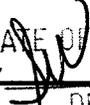


NO. 37301-7-II

FILED  
COURT OF APPEALS  
DIVISION II

COURT OF APPEALS, DIVISION II

09 FEB 27 PM 12:31

STATE OF WASHINGTON  
BY  DEPUTY

---

STATE OF WASHINGTON,

Respondent,

vs.

LARRY P. GUIDRY, JR.,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Christine A. Pomeroy, Judge  
Cause No. 07-1-01538-1

---

BRIEF OF *AMICUS CURIAE*  
NISQUALLY INDIAN TRIBE

---

BILL TOBIN, WSBA NO. 4397  
Attorney for *Amicus Curiae*  
Nisqually Indian Tribe

P.O. Box 1425  
Vashon, Washington 98070  
(206) 463-1728

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

STATEMENT OF IDENTITY AND INTEREST ..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 4

    A. Public Law 280 Permits States to Assume Only General  
        Criminal and Civil Jurisdiction on Indian Reservations ..... 4

    B. Public Law 280 Explicitly Excludes State Jurisdiction  
        Over Tribal Fishing and Hunting from Its Coverage ..... 5

    C. Washington State Jurisdiction Over the Treaty-Secured  
        Fishing Rights of the Nisqually Tribe is Preempted by  
        Federal and Tribal Law ..... 6

    D. The Case of *State v. Squally* Has No Bearing on the  
        Case Before the Court ..... 10

CONCLUSION ..... 13

CERTIFICATE OF SERVICE ..... 15

## TABLE OF AUTHORITIES

### FEDERAL CASES:

<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976) .....	5
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987) .....	5
<i>Confederated Tribes of the Colville Reservation v. Washington</i> , 938 F.2d 146 (9 <sup>th</sup> Cir. 1991) .....	5
<i>Montana v. U.S.</i> , 450 U.S. 544 (1981) .....	11
<i>New Mexico v. Mescalero Apache</i> , 462 U.S. 324 (1983) .....	--
.....	6, 7, 8, 9, 11, 12, 13
<i>Puyallup Tribe v. Department of Game (“Puyallup I”)</i> , 391 U.S. 392 (1968) .....	8
<i>Puyallup Tribe v. Department of Game (“Puyallup III”)</i> 433 U.S. 165 (1977) .....	9
<i>Tulee v. Washington</i> , 315 U.S. 681 (1942) .....	8
<i>United States v. Washington</i> , 384 F.Supp. 312 (W.D.Wash. 1974) .....	--
.....	1, 2, 3, 8, 9, 11, 12, 13
<i>United States v. Washington</i> , 626 F.Supp. 1405 (W.D. Wash. 1981) .....	1, 11
<i>United States v. Winans</i> , 198 U.S. 371 (1905) .....	8
<i>Washington State Commercial Passenger Fishing Vessel Ass’n v.</i> <i>Washington</i> , 443 U.S. 658 (1979) .....	1

### STATE CASES:

<i>State v. Price</i> , 87 Wash.App. 424 (1997) .....	10, 11
<i>State v. Squally</i> , 81 Wash.App. 685 (1996) .....	13
<i>State v. Squally</i> , 132 Wn.2d 333 (1997) .....	13

**TREATIES:**

Treaty of Medicine Creek, 10 Stat. 1132 (1854) .....10

**FEDERAL STATUTES:**

18 U.S.C. 1162 ..... 5, 6

25 U.S.C. 1321 ..... 5, 6

28 U.S.C. 1360 ..... 5

**STATE STATUTES:**

RCW 77.15.570 .....2, 3, 10

**TRIBAL CODES:**

Nisqually Tribal Code 14.20.01 ..... 3

## I. INTRODUCTION

The Nisqually Indian Tribe appears as *amicus curiae* to present authorities and argument on questions of federal, tribal and state jurisdiction over treaty Indian fishing rights as those questions are raised in the context of this case. The defendant/appellant Larry Guidry is the spouse of an enrolled member of the Tribe. Mr. Guidry fished on the Nisqually River under the authority of a fishing assistant permit issued by the Tribe. He is charged with violation of a state statute that imposes limits on the exercise of the right of a treaty tribe member to assistance, which right arises under federal law. The Tribe maintains that the State lacks jurisdiction to regulate the treaty fishery in the manner asserted by the State in this case.

