halibut, being a principal food item of the Makah Indians. (See Finding 5 ante) Soon thereafter, with the completion of coast to coast railway communication commercial fishing originated and expanded rapidly coastwise covering a territory some 2,000 miles along and up into the Bering Sea. (Def. Ex. 113 - H. Report 391, 72nd Cong., 2nd Sess.)

Dr. William Thompson in his report to the American Fisheries Society stated:

This great fishery is relatively new. It began with the inauguration of steam transportation across the continent. With the completion of the Northern Pacific railroad, the first carloads of halibut were shipped through Tacoma to eastern markets. * * * *

In 1868 the fish came from Cape Flattery; in 1910 the vessels were exploiting southeastern Alaska; in 1913 and 1914, the banks on the eastern side of the Gulf of Alaska first received concentrated attention; in 1923 and 1924 the banks along the western side of the Gulf were first fished in earnest; and now, vessels are going as far as the entrance to the Bering Sea. (Def. Ex. 111, p. 126)

14. With the growth of the halibut fishery as one of the most important of the Pacific northwest, the ever increasing concentration of highly efficient fishing gear along the coastal fishing banks, while producing an ever growing total yield of halibut taken, nevertheless began to deplete this valuable food source with an alarming rate. In 1913 a peak yield of over 66 million pounds was taken, but since that date the figure has steadily declined until in 1918 it reached a low of barely 39 million pounds total catch. Unless immediate steps were taken to conserve the dwindling halibut supply, the Pacific fishing banks would be completely exhausted of this species within a short period.

(a) During the period of 1914 to 1916, Dr. William F. Thompson, one of the pioneer experts in this field and a member of the International Fisheries Commission, called attention to the decline in the halibut fishery by noting the increase in work hours needed to complete each fishing voyage, by the decrease in the average number of fish taken for each unit of gear employed, and the reduced average weight of the fish taken. (Def. Ex. 42)

(b) The British Columbia Fisheries Commission reported in 1916 that:

* * * intense fishing on the halibut banks of the coast of British Columbia and the United States has resulted in not only serious depletion, but has made its influence felt throughout the whole biological appearance of the species * * *. The numbers still found on them [fishing banks] are so small, and the percentage of mature fish in this population has fallen so low, that it appears imminent that the halibut will drop to a minor position among food fishes of the Pacific. (Def. Ex. 109)

Report No. 1 of the International Fisheries Commission (1928) states the following:

The amount of gear now used on the older banks is about two and one-half times the quantity formerly used, yet the present catch is only about 40 per cent of the former yield from these grounds. Under the stress of this great intensification of fishing effort the abundance of fish on the older banks has fallen enormously to 16 per cent of the abundance in 1906. Where in 1906 the catch per set of a unit of fishing gear was nearly 300 pounds, in 1926 it was below 50 pounds. * * * * Accompanying this fall in abundance there has been a decrease in the average size of the fish landed, and a great increase in the percentage of undersized fish. (Def. Ex. 129)

15. A contributing factor to this steady decline is the halibut's characteristically slow rate of reproduction; its period of maturation being approximately 12 years. Thus, in a given period the intensity of the depletion of a total fishery could be concentrated within the life span of one immature fish.

(a) Jozo Tomasevich in "International Agreements on Conservation of Marine Resources; With Special Reference to the North Pacific (1943)" described the physiological characteristics of the halibut as follows:

The Pacific halibut is a "demersal" species of flat fish living at the bottom of the continental shelf along

the Pacific Coast, mainly in waters between 15 to 200 fathoms deep and having a bottom temperature of 3° 8° C. One of the most important characteristics of the halibut is its slow growth. Only about 50 percent of females are mature at the age of twelve years. Some reach an age in excess of thirty years. The male is always much smaller than the female; the male seldom reaches a weight of over 40 pounds, while the female occasionally exceeds 300 pounds. (Def. Ex. 42)

(b) The International Fisheries Commission Report No. 1 (1928)

states:

The rapidity of decline is regarded as especially serious because of the very slow growth of the halibut, an adult being from 12 to 25 years, or over, in age. Hence the present decline has taken place within the life span of one halibut of ordinarily large size. As nearly all the fish which are being caught now were spawned 8 to 10 years ago, the abundance of the younger fish, which will be annually available for capture in the next 10 years, has already been established. If these are greatly reduced in numbers, and the intensity of the fishing is maintained, the outlook for a future stock of spawning fish sufficient to maintain the supply presents a hopeless picture. (Def. Ex. 129)

16. The preservation and utilization of the rich Pacific ocean halibut fishery has always been the mutual concern of Canada and the United States. As early as 1892, it was agreed that a joint commission should undertake an overall and comprehensive study of the halibut leading to recommendations of measures designed to insure protection and preservation of the species. (Def. Ex. 38) An extensive report was published, but no affirmative action was ever taken. In 1910 there were sent to Congress recommendations for a system of uniform regulations for the preservation of food fishes in Canadian-American waters, but these were never adopted. (Def. Ex. 39 - House Doc. 638, 61st Cong., 2nd Sess.)

17. In 1924 after much agitation, Canada and the United States concluded a treaty establishing the International Fisheries Commission which was designed solely to administer a program for the preservation of the halibut fishery of the Northern Pacific Ocean. (43 Stat. 1841) Subsequent conventions of 1930 (47 Stat. 1872), 1937 (50 Stat. 1351), and 1953 (67 Stat. 494) continued and strengthened the regulatory power of the Commission.

18. The Commission's prime power is limiting the halibut catch by restricting the length of the fishing season. Artificial propagation of the species is impractical. By limiting the catch to that amount which will permit replenishment of the stock through normal reproduction, a future supply will be insured. The results over the years have justified the Commission's policy in this regard, and this type of regulation has not only proved sound and reasonable, but is the assured method which will eventually produce in the years to come a sustained optimum yield without damage to future supply.

(a) Circular 1, International Fisheries Commission (1936) states the Commission's power to regulate as follows:

The most important power is that of limiting the catch of halibut which can be taken from an area. This power is stated in two ways in the treaty; first, as the power to change the length of the closed season; and second, as the power to set a limit to the catch. These reach the same end because the length of the fishing season determines the amount which can be taken. The intent was to see that the Commission had the power to do the one essential thing: namely to limit the catch to the amount which the banks can produce without damage to future supply, and which will allow sufficient reproduction to take place. (Def. Ex. 79)

(b) Dr. William F. Thompson, speaking on the feasibility of artificial propagation of the halibut, stated:

It is a pity that man cannot effectively increase the rate of survival. Each halibut lays as many as a million and a half eggs during a spawning season. As a result the ocean waters contain vast numbers of floating larvae. No hatchery could carry the larvae beyond a stage at which it begins to take natural food and the numbers in such stages in nature is so vast, that hatchery production would be but a negligible percentage.

Unable to interfere, man finds himself faced with a serious problem in the regulation of the marine fisheries. (Def. Ex. 111 - "The Work of the International Fisheries Commission Upon the Halibut" (1928))

(c) The first report of the International Fisheries Commission (1931) sums up the problem of artificial propagation as follows:

Artificial propagation of halibut is for technical and scientific reasons, impracticable. The numbers of young that could be thus produced would be a minute part of those hatched under natural conditions. Their culture would be expensive and the young fish could not be kept long after hatching. Hence, it is evident that the natural supply is overwhelmingly the most important, and that it must be cared for. (Def. Ex. 129, p. 21)

(d) The result of the conservation measure adopted by the Commission have not only stopped the decline of the fishery but have improved the condition of species and increased the abundance of the halibut stocks on the banks. As stated in the Commission's report, number 13, (1948) "The accumulation of larger stocks has already made it safe to permit the taking of an annual catch of 56,000,000 pounds, an increase of 13,000,000 pounds over that obtained by the unrestricted fishery immediately prior to the inauguration of regulation. Present increased catches are taken with one-third less fishing effort than before." (Def. Ex. 141)