## II. STATEMENT OF IDENTITY AND INTEREST

The Nisqually Indian Tribe has rights to fish, hunt and gather within and outside its reservation boundaries, reserved in treaties signed with the United States. These rights are among the most precious and jealously defended rights that treaty tribes possess, a fact recognized repeatedly by the federal courts, *Washington State Commercial Passenger Fishing Vessel Ass'n v. Washington*, 443 U.S. 658 (1979).

The usual and accustomed fishing places of the Nisqually Tribe are located in the southerly reaches of Puget Sound, as established by action of the U.S. District Court in *United States v. Washington*, 384 F.Supp. 312, 369 (W.D. Wash. 1974); 626 F.Supp. 1405, 1441-1442 (W.D. Wash. 1981).

The district court, in its ruling regarding treaty fishing rights, held in 1974 that a treaty fisher could be assisted in the exercise of the treaty fishing right by certain persons, *U.S. v. Washington*, 384 F.Supp. 312, 412. In furtherance of the implementation of the right of treaty

fishers to assistance, the Tribe has passed a law outlining the circumstances surrounding the permitting and exercise of the right to assistance.

In the case under appeal, the State of Washington has added restrictive conditions to the federal law permitting the use of fishing assistants, by enacting and attempting to enforce RCW 77.15.570, which statute is the basis for the prosecution of the defendant in this case. These actions impede the authority of the Tribe to enact its own laws under the auspices of federal authority for the conduct of its treaty fisheries.

### III. STATEMENT OF THE CASE

In 1974, the U.S. District Court for the Western District of Washington, the Honorable George Boldt presiding, entered a decision in the case of *United States v. Washington, supra*, that outlined the parameters of the fishing rights secured to certain Western Washington Indian tribes by treaties with the United States executed in the 1850's. The Nisqually Tribe intervened in the case as a plaintiff. The Tribe is a signatory to the Treaty of Medicine Creek, 10 Stat. 1132 (1854). The district court decision confirmed the right of the Nisqually Tribe to take fish at all usual and accustomed grounds and stations, and made other rulings regarding the fishing right.

As part of its decision, the court specified that a treaty fisher could be assisted in the exercise of the treaty fishing rights by certain persons, *id.* at 412. Those persons include the fisher's spouse (whether or not possessing individual treaty rights), forebears, children, grandchildren and siblings.

Acting under the authority of the federal court ruling, the Nisqually Tribe enacted an implementing ordinance specifying the circumstances under which a treaty fisher's assistant could fish. The tribal code permits the authorized assistant to fish without the presence of the enrolled tribal member on the Nisqually River and in McAllister Creek. The code further

requires that the tribal member be present when the assistant was participating in the fishery in the other usual and accustomed grounds of the tribe as adjudicated by the district court. The tribal code references *U.S. v. Washington* as the basis for the right to assistance. Section 14.20.01 of the Nisqually Tribal Code authorizing the use of fishing assistants can be found at CP 74-75.

The Tribe issues permits and tribal identity cards to authorized fishing assistants for use in the tribal treaty fishery. Mr. Guidry was fishing within the rules promulgated in the tribal code at the times and places at issue in this case. He was issued a tribal permit and an identity card, which he had on his person at all times when fishing.

The State of Washington has passed a law that places a restrictive limitation absent from the federal law on the exercise of the right to assistance. In doing so, the State took Judge Boldt's words and added the restrictive phrase "when the treaty fisherman is present at the fishing site" not present in the original ruling. That law, RCW 77.15.570, requiring the enrolled tribal member to be present at the fishing site at all times when the assistant was fishing, puts the state law directly at odds with the tribal code. Mr. Guidry was accosted by agents of the Department of Fish and Wildlife in December, 2006, and charged with violation of RCW 77.15.570. At the time he was arrested and charged, he had in his possession and produced the identification showing his permitted status under tribal law.

At the trial, Mr. Guidry testified that he and his wife work together in the preparation and processing of the fish caught by Mr. Guidry, and that the income from Mr. Guidry's fishing activities is used to provide for the needs of the Guidry family, ER 170-171. Lorena Guidry testified that during the winter chum salmon season she would go to the fishing site from time to

time but was not in the boat, due to the cold, lack of room in the boat and the dangers on the river at that time of year, ER 196-197.

Testimony by the Tribe's natural resources director in the superior court established that the chum fishery was not closed for conservation at the time Mr. Guidry was fishing, ER 236-237. The State offered no evidence at the trial regarding the need for any conservation-based regulation of the chum fishery.

#### **IV. ARGUMENT**

##### **A. Public Law 280 Permits States to Assume Only General Criminal and Civil Jurisdiction on Indian Reservations.**

In this case, the trial court and the prosecution assert that the State has jurisdiction over the Nisqually Tribe's fisheries based on "the governor's 1957 proclamation", Conclusion of Law No. 3, ER 265. In fact, that proclamation is only the final step in the acquisition of state jurisdiction under what is known as Public Law 280 ("Pub.L .280"). Passed by Congress in 1953, this act authorized the acquisition of criminal and civil jurisdiction by states over Indian reservations. The governor's 1957 proclamation constitutes the acceptance of jurisdiction by the State, following congressional authorization under Pub.L. 280 and a petition by the Nisqually Tribe for the assumption of jurisdiction.

Although the governor's proclamation contains sweeping language implying that the State had acquired jurisdiction over all the lands and people of the Nisqually Reservation, the actual jurisdiction acquired was much narrower in scope. Irrespective of the language of the proclamation, the State acquired only that jurisdiction authorized by Congress. Public Law 280 and the federal case law interpreting its application make clear that it authorizes the assumption of general criminal and civil jurisdiction only.

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Supreme Court rejected a claim by Minnesota of the right to tax personal property belonging to an Indian and located on an Indian reservation. The state relied on Pub.L. 280 as the basis of its authority. The Court made clear that the Act was not intended to effect total assimilation of Indian Tribes, *Id.* at 387-389. Pub.L. 280 jurisdiction is narrowly circumscribed and does not include the authority to tax. Also excluded from the jurisdiction acquired by the state under Pub.L. 280 is the power to enforce state regulatory laws, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9<sup>th</sup> Cir. 1991). And, most importantly for this case, the Act itself specifically excludes state authority over fish and wildlife from state Pub.L. 280 jurisdiction.

**B. Public Law 280 Explicitly Excludes State Jurisdiction Over Tribal Fishing and Hunting from Its Coverage.**

As noted above, Pub.L. 280 jurisdiction is limited to general civil and criminal jurisdiction, and excludes the authority to tax and other types of state laws. Public Law 280 consists of three separate federal statutes, 18 U.S.C. 1162, State jurisdiction over offenses committed by or against Indians in the Indian country; 25 U.S. C. 1321, Assumption by State of criminal jurisdiction; and 28 U.S.C. 1360, State civil jurisdiction in actions to which Indians are parties.

Two of the statutes contain the following identical language:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize any regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; nor shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty,

agreement or statute with respect to hunting, trapping or fishing or the control, licensing or regulation thereof.

18 U.S.C. 1162 (b); 25 U.S.C. 1321 (b)  
(Emphasis added)

In *New Mexico v. Mescalero Apache*, 462 U.S. 324 (1983) the U.S. District Court enjoined the State of New Mexico from enforcing its game laws against non-Indians on the tribe's reservation. In rejecting New Mexico's claim of authority to regulate the hunting activities of non-Indians on the Mescalero Apache Reservation, the Court stated:

Federal law commits to the Secretary and the Tribal Council the responsibility to manage the reservation's resources. It is most unlikely that Congress would have authorized, and the Secretary would have established, financed, and participated in Tribal Management if it were thought that New Mexico was free to nullify the entire arrangement. (Citations omitted) [FN5]

[FN5] Congress' intent to preempt State regulation of hunting and fishing on reservations is reinforced by Pub.L.280. That law, which grants limited criminal and civil jurisdiction over Indian reservations to States which meet certain requirements, contains a provision which expressly excludes authority over hunting and fishing. That provision provides that a State which has properly assumed jurisdiction under Pub.L. 280 is not thereby authorized to

“deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing *or the control, licensing or regulation thereof*” 18 U.S.C. 1162 (b); 25 U.S.C. 1321(b) (Emphasis in original).

### **C. Washington State Jurisdiction Over the Treaty-Secured Fishing Rights of the Nisqually Tribe is Preempted by Federal and Tribal Law.**

In *New Mexico v. Mescalero Apache, supra*, The Supreme Court considered the question of the extent of the authority of the State to regulate the hunting and fishing activities of non-Indians on the reservation. The Court reviewed the history of the development of a management regime for fish and wildlife on the reservation, conducted by the tribe under the authority and with the assistance of the federal government, *Id.* at 328. The state had enacted fishing and

hunting regulations that were in conflict with, and in some cases more restrictive than the rules set out by the tribe. The state attempted to enforce its laws against non-Indians hunting or fishing on the reservation, *Id.* at 329. Although conceding tribal jurisdiction over the hunting and fishing activities of Indians on the reservation, the state claimed concurrent jurisdiction over non-Indian hunting and fishing activities on the reservation, *Id.* at 330. The Court found that concurrent state jurisdiction would seriously disrupt the comprehensive federal-tribal management scheme established pursuant to federal law, *Id.* at 338, 339.