(e) Dr. William F. Thompson, defendant's expert witness, testified as to the results of the Commission's conservation measures over the years, as follows:

Regulation increased the stock on the banks tremendously. The catch per unit of year rose sharply from the date of first restriction. The restriction did this. It reduced the take from the bank to within the limit which the banks were producing. (Tr. 241)

According to Dr. Thompson, if there had been no international agreements or regulations designed to conserve and protect the existing halibut fishery, then --

In my opinion based upon my experience with other fisheries, the stock of halibut would have been reduced to as low as a level as it would have paid the commercial fisherman to operate on them. That level would have been so low as to reduce, in my opinion, the total take from all sources. It would have reduced the stock of large fish for more than what happened. (Tr. 244-245)

(f) Other comments on the positive results of the Commission's regulation of the halibut fishery may be found in Tomasevich, "International Agreements on Conservation of Marine Resources" (1943), page 187: "The American-Canadian halibut conservation program, the first international undertaking with the purpose of conserving and rebuilding a relatively depleted deep sea fishery, is on the way to complete success in its primary purpose." (Def. Ex. 118); Barnes and Gregory, "Northern Pacific Fisheries, (1939)," at page 242: "The danger of possible interruption to the halibut conservation work cannot be too greatly stressed. At present the Pacific halibut banks are unquestionably being rehabilitated. This is a very delicate process, however; the reserve so far built up is small, capable of being swept

away in one year of unregulated fishing. To bring the banks back to anything like their former state of abundance will require years of careful regulation." (Def, Ex. 41); Testimony of Miller Freeman, ex-member of the International Fisheries Commission: "From the moment that regulation was applied along the lines which research had indicated, depletion was arrested and the curve of abundance turned upward. The upward trend continued for twenty years and I am proud to say that in 1954 the North Pacific halibut catch was the largest ever made even in the early days when the industry was fishing a virgin stock." (Tr. 191, 192)

19. The regulations promulgated by the International Fisheries Commission established a seasonal limit for the taking of halibut within the convention waters inclusive of the Cape Flattery area. The duration of the open season depends upon the time it takes for fishermen working a given area to land the quota fixed by the Commission for that year. The calculated quota represents the total number of halibut which a particular fishing band may safely yield that year without damaging future supply. Said regulations are applicable to all fisherman including the Makah Indians without exception. (25 U.S.C. Sec. 772, Tr. 381).

A marked decrease in the length of the fishing season has occurred since the advent of regulations. This has resulted from the abundance of halibut, coupled with larger trips and an increase in the number of ships attached to the fishery. Over a five-year period, beginning in 1942 the length of the halibut season has been as follows:

1942, 2 months, 13 days; 1943, 2 months, 4 days; 1944, 1 month, 18 days; 1945, 1 month, 15 days; and 1946, 1 month, 11 days (Def. Ex. 142, Report of International Fisheries Commission, 1949 - p. 12).

20. The modern Makah Indian does not depend upon a subsistence economy as practiced by his forefathers at the time of the 1855 Treaty. Besides engaging in commercial fishing on his own, he may be employed by the fisherman's cooperative, work for other commercial fishing interests, or work at the logging camps. Commercially speaking, the individual Makah fisherman does not play an important part in the coastal fishing industry since he finds it prohibitively expensive at this time to outfit and equip a modern fishing vessel capable of competing with the commercial "long line" fishermen who work the Cape Flattery waters and the Swiftsure Banks during the open season.

(a) Plaintiff's witness, Charles Peterson, a Makah tribal council member and a commercial fisherman, testified that the Makah Indians ordinarily fished the Swiftsure Banks for halibut from open canoes with hand lines and that since commercial fishing boats using modern "long line" equipment are able to saturate a large area with hoods, it is impossible to take halibut in any great numbers by single hand lines. (Tr. 332-336) Mr. Peterson spoke further of the tremendous expense of purchasing modern fishing gear (Tr. 336). He stated that a smaller boat can cost \$17,000 and that "some of the newer vessels that are equipped to fish halibut and combine their use for other fishery, they run \$50 to \$75 thousand dollars." (Tr. 337)

(b) Mr. Peterson testified further that trolling for salmon on a

commercial basis is his main occupation today.

Q: Do you get the fish that you then dry and preserve for future use in your home, or are you in the commercial business?

A: Well, we do trolling. We do more or less a commercial fishing. We save what we feel like and cure them and salt them and dry them, can them. Like I say, we are educated now, we don't confine our food to dried seal or dried fish." (Tr. 348)

(c) In 1950 Mr. Peterson on another occasion and before another tribunal testified that during the 1942-1943 season the annual income of the Makah Tribe (population 464) total \$206,050, of which \$55,000 represented total income from fish sold for cash. This was in addition to these fish taken for the personal consumption of the members of the tribe. (Pl. Ex. 16, pp. 82, 101) .

(d) Plaintiff's witness, Ernest Robert Soeneke, Vice-Chairman of the Makah Tribal Council, identified himself as a fish buyer and co-partner of the Bay Fish Company, testified in this case that during the past season (1955) the number of saleable halibut taken by the Makah fishermen averaged about one hundred pounds, per man per day (Tr. 351)

In 1950 witness Soeneke testifying in another matter before another tribunal stated that during the three-year period of 1947, 1948, and 1949, the total amount of all fish landed by Makah fishermen at his company exceeded 500,000 pounds of which 150,000 pounds were halibut. (Pet. Ex. 16, pp. 197, 198)

(e) Plaintiff's witness Kenneth Ward, Chairman of the Makah Tribe testified that in the past ten years halibut fishing has not played an important part in the economic life of the tribe.

"Well it hasn't done too much for the economy of the tribe lately on account of the restrictions and the amount of people who are fishing out there." (Tr. 361)

He stated further that around the Swiftsure Banks at a given time can be found perhaps one hundred to one hundred fifty fishing boats. (Tr. 363-363)

21. By entering into international agreements with Canada to conserve, protect and restore the depleted Pacific halibut ocean fishing, the United States did not deprive, abrogate, or deny to the Makah Tribe of Indians any right which they may have reserved under Article IV of the 1855 Makah Treaty to fish in common with all citizens of the United States at usual and accustomed grounds and stations because:

(1) Such fishing rights as guaranteed under Art. IV of the 1855 Makah Treaty are not so absolute, unlimited, and exclusive in that they cannot be accommodated and adjusted to meet changing circumstances where the Government must impose reasonable regulations designed to conserve and protect our natural resources for the benefit of all. Tulee v. State of Washington, 315 U.S. 1081 (1942), Makah Indian Tribe v. Schoettler, 192 F. 2d 244 (1951); and

(2) The defendant has shown by overwhelming evidence (for the most part undisputed) that the seasonal restrictions, imposed upon the Pacific coast halibut fishery by regulations promulgated and adopted by the International Fisheries Commission, pursuant to the Convention between Canada and the United States, are fair, reasonable, and absolutely necessary to conserve, protect, and rehabilitate the halibut species.

Tulee v. State of Washington, Makah Indian Tribe v. Schoettler, supra -
See Finding 12.

(3) The reserving of Makah fishing rights at usual and accustomed places under the 1855 Treaty was founded upon the need of the petitioner tribe to maintain its then subsistence economy which was based primarily upon the immediate products of the sea, and in no sense was this treaty provision a guarantee of future commercial fishing rights.

(4) Petitioner has failed to prove that in complying with the regulations of the halibut Commission, or by their enforcement, the individual members of petitioner tribe suffered a deprivation to the extent that they are unable to sustain their immediate wants or that of their families consistent with a subsistence economy.

/s/ EDGAR E. WITT
Chief Commissioner

/s/ WM. M. HOLT
Associate Commissioner