In considering the matter of federal-tribal preemption, the Court compared the contributions of the state and federal/tribal governments to the development of the reservation's resources. The Court found that the reservation's fishing resources were wholly attributable to the Tribe's efforts. For example, the Tribe had established eight artificial lakes and stocked them with fish from a federal hatchery on the reservation. In contrast, the state had not stocked any waters on the reservation since 1976, *Id.* at 328.

Another factor influencing the Court's ruling was the absence of a compelling state interest in regulating the Tribe's on-reservation hunting and fishing. The resources in question were developed by state and federal efforts and the state made no significant contributions to those resources. Further, the state was unable to identify any other "governmental functions" it provided in connection with hunting and fishing on the reservation. The state also failed to show that any off-reservation effects justified state intervention, *Id.* at 341-342, and the Court found that state's financial interest in the sale of licenses was "simply insufficient" to justify the assertion of concurrent jurisdiction, *Id.* at 343. The Court concluded,

In this case the governing body of an Indian Tribe, working closely with the Federal Government and under the authority of federal law, has exercised its lawful authority to develop and manage the reservation's resources for the benefit of its members. The exercise of concurrent jurisdiction by the state would

effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of State interests which justify the assertion of concurrent authority, we conclude that the application of the State's hunting and fishing laws to the reservation is preempted.

*Id.*, 343-344. (Emphasis added)

In the case before the Court, the fishing rights of the Nisqually Tribe are derived from a treaty with the United States and are conducted exclusively under the authority of federal law. State regulation of treaty fishing is narrowly circumscribed, and in fact extends only to non-discriminatory regulations that are reasonable and necessary for the conservation of the fishery resource. For over a century, the Supreme Court has sharply restricted state power over treaty fisheries while taking an expansive approach to the independence of the Indian tribes. Treaty Indian fishing cannot be compromised by state property laws, *U.S. v. Winans*, 198 U.S. 371 (1905). Treaty fishers cannot be required to have state licenses, *Tulee v. Washington*, 315 U.S. 681 (1942). In 1968, the Supreme Court ruled that the only authority the State possessed over Indian fishing was the right to regulate for conservation of the resource. *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) ("*Puyallup I*").

In the 1974 comprehensive articulation of state authority over treaty fishing, Judge Boldt spelled out the details of jurisdictional relationship, *U.S. v. Washington, supra*. The tribes reserved the exclusive right to fish within the area and boundary waters of their reservations, *Id.* at 332, 341, and at all usual and accustomed grounds and stations, *id.* at 332. These reserved fishing rights cannot be denied or qualified by the State, with the State possessing the power to regulate treaty fishing only to the extent reasonable and necessary for conservation. Further, the regulations must not discriminate against the Indians, *Id.* at 333, 342. The State has the burden

of proving conservation necessity, *Id.*, at 342. Although the treaties were negotiated with the tribes, they reserved rights “to every individual Indian, as though described therein”, *Id.* at 407. Any person showing tribal identification to establish that he is exercising fishing rights of a treaty tribe and is fishing in the tribe’s usual and accustomed places is protected by federal law from state action, unless the State has established that such action is an appropriate exercise of its police power, *Id.* at 403, 408. With respect to the State’s burden to establish that a regulation is a lawful exercise of its power, the court stated:

Every regulation of treaty right fishing must be strictly limited to specific measures which before becoming effective have been established by the state, either to the satisfaction of all affected tribes or upon hearing by or under direction of this court, to be reasonable and necessary to prevent demonstrable harm to the actual conservation of fish.

*Id.* at 342 (Emphasis added).

The Supreme Court acknowledged the right of the State to regulate for conservation purposes, including on the reservation, in *Mescalero Apache, supra*, citing *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977) (“*Puyallup III*”). However, in this case, the State has not met its burden of showing conservation necessity for the enactment of RCW 77.15.570. The evidence at the trial court was uncontroverted that there was no conservation closure on the Nisqually River chum fishery during the time period in which Mr. Guidry was charged with illegal fishing. When asked about the size of the chum run in December, 2005, David Troutt, the Tribe’s Natural Resources Director, testified:

A I don’t have a specific number, but I know that it was – it was a number large enough to provide for a full statement (sic) and a full fishery through our scheduled season.

Further, Mr. Troutt submitted a declaration to the court in connection with pre-trial motions. In that declaration, a copy of which can be found at CP 49-50, Mr. Troutt stated:

“In December of 2005 there was a large run of chum and this run was in no danger of being depleted.”

The State presented no biological evidence in the case whatsoever. It failed to meet its burden of proving a conservation necessity for the enforcement of its laws against an individual licensed by the Tribe under the authority of federal law.

The State presented no evidence to establish that it had an interest in regulating the treaty fishery due to its contribution to the resource. Whereas the State’s case was devoid of evidence of resource enhancement on the Nisqually River, in response to a question regarding the number of hatcheries on the Nisqually River, Mr. Troutt testified:

A There are two hatcheries on the Nisqually River, both run by the Nisqually Indian Tribe through my program.

Q Where are those hatcheries located?

A They’re both located on the Nisqually Reservation.

ER 236

In his declaration previously referred to, Mr. Troutt stated:

“There are two hatcheries on the Nisqually River. One at Clear Creek and one at Kalama Creek. We provide care for over 3 million Chinook and 1 million Coho each year.”

The State provided no justification for its assertion of jurisdiction over treaty fisheries in this case. However, the state rationale for the passage of RCW 77.15.570 was articulated in the case of *State v. Price*, 87 Wash.App. 424 (1997). The court claimed that the statute was enacted

to protect Indian treaty rights, *Id.* at 431. That rationale may have served the facts in *Price*, but it has no application in this case. In *Price*, Mr. Price was fishing outside the usual and accustomed fishing places of the Yakama Indian Nation. Further, by tribal ordinance, that Indian tribe prohibited any person not a tribal member from participating in the treaty fishery in any manner, *Id.* at 432.

In contrast, Mr. Guidry was authorized under Nisqually law to fish where and how he did, and held a tribal permit and tribal identification. In addition, it is likely that he was fishing within the usual and accustomed grounds of the Nisqually Tribe, although the trial court's imprecision in defining the places where the alleged offenses occurred makes it impossible for this Court to make that determination. Consider the trial court's Conclusion of Law No. 6, at CP 103:

“The defendant caught fish off the Nisqually Indian Reservation on December 19th through December 21, 2005. He may have caught his fish on the reservation on December 18, 2005. On all of those days, he may have been fishing outside of the Nisqually Tribe's usual and accustomed area.”

In fact, the Tribe's usual and accustomed places include all of the eastern half of South Puget Sound south of the Tacoma Narrows as well as the Nisqually River, including the open waters thereof, see *U.S. v. Washington, supra*, 384 F.Supp. 312, 369 (W.D. Wash. 1974); 626 F.Supp. 1405, 1441-1442 (W.D. Wash. 1981). It is unlikely that Mr. Guidry, using only a small skiff suitable for river travel, ever went outside of those boundaries.

In *Mescalero Apache*, the Court distinguished the case of *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Court had held that the Crow Tribe could not regulate hunting and fishing on reservation lands not owned by the tribe or held in trust. However, in *Montana*,

the tribe had not claimed that non-Indian hunting and fishing on non-tribal lands impaired the tribe's reserved hunting and fishing rights, *Mescalero Apache, supra*, 462 U.S. at 331, n. 12. In the case before the Court, the Nisqually Tribe does in fact claim an impairment of its reserved fishing rights by state encroachment on the Tribe's inherent sovereign power to exercise jurisdiction over members and non-members' utilization of the Tribe's federally protected fishing rights.

In effect, the State is claiming that it knows better than the Nisqually Tribe, its elected leadership, and its treaty fishers and their families what is good for them. Frankly, this attitude is patronizing in the extreme to the Tribe, which has taken the appropriate steps under the authority of federal law to authorize Mr. Guidry's fishing activities by passing an ordinance and issuing a permit and identification.

The State claims that a person cannot be assisting a treaty fisher if the treaty fisher is not present at the fishing site. Even if that were to be the case, which the Nisqually Tribe disputes, the State failed to follow the procedures proscribed in *U. S. v. Washington* for obtaining a proper determination of the question. As noted above, a state regulation asserting control over treaty fishing activities must either be established to the satisfaction of any affected tribe or to the federal court before taking effect, *Id.* at 342.

Judge Boldt provided for continuing jurisdiction of the federal court to provide a forum for the resolution of just such questions. In what is referred to as "Paragraph 25" of the injunction in *U.S. v. Washington*, the court held that a party could return to the court for a determination of a variety questions concerning the case, including "whether any party is acting

in conformity with Final Decision 1, Paragraph 25 (1) *Id.* at 419. That jurisdiction is ongoing to this day.<sup>1</sup>

**D. The Case of *State v. Squally* Has No Bearing on the Case Before the Court.**

The State has made an argument, which the trial court apparently accepted, that the case of *State v. Squally*, 132 Wn.2d 333 (1997), somehow shores up the State's claim to jurisdiction over the treaty fisheries of the Nisqually Tribe. This case is irrelevant to the case before the Court. In 1957, the Tribe petitioned and the state accepted Pub.L. 280 general criminal and civil jurisdiction over the Nisqually Reservation. The Tribe's petition contained a metes and bounds legal description of the reservation boundaries at that time. In subsequent years, the Tribe added additional lands to its reservation land base that were outside the legal description contained in the 1957 petition. The issue in *State v. Squally* was whether the state's Pub. L. 280 jurisdiction extended to those after-acquired lands. The court ruled that it did so apply.<sup>2</sup>

Thus, *State v. Squally* was concerned solely with the geographic extent of the state's on-reservation P.L. 280 criminal and civil jurisdiction. As noted above, P.L. 280 provides no basis for the assertion of state jurisdiction over treaty Indian fisheries or their management, including the role of non-members, *Mescalero Apache, supra*.

**V. CONCLUSION**

The Nisqually Tribe has a vital interest in protecting its treaty-secured fishing rights from encroachment by state authority. In this case, the state and the trial court base the State's jurisdiction over fishing by a tribally licensed assistant fishing under the authority of federal law

---

<sup>1</sup> The terms of Paragraph 25 were modified by federal court order dated August 23, 1993. However, the provisions relating to continuing jurisdiction to ensure compliance with Final Decision I were unchanged. See U.S. District Court No. 70-9213, Docket No. 13599.

<sup>2</sup> The Nisqually Tribe rejects the reasoning and the result in the state Supreme Court ruling in *State v. Squally*. The Tribe maintains that the correct statement of the law is contained in this Court's opinion in that case, *State v. Squally*, 81 Wash. App. 685 (1996).

on Public Law 280. That Act by its own terms excludes state jurisdiction over fishing from the assumption of jurisdiction which it authorizes.

Further, state jurisdiction is preempted by the comprehensive federal-tribal management scheme established under federal law. In fact, virtually every aspect of treaty Indian fishing is governed by federal law. Federal law provides that the State may not act to condition Indian fishing rights, yet it has done exactly that by taking Judge Boldt's language and adding a restrictive clause that was not present in his original ruling. The State can regulate only for conservation and has the burden of proving that basis. The State submitted no evidence on this point. The State presented no evidence to counter the proof offered on behalf of Mr. Guidry regarding the salmon enhancement activities of the Tribe. The State failed to follow the procedures set up by the federal court for resolving disputes regarding the scope of treaty fishing activities. And the only rationale advanced by the State for attempting to enforce its restrictive law over Indian fishing is to protect the Nisqually Tribe from itself. The case against Mr. Guidry should be dismissed.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of February, 2009.

  
BILL TOBIN WSBA # 4397  
Attorney for *Amicus Curiae*  
Nisqually Indian Tribe  
P.O. Box 1425  
Vashon, WA 98070  
Phone: (206) 463-1728  
Fax: (206) 462-1729

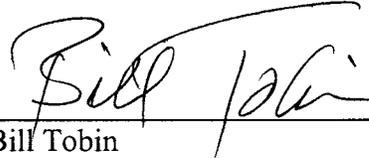
**CERTIFICATE OF SERVICE**

I, Bill Tobin, hereby certify that I served a copy of this Brief of *Amicus Curiae* Nisqually Indian Tribe, First Class Mail, on the 26<sup>th</sup> day of February, 2009, on the persons named below, at the addresses stated.

Persons served:

Thomas E. Doyle  
Attorney for Appellant  
P.O. Box 510  
Hansville, Washington 98340-0510

Loreva M. Preuss  
Attorney for Respondent  
600 Capitol Way North  
Olympia, Washington 98501



Bill Tobin  
Attorney for Nisqually Indian Tribe

FILED  
COURT OF APPEALS  
DIVISION II  
09 FEB 27 PM 12:32  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY