10-3-1995

Brief of Appellee-Plantiff Tribes

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 95-35446

UNITED STATES OF AMERICA, et al.,

Plaintiffs/Appellees,

v.

STATE OF WASHINGTON, et al.,

Defendants

and

INNER SOUND CRAB ASSOCIATION, EDWARD KNUDSON, AND WASHINGTON DUNGENESS CRAB FISHERMEN'S ASSOCIATION, ERNEST SUMMERS,

Applicants for Intervention/Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
THE HONORABLE EDWARD J. RAFEEDIE, JUDGE

BRIEF OF APPELLEE-PLAINTIFF TRIBES

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellee Tribes are all federally recognized Tribes of American Indians. They have no parent companies, subsidiaries or affiliates that have issued shares to the public. The Tribes filing this brief are: The Lummi Nation, the Nooksack Indian Tribe, the Upper Skagit Indian Tribe, the Port Gamble, Jamestown and Lower Elwha Bands of S'Klallam Tribes, the Skokomish Indian Tribe, the Makah Indian Tribe, the Quileute Indian Tribe, the Hoh Indian Tribe, the Quinault Indian Nation, the Swinomish Indian Tribal Community, the Suquamish Indian Tribe, the Muckleshoot Indian Tribe, the Squaxin Island Indian Tribe, the Tulalip Tribe, and the Puyallup Indian Tribe.

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I. JURISDICTIONAL STATEMENT

Appellee Tribes (hereinafter 'Tribes') agree with the Jurisdictional Statement of Appellants.

II. STATEMENT OF ISSUES

Was intervention properly denied to two groups of dungeness crab fishers (the Inner Sound Crab Association, hereafter "ISCA" and the Washington Dungeness Crab Fishermens Association, hereafter "WDFCA," collectively "Crabbers") when:

1. Intervention was sought 19 months after the District Court ruled that shellfish were "fish" under the relevant Indian Treaties; 14 months after the District Court ruled that the Treaties reserved to the Indians the right to take shellfish in any depth of water, 10 months after trial; and 2 months after a sixty - five page manuscript decision had been entered;

2. The members of the ISCA and the WDCFA (collectively "Crabbers") do not possess, as a matter of state law, any property rights in their state issued licenses to harvest crab, and may be divested of these licenses at the whim of the State;

3. Such interests as the Crabbers may have in their licenses are, as a matter of state and federal law, completely derived from the sovereign rights of the State -- a State which has vigorously defended these sovereign rights for over twenty-five years in United States v. Washington, and over six years in this subproceeding?

III. COUNTER-STATEMENT OF THE CASE

A. HISTORY OF THIS SUBPROCEEDING

1. The Shellfish Subproceeding In The Context Of United States v. Washington.

This appeal comes from a subproceeding in the umbrella case of United States v. Washington, Civil No. 9213, Western District of Washington. United States v. Washington was filed in 1970 to enforce Treaty fishing rights reserved by Washington State Indian Tribes in five Treaties with the United States signed in the 1850's. After three weeks of intensive trial in 1973, Judge George Boldt issued his 111 page Final Decision No. 1 on February 12, 1974, United States v. Washington, 384 F. Supp. 312, aff'd 520 F. 2d 676 (9th Cir 1975), cert. denied 423 U.S. 1086 (1976).

Final Decision No. 1 was not accepted by much of the non-Indian fishing population of Washington State, see, e.g. 520 F. 2d 676 at 693 (Burns, J. Concurring), Puget Sound Gillnetters v. United States District Court, 573 F. 2d 1123 at 1128-9 (9th Cir. 1978), and Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 at 696, n.36 (1979) (hereafter `Fishing Vessel').[1] The continued opposition to the Court's decrees led to seemingly unending motions before the District Court, some of the results of which are reported at 459 F. Supp. 1020 (W.D. WA 1978), 476 F. Supp. 1101 (W.D. WA 1979), and 626 F.Supp. 1405 (W.D. WA

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[1] Many of the members of the ISCA were salmon fishers displaced by Final Decision No. 1. See: Visser Declaration, ¶ 4 (ER at 085).

WA 1985). As a matter of administrative control, the District Court established a mechanism which separately numbered each controversy arising in United States v. Washington, and treated each such issue as a individually numbered subproceeding.

The shellfish subproceeding, No. 89-3, was filed by 16 Puget Sound Tribes on May 19, 1989. The Tribes sought a declaration that their Treaty fishing right of 'taking fish' extended to all species of shellfish found within their traditional fishing grounds. (Supp. ER at 1) The tribal request included dungeness crab.[2]

The State of Washington filed an answer denying the Tribes' rights to shellfish. (Supp. ER at 13).

2. The Inner Sound Crab Association Moved To Intervene.

Several potential parties promptly sought intervention, including the Inner Sound Crab Association, appellants here.[3] (See: e.g., Supp ER at 23, 26 and 28). The ISCA represented itself to be a group of commercial crab fishers licensed by the State of Washington. (Supp. ER at 31). They argued in support of their intervention that the State would not adequately represent them due

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[2] The Tribes sought relief which included such shellfish as clams and oysters, which are found embedded in tidelands which may be owned by the State or private persons. (Supp ER at 010) However, dungeness crab are free swimming shellfish, ferrae naturae, found only in public waters. As a result, this appeal does not involve the District Court's rulings regarding tribal shellfishing rights on private or state-owned tidelands, and we do not discuss those.

[3] These motions for intervention, including that of the ISCA, are not at issue in this appeal.

to the State's penchant for settling with the Tribes (Supp. ER at 39), that the State would not prosecute with sufficient vigor the 'moderate living' defense to the tribal claims, (Supp. ER at 40), and, most importantly, that the State would not insist on unitary management of the crab resource which would continue the 'equal opportunity' fishery of the past under which the state licensees harvested approximately 80% of the Puget Sound commercial crab resource. (see Supp ER at 32). The ISCA also averred that the tribes did not harvest subtidal crab at treaty times, and that therefore the Treaty fishing right did not extend to subtidal crab (Supp. ER at 31).

The trial court denied the ISCA motion to intervene on January 27, 1993 (ER at 1), but granted the ISCA amicus status entitled to receive and comment upon all pleadings. The Clerk placed counsel for the ISCA on the Master Service List, and the ISCA does not claim that it did not get notice of all filings in the subproceeding. The ISCA did not appeal the denial of its 1991 motion for intervention.

3. The District Court Ruled That 'Shellfish' Are 'Fish' Under The Treaties.

On August 31, 1993, the District Court granted the Tribes' partial summary judgment that the Treaty secured 'right of taking fish' included within it the right of taking shellfish. Order of August 31, 1993, at 5 (Supp. ER at 47). see also, United States v. Washington, (subproceeding 89-3, `shellfish') 873 F. Supp. 1422

at 1430 (W.D. WA. 1994). The trial court reached its conclusion on the plain meaning of the word 'fish', without reference to the canons of interpretation that are used when construing Indian Treaties. Id. Dungeness crab are thus 'fish' within the meaning of the Treaties.

Although their amicus status allowed it to comment on this partial summary judgment motion, the ISCA filed nothing regarding this motion. Although this ruling clearly implicated the ocean crab fishery, the WDCFA was silent.

4. The District Court Held That The Treaty Right Includes The Right To Deep Water Harvest.

On January 5, 1994, the District Court ruled that the Treaty right to take shellfish included the right to harvest any species within a tribe's usual and accustomed fishing areas at any depth in the water column, and:

> As discussed above, prior to the signing of the Stevens Treaty, the Tribes had the absolute right to fish for whatever species they desired within their usual and accustomed grounds. Similarly, they had the absolute right to plumb any depths within those usual and accustomed grounds. Just as it is irrelevant that the Tribes chose not to harvest the named species, it is irrelevant that they could not, because of technological limitations, harvest shellfish in deep-water area.

(Supp. ER at 66)[4] (emphasis in original)

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[4] The trial court did not, at this time, rule on the issue of whether the tribal usual and accustomed fishing areas for salmon were coextensive with those for shellfish. See: Order of January 27, 1994 (Supp ER at 69). The district court later ruled that usual and accustomed fishing areas are the same for all species. 873 F.Supp. at 1431.

Dungeness crab harvests at subtidal depths are thus included within the Treaty right confirmed by this ruling, even if - as the ISCA Proposed Complaint in Intervention alleged - these crab were not harvested at the time of the signing of the Treaties.

Despite its amicus status that permitted it to advise the court of its concerns, the ISCA filed nothing regarding this partial summary judgment motion. Although the crab harvested in the ocean is caught in deep water, the WDCFA made no moves to protect their "interest" in this fishery.

5. A Three Week Trial Was Held in May, 1994, Resulting In The Memorandum Opinion Found At 873 F. Supp. 1422.

Trial lasting three weeks was held in late April and early May, 1994. The ISCA failed to participate in any manner in the pre-trial briefing, the trial, or the post-trial briefing.

On December 20, 1994, the District Court filed its sixty four page (manuscript) Memorandum Opinion. The Court reaffirmed its 'shellfish are fish ruling', 873 F. Supp. at 1430, and its 'deep water harvest' decision. Id. The division of shellfish subject to the Treaty right between Treaty and non-Treaty harvesters is approximately equal, as decreed by the Supreme Court in Fishing Vessel. 873 F. Supp. at 1445. The Court invited the parties to negotiate an implementation plan, or, failing that, to submit issues for an implementation hearing before January 31, 1995. 873 F. Supp. at 1450. That date was later extended to February 15, 1995, (Supp. ER at 105).

6. The ISCA Filed A Response To Tribal Draft Implementation Plan.

On January 31, 1995, the ISCA filed its 'response' to a draft tribal implementation plan[5] (ER at 69). The ISCA demanded a 'seat at the table' where any implementation plans regarding crab were to be discussed (ER at 69-70, see: ER at 67). Attached to the Response was the ISCA position with regard to tribal off-reservation crab fisheries (ER at 72).

This ISCA position paper submitted after the District Court's decision repeats the ISCA conclusion that crab were not used by Indians at Treaty times except as a 'starvation food', that there was no commercial use of crab by tribal members until extremely recently,[6] that no separate allocation of crab is appropriate to the Indians, and that, if the Tribes are to be allocated any portion of the crab, the 'only acceptable solution' to the ISCA is to allow the tribal members to fish a set amount of gear at the same times and in the same areas as the ISCA, under state law. (ER at 72)

7. The Trial Court Issued A Second Interim Order Relating To Implementation And Set An Implementation Trial.

On March 3, 1995, the District Court issued a Second Interim

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[5] The 'tribal implementation plan' to which the ISCA responds was a draft which had been circulated by the Tribes, and was not the final plan submitted to the District Court.

[6] The ISCA does not cite to the voluminous trial record in support of any of its factual assertions. (ER at 72-3.)

Order (Supp. ER at 107) which permitted implementation of the Court's December 20, 1994, decision if the parties filed a stipulation and proposed order setting out the terms of the implementation. The Court also set a trial on implementation issues to begin May 8, 1995, and ordered the parties to submit a list of issues for trial no later than March 20, 1995.

8. The ISCA, Joined By The WDCFA, Filed A Renewed Motion To Intervene.

On March 16, 1995, the ISCA and the WDCPA jointly filed a Motion for Intervention (ER at 74). The WDCFA averred that it was a Washington non-profit corporation including within its membership "major elements of the non-Indian commercial crab fishing industry off the coast of Washington." (ER at 103) For ease of reference, the ISCA and the WDCFA will be jointly referred to as the 'Crabbers'.

The Crabbers' proposed Complaint in Intervention (Supp. ER at 118)[7] states that the Crabbers are state licensees who seek relief in five ways:

1. To participate in all negotiations and litigation regarding implementation;

2. To obtain an injunction against the application of state laws [presumably to them] which do not conform to the Court's orders, or which "convene" (sic) the established legal rights of

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[7] This pleading inexplicably is not included in the record proposed by the Crabbers.

the Crabbers to a share of the crab harvest;

3. To obtain appropriate court orders "to ensure that applicants' rights to a share in the dungeness crab harvest and resource are fully protected";

4. To enforce the State's management goals for the crab fishery; and

5. To force the Indian crab fishery to conform to the same seasons and catch restrictions as applied to the Crabbers. (Supp. ER at 119-20).

The Crabbers claimed that they do not seek to relitigate previously decided issues, reopen evidentiary issues, or conduct discovery unrelated to their requested participation (ER at 75).

9. The Trial Court Denied The Crabbers Intervention And Amicus Status.

Briefs on the Crabbers' intervention motion were filed, and, on April 7, 1995, the trial court denied intervention and denied amicus status to all applicants for intervention.[8] Initially, the

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[8] The trial court's Order denying intervention to the Crabbers also decided a petition for intervention by the Washington Harvest Divers Association and the Geoduck Harvester's Association. The Harvest Divers are appellants in No. 95-35442. The Order denied intervention, 'enhanced' amicus status, and 'normal' amicus status to all groups seeking intervention, on the grounds that "...these groups would provide no helpful information to the Court on how to implement the Tribes' 50% share." (ER at 131-2) Since neither crab group sought "enhanced" or regular amicus status, the effect of this part of the order on the Crabbers is not clear, nor is it clear if the Order removed the ISCA as amicus. The Crabbers' Notice of Appeal (ER at 133-4) appealed the entirety of this Order. The tribes do not object to continuation of the ISCA as amicus curiae or to the admission of the WDCFA as amicus curiae.

applications were untimely. (ER at 127-8)

In addition, the District Court held:

> The issue before the Court is how the Tribes are to take their 50% share of the harvestable shellfish; the groups actually seek to litigate how the state will manage the non-Indian 50% share or the fact that the Indians were adjudicated to have such a right in the first place. Such issues are not in common with the one before the Court, namely how to implement the Tribes' rights.

(ER at 131).

The Court also ruled that the Crabbers did not have legally protectable interests justifying intervention, since their ability to harvest was entirely dependent on the goodwill of the Washington State Legislature (ER at 128-9). The Crabbers were adequately represented by the State of Washington (ER at 130).

Permissive intervention was also denied not only because the applications for intervention were untimely and the intervention would prejudice the rights of existing parties, but also because no common questions of law or fact were present among the existing parties and the Crabbers (ER at 131).

The Crabbers filed a timely appeal.

10. Trial On The Implementation Issues Was Held In May, 1995.

Trial on the implementation issues took place in May, 1995. No questions regarding crab or other deep-water species or harvests were at issue.

11. The Parties Agreed On An Interim Puget Sound Dungeness Crab Management Plan.

After substantial negotiation and consideration of biological

issues and harvest regimes (Supp. ER at 178-80, 183-4, 186-191) the State and the affected Tribes agreed on an Interim Order for Puget Sound Dungeness Crab Fishery (ER at 135), which was filed and approved on August 2, 1995, pursuant to the Second Interim Order. As a phasing in of the Tribes' Treaty right to 50% of the harvest, this one year plan sets the tribal allocation at 40% for this season only. All rights of appeal were preserved (ER at 136).

The ISCA objected to the 1995-6 interim crab management plan (Supp. ER at 121) on three grounds: (a) it permitted a tribal commercial crab season during August and September, before the non-Treaty commercial crab season, during a time when the ISCA asserted that the crab were 'most susceptible to incidental injury and death [9]; (b) the ISCA, having been denied intervention, had no opportunity to comment to the Court on the interim plan before it's entry, cf. Supp. ER at 187, 190-91); and (c) there were "other inequities and discrepancies" in the plan that should be brought to the Court's attention (Supp. ER at 122-3). The ISCA sought a hearing to bring its concerns to the attention of the Court.

The Court denied the ISCA request without comment (Supp. ER at 182).

12. The District Court Entered An Implementation Order And Final Judgment.

On August 25, 1995, the trial court entered its Order

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[9]The ISCA did not accompany its factual assertions with any declarations, and, in fact, these statements are not supported by scientists involved in crab management (Supp. ER at 179-180, 188).

re:Implementation (Supp. ER at 124), followed three days later by a Final Judgment in favor of the plaintiff Tribes and the United States (Supp. ER at 181).

IV. SUMMARY OF ARGUMENT

Neither Crab Association meets the standards for intervention as of right or for permissive intervention.

The ISCA's motion is untimely because it renewed its interest in the case over a year after the second of two rulings made by the District Court that summarily affirmed the rights of the Tribes to harvest crab in deep water. The WDCFA motion is untimely since it slept on its interests for the entirety of the pre-trial and trial proceedings before seeking intervention. Although the coastal Tribes (Quinault, Hoh, and Quileute) did not seek relief in this subproceeding, their rights and interests would clearly be determined in this subproceeding through the doctrines of issue preclusion (res judicata) and stare decisis, a legal conclusion apparent to all.[10] The tardy actions of the Crabbers would severely prejudice the existing parties by involving other parties who have not accepted some of the basic rulings in United States v. Washington, notwithstanding the pious claims that the Crabbers do not seek to relitigate any matters already decided. The failure of

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[10] The district court held that the Quinault and Yakama Tribes would be bound by any rulings on the nature and scope of the treaty entitlement to harvest nonanadromous fish and shellfish on August 11, 1993, an order which seems to also have been missed by the WDCFA. Docket No. 13584/13369.

the Crabbers to move to intervene sooner is not explained.

The members of the Crabbers have no protectable property right in their licenses or in the value of their licenses. They harvest crab at the whim of the Washington State Legislature, and their harvesting privileges can be withdrawn if the Legislature (or the Washington Department of Fisheries and Game) chooses to reallocate the right to exploit State's sovereign ownership of the crab to recreational or other harvesters.

As licensees of the State, the Crabbers are represented by their sovereign. A disagreement over public policy, or over litigation strategy, does not give rise to inadequate representation. The Crabbers really seek intervention to impeach the management policy and philosophy of the State and to persuade the trial court to impose an 'equal opportunity' crab fishery upon the Tribes. All of the Crabbers' disputes with the State are properly raised in State court; all parties agree that the 'equal opportunity fishery' urged by the Crabbers has been conclusively rejected by the Supreme Court as a legal theory. Fishing Vessel, supra, 443 U.S. at 676-8, and n.22.

Neither are the Crabbers entitled to permissive intervention. Not only are their motions untimely, but the trial court was correct in concluding that there are no common issues of law or fact between the Crabbers and the Tribes. This subproceeding concerns management and implementation of the Indian share of the shellfish; the Crabbers seek to enforce their theories against the

State's management of the non-Indian share. In addition, there is no independent jurisdictional basis upon which the Crabbers can base their permissive intervention.

The District Court was correct in denying the Crabbers' Motion to Intervene.[11]

V. STANDARD OF REVIEW

Review of the District Court's denial of intervention as of right is de novo; however, review of the question of timeliness of the motion is under the abuse of discretion standard. United States v. Oregon, 913 F. 2d 576 (9th Cir 1990).

Denial of permissive intervention is also reviewed for an abuse of discretion. County of Orange v. Air California, 799 F.2d 535 at 539 (9th Cir 1986).

VI. ARGUMENT

A. INTERVENTION WAS PROPERLY DENIED UNDER FED.R.CIV.P.24 (A)(2).

An applicant for intervention as of right under Fed.R.Civ.P. 24(a)(2) must be (a) timely, (b) possess a legally protectable interest affected by the case, (c) be so situated such that it cannot protect that interest without intervention, and (d) not be adequately represented by the existing parties. State of California v. Tahoe Regional Planning Agency, 792 F. 2d 775, 778, (9th Cir 1978). The Crabbers meet none of these standards.

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[11] The Tribes believe that this appeal is frivolous and is therefore a candidate for summary affirmance under 9th Circuit Rule 34-4.

B. THE CRABBERS' INTERVENTION MOTION WAS UNTIMELY.

Three factors are analyzed in determining whether timliness, the "threshold requirement for intervention", United States v. Oregon, 913 F. 2d 576, 588 (9th Cir. 1990), cert. den., 501 U.S. 1250 (1991), is met: (a) the stage of the proceeding at which the intervention is sought, (b) the prejudice to other parties, and (3) the reason for and length of the delay. Officers for Justice v. Civil Service Com'n, 934 F. 2d 1092, 1095 (9th Cir. 1991).

1. The Crabbers' Motion Comes Too Late in the Shellfish Subproceeding to Support Intervention.

The ISCA initial intervention came shortly after the subproceeding was filed, and was denied well before any significant discovery or other pretrial preparation had taken place. No appeal was taken.

But by the time the Crabbers made the motion presently under appeal, not only had two summary judgment motions been decided which affected the Crabbers, but the initial trial determining the Tribes' rights to crab had resulted in a memorandum decision by the District Court. At the trial court's invitation, the parties had submitted proposed implementation plans, together with a list of proposed issues for an implementation hearing. Only one of those issues arguably raised a question regarding deep water species such as crab; they dealt instead with clams, oysters, and other

stationary shellfish.[12] The Court's Order Re: Implementation of Shellfish Provision (Supp. ER at 124) does not mention crab harvesting. By the time the Crabbers got around to their current intervention motion, over 14 months had passed since the trial court had decided all of the issues dealing with deep water harvests.

Intervention during the remedial phase of litigation has been allowed as timely. See, e.g., Grubbs v. Norris, 870 F.2d 343 (6th Cir. 1989), although applicants for such intervention must make a strong showing of need for participation. Wright, Miller & Kane, Federal Practice & Procedure 2d § 1916, at 444. The applicant must still address the three matters relating to timely intervention: (1) stage of proceeding, (2) prejudice to other parties, and (3) reason and length of delay. United States ex rel. McGough v. Covington Technologies, 967 F.2d 1391, 1394 (9th Cir. 1992). This subproceeding has gone too far to permit the Crabbers' intervention, especially for the reasons recited in their Proposed Complaint In Intervention (Supp. ER at 118).

Permitting intervention at this terminal stage would severely prejudice the parties. Not only does contending with any additional party in an involved case multiplies the work of the existing parties, but here the resources needed to refute the patently improper claims and frivolous assertions urged by the Crabbers will

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[12] That issue was settled before the implementation trial in May, 1995.

waste federal, state and tribal resources. See: discussion infra, at § E. 2. The delay inherent in meeting the Crabbers' peripheral issues and their disagreement with their sovereign's management is prejudice enough to deny intervention.

This delay is not harmless, for the Tribe and the State have spent substantial time negotiating implementation plans for crab, plans which the Crabbers now wish to upset. [13]

The crab implementation plan, while not as long in gestation as the Columbia River Plan in United States v. Oregon, 913 F.2d at 588, is nonetheless delicately balanced. (Supp. ER at 179-80, 188-9) The Crabbers seek intervention in order to play the role of 'political commissar', overseeing the State's negotiations, threatening the State with protracted litigation in this Court if the State does not enter into crab management plans that accord with the ISCA "Position With Regard to a Tribal Off-Reservation Crab Fishery" (ER at 72-3). This 'Position' rejects many of rulings of the courts in United States v. Washington.

For example, the 'only acceptable solution' to the ISCA of the allocation of fishing opportunity is one which has tribal and non-Treaty fishers dropping their crab pots at the same time, in the same waters, and with the same gear and size limitations (Supp. ER at 72). This 'equal opportunity fishery' was rejected sixteen

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[13] When the State, acting in good faith to implement 50% harvest sharing, closed the non-Treaty crab and urchin fisheries, the Crabbers sued the State in Thurston County Superior Court. See 3-10-95 Joner Dec. ¶¶ 11, 12 (Supp ER at 110).

years ago. Fishing Vessel, 443 U.S. at 676-85 (1979). As a second example, the ISCA opposes 'exclusive geographic areas' for tribal crabbing, ignoring the unchallenged 1974 ruling of the District Court that "an exclusive right of fishing was reserved by the tribes within the area and boundary waters of their reservations...." United States v. Washington, 384 F. Supp. 312 at 332 (emphasis in original, footnote omitted). As a final example, the ISCA offers the entirely unsupported theory that crab was a 'starvation food' used only in winter during extreme circumstances. There is nothing in the record (which was closed in May, 1994, some seven months before the ISCA put forth its position) to substantiate this novel assertion; however, permitting the Crabbers intervention will require the Tribes to spend valuable resources refuting this spurious claim.[14]

Intervention of the Crabbers will, notwithstanding their assertion that they do not seek to relitigate previously decided matters, require the Tribes to spend valuable resources in

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[14] The Crabbers may argue they hold a legally protectable interest because the Treaty shellfish provision was intended to protect the non-Indian shellfish industry. The proviso, however, was intended to foster only non-Indian cultivation of embedded shellfish. See: 873 F.Supp at 1436-7. The Crabbers do not "stake or cultivate" within the meaning of the proviso, or otherwise participate in the embedded shellfish industry in any fashion. The Crabbers merely harvest a species that is both naturally occurring and free-swimming. Thus, the Crabber's fishery is legally indistinguishable from the non-Indian salmon fishery in which individual State-licensed fishers hold no legally protectable interests. Fishing Vessel, 443 U.S. at 679, See also: (Supp ER at 52).

'negotiating' rejected management options and refuting unproven (and insupportable) factual assertions. This prejudice is sufficient to affirm the District Court's denial of intervention.

The final matter to be considered relating to timely intervention is the reason for and length of delay. There is no excuse for the Crabbers' somnolence.

The shellfish case has been the subject of widespread publicity throughout its life. Various property owner groups were formed to combat the tribal claims, see: 873 F. Supp. at 1428, n.4. It is hard to believe that the members of the ISCA, which first moved to intervene in 1991, do not talk to their counterparts in the WDCFA. The Courts have consistently construed all five Stevens Treaties together, importing the language enumerated in one into all of the others, e.g. Fishing Vessel, 443 U.S. 658, passim, and at 674, n.21, United States v. Washington, 312 F. Supp. 384 at 350. The shellfishing clause is contained in Article 3 of the Treaty with the Quinault, 12 Stat. 971, II Kappler's: Indian Affairs: Laws and Treaties 719, in the same words as the shellfishing clause is found in the Puget Sound Treaties. The coastal tribes are parties to United States v. Washington, and it defies legal understanding to think that they would not be bound by rulings in the case. The potential effects of a ruling in this shellfish case on all crab fishers have been obvious since the filing of the subproceeding in 1989.

The ISCA offers no excuses for its silence throughout the

pretrial proceedings, and in particular for its failure to express its theories during the briefing of the two summary judgment motions that virtually decided the deep-water crab harvest issues. The WDCFA has no explanation for its 'head in the sand' attitude throughout this subproceeding.

A party seeking intervention must act as soon as it knows or has reason to know that its interests might be adversely affected by the litigation. United States v. Oregon, supra, 913 F. 2d at 589. The Crabbers did not act.

The District Court's conclusion that this motion for intervention was untimely is squarely within its discretion and should be affirmed.

C. THE CRABBERS ARE NO DIFFERENT THAN ANY OTHER CITIZEN OF THE STATE: THEY DO NOT POSSESS THE REQUISITE INTEREST IN THE SUBJECT MATTER OF THIS CASE TO ALLOW INTERVENTION.

1. The Crabbers' Interests Are The Same As Every Other Citizen's.

In order to have a right to intervene under Rule 24(a)(2), an applicant must demonstrate that it has a "direct, substantial and legally protectable interest" in the subject matter of the case. Portland Audubon Soc'y v. Hodel, 866 F.2d 302,308-09 (9th Cir.), cert. denied, 492 U.S. 911 (1989). To be "legally protectable," the interest must be one "which the substantive law recognizes as belonging to or owned by the applicant." United States v. South Florida Water Management Dist., 922 F.2d 704, 710 (11th Cir. 1991); New Orleans Public Serv. v. United Gas Pipe Line, 732 F.2d 452, 466

(5th Cir. 1984). Put another way, it must be "an interest sufficient to support a legal action or defense which is founded on [that] interest." Diamond v. Charles, 476 U.S. 54, 67 (1986) (concurring op.) (emphasis added).

In this case, the "substantive law" is the Stevens treaties and it is clear that the treaties do not confer on non-Indian commercial fishers any legally protectable rights. Chief Judge Rothstein so held in denying intervention to another commercial fishing organization, the Purse Seine Vessel Owners Association ("PSVOA"), in Subproceeding 90-1 of United States v. Washington:

> PSVOA reads far too much into ... language [of Fishing Vessel] by inferring that individual citizens can be considered parties to the treaty. At another point, the opinion clearly states that a treaty, including one between the federal government and an Indian tribe, is essentially a contract between two sovereign nations. [Fishing Vessel] at 675. Moreover, the opinion specifically rejects the idea that the treaties placed each individual Indian on an equal footing with each individual citizen of the State ... Id. at 679. Certainly, PSVOA's members may benefit as residents of the State of Washington from the treaty provisions giving "citizens of the Territory" a fair share of the fish resources. But they do not have any treaty entitlement to a specific share of the fish as individuals or any specific protectable interest stemming from the treaties which is not derivative of the State of Washington's rights and interests as a successor to the United States which signed the treaties.

United States v. Washington, Subproceeding 90-1, Order Denying Intervention (W.D. Wash. October 19, 1993) (Supp. ER at 52). [15]

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[15] The Crabbers have no legally protectable interests under State law. There is no right to fish in State waters. State ex rel. Bacich v. Hulse, 187 Wash. 75,79, 59 P.2d 1101 (1936). There is no right to harvest crab in State waters. Foley v. Department of

This court recognized that fishers have no independent property rights in the fish when it turned aside collateral attacks on United States v. Washington mounted by the Puget Sound Gillnetters Association and other organizations made up of fish harvesters. The fishers' ability to take fish was:

> ... purely derivative of the state's power to regulate rights in the fish. The fishers' interest is therefore derivative of the state's interest; the fishers are in privity with the state and are bound by actions affecting its sovereign interest to which it is a party. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340-1, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958); Wyoming v. Colorado, 286 U.S. 494, 506-9, 52 S.Ct. 621, 76 L.Ed. 1245 (1932).

Puget Sound Gillnetters Ass'n v. U.S. District Court, 573 F.2d 1123, 1132 (9th Cir. 1978) (emphasis added); See also: Fishing Vessel, 443 U.S. at 692, n.32.

The Crabbers are in the same position as any other resident of the State of Washington vis-a-vis the public resources of the

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Fisheries, 119 Wn.2d 783, 837 P.2d 14 (1992); Weikal v. Department of Fisheries, 37 Wn.App. 322, 325, 679 P.2d 956 (1984). No property right attaches to fish until they are caught. Marincovich v. Tarabochia, 114 Wn.2d 271, 276, 787 P.2d 562 (1990). The Crabbers have only a privilege to harvest the public resources of the State, a privilege that can be limited, conditioned or withdrawn by the State. Foley, supra, Weikal, supra, Bacich, supra. RCW 75.30.120. The Crabbers have no property interest in the shellfish prior to capturing them. Id. quoting Vail v. Seaborg, 120 Wash. 126, 130, 207 P.15 (1922).

The State can and has entirely prohibited commercial traffic in various species. See: e.g., RCW 77.08.020, 77.16.040. This includes steelhead trout, which are and were commercially important to the Tribes. Id., Pioneer Packing v. Winslow, 159 Wash. 655 (1930) By the same token, the State as a sovereign, could ban the non-treaty commercial harvest of crab leaving the Crabbers without even a privilege, let alone a protectable right.

State, notwithstanding their claims of economic damage resulting from any agreed upon or judicially imposed allocation plans. The Crabbers' State licenses does not give them any right to restrict, define or otherwise affect the tribes' treaty right to harvestable shellfish. See: Puget Sound Gillnetters Ass'n v. Moos, 92 Wn.2d 939, 948 n.5 (1979). Moreover, as the trial court ruled, this case has nothing to do with the Crabbers' State fishing licenses: it has to do with how the Tribes are to take their 50% of the harvestable shellfish. The Crabbers are much more in the position of the loggers denied intervention in Portland Audubon Society, than the members of environmental groups permitted intervention in such cases as Sagebrush Rebellion, Inc., v. Watt, 713 F.2d 525 (9th Cir. 1983). The loggers' "purely economic" interests were not sufficient to support intervention. Portland Audubon Society, 866 F.2d at 309.[16]

The outcome in County of Fresno v. Andrus, 622 F.2d 436 (9th Cir. 1980), was different precisely because the law at issue there (as opposed to the Treaties here) was designed to protect the intervenors. In County of Fresno, the County sued to prevent the Secretary of Agriculture from promulgating regulations governing

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[16] The Environmental Defense Fund was denied intervention in Westlands Water District v. United States, 700 F.2d 561 (9th Cir. 1983), because its collective interests were the same as the majority of southern California residents. The interests of the Crabbers are no different than any other 'citizens' regarding the resources over which the State exercises parens patriae responsibility.

the disposal of excess acreage that received subsidized water from a federal reclamation project.[17] The applicants for intervention, a group of small farmers and would-be farmers, sought intervention as defendants to protect their interest in making the excess land available for their purchase. This court allowed intervention as of right because Congress, in passing the Reclamation Act, intended that these farmers would be the direct beneficiaries of the sale of the excess land and their ability to purchase the land would be adversely affected if the Secretary was delayed in issuing the regulations. 622 F.2d at 438. In addition, the farmers had already commenced and won major litigation requiring the promulgation of these regulations. Id.

By contrast, the Crabbers do not have the necessary "interest" which would permit them to intervene in this action. The Treaties had two parties: The United States and the Tribes. The intended beneficiaries of the Treaties were the citizens of the parties, to the extent that the parties permitted their citizens to share therein. Gillnetters, 573 F.2d at 1132; United States v. Washington, 520 F.2d 676, at 688 (9th Cir. 1975).

The Crabbers have the same "interest" in crab as the loggers in Portland Audubon Society had in the public forests. The loggers had only the right to bid on the harvest of the public forests: a

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[17] The Reclamation Act at issue required a landowner receiving federally subsidized water from a reclamation project to own only 160 acres benefitting from the project.

possibility that the trees would both be available for cutting and that they would submit the successful bid. The Crabbers have only a revocable license to harvest crab: a hope that the State will make the shellfish available for commercial exploitation and that the crab will crawl into their pots. Just like the Purse Seiners in Subproceeding 90-1, the Crabbers do not have any right to infringe upon or otherwise affect the Tribes' treaty right to take fish.

2. The Crabbers Cannot Intervene At This Time To "Protect Their Right To Appeal".

The Crabbers'attempt to use Yniquez v. Arizona, 939 F.2d 727, 734 (9th Cir. 1991), to justify their intervention as a means to preserve their "right" to appeal. However, in Yniquez, unlike the present case, the Attorney General on behalf of all defendants had publicly announced that he would not appeal the final judgment of the District Court striking down an initiative approved by the electorate which would have made English the official language of Arizona. The applicants for intervention were the prime sponsors of the initiative; they alleged that their "interest" in the decision of the populace would be defeated by the failure of the State to appeal. The Circuit Court held that the initiative sponsors stood in the shoes of the state legislature, and therefore had "standing" - the requisite interest - to support intervention in order to insure that an appeal was taken.

This is plainly not the fact pattern presented here. Initially, the Attorney General has not announced her intention not

to appeal; instead, her staff has engaged in negotiations as directed by the Court (Supp. ER at 183, 186). Secondly, the Crabbers are the sponsors of nothing but discord; there has been no action comparable to an election. Thirdly, at least some parties - the Growers - have already filed one Notice of Appeal,[18] and it is likely that other parties (including the State) will appeal the final decision of the Court. Fourthly, the time for appeal has been stayed by the Tribes' and United States' motion for reconsideration under Fed.R.Civ.P. 59. The Crabbers have pointed to no evidence that there will be no appeal: their Yniquez argument is premature. Finally, the Yniquez decision was narrowly tailored to the facts of that case and cannot be extended to cover the Crabbers' situation here.

D. THE CRABBERS ARE ADEQUATELY REPRESENTED BY THE STATE.

1. The Crabbers Must Make A Substantial Showing That Their Interests Are Not Already Represented By The State of Washington.

No intervention of right can be established if the applicant's interests are adequately represented by an existing party. The applicant has the burden of demonstrating inadequate representation. While this burden is ordinarily minimal,

> . . . courts impose a greater burden upon an applicant when an existing party is a governmental entity charged with protecting the applicant's interests. In cases of this sort, the parens patriae principle applies, and it

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[18] The Growers' Notice of Appeal was withdrawn after the Court made it clear that its December 20, 1994, Memorandum, was not a final judgment or otherwise appealable.

> is presumed that the state represents the interests of all its citizens. Environmental Defense Funds, Inc., v. Higginson, 631 F.2d 738,740 (D.C. Cir. 1979); 3B MOORE'S FEDERAL PRACTICE, 24.07 [4] at 24-72.

United States v. Hooker Chemical & Plastics Corp., 101 F.R.D. 451, 456 (W.D.N.Y. 1984), aff'd, 749 F.2d 968 (2nd Cir. 1984).

The Washington Attorney General represents the sovereign interests of the State regarding the Indian treaties here at issue. Fishing Vessel, 443 U.S. at 693-94, See also: RCW § 43.10.030; Young Americans for Freedom v. Gorton, 91 Wn.2d 204, 588 P.2d 195 (1978).

Thus, the applicants misstate the applicable rule when they claim that their burden is "minimal."

The Supreme Court has emphasized the heavy burden upon an applicant for intervention when his or her state is such a litigant:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

State of New Jersey v. State of New York, 345 U.S. 369, at 373 (1953) (emphasis added).[19]

The court explained:

> The "parens patriae" doctrine . . . is a recognition of

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[19] Cases such as this, decided before the most recent Rule 24 amendments, are still good law in regard to these intervention requirements. Wright, Miller & Kane, Federal Practice & Procedure: Civil § 1909, p. 313; Introduction to "Rule 24. INTERVENTION," p. 227, nn. 1-4.

> the principle that the state when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." Kentucky v. Indiana, 281 U.S. 163, 173-174 (1920). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Id. at 373; See, also: United States v. Nevada, 412 U.S. 534, 538 (1973).

There is a presumption of adequate representation when the existing party in the lawsuit is a government charged by law with representing an applicant for intervention's interest. Forest Conservation Council v. United States Forest Service, ---F.3d---, 1995 WL 562019 (9th Cir, Sept. 25, 1995), at 9. Delaware Valley Citizens Council v. Commonwealth of Pennsylvania, 674 F.2d 970, 973 (3rd Cir. 1982) 7C Wright, Miller & Kane, Federal Practice & Procedure, § 1909. When a State is protecting its sovereign interests, such as here, it is presumed to represent the interests of its citizens, Id., and an applicant for intervention must overcome this presumption. Forest Conservation Council, supra, Environmental Defense Fund. v. Higginson, 631 F.2d at 740.

The Crabbers' assertions of inadequate representation have been clearly rejected by the Supreme Court in Fishing Vessel:

> . . . these individuals and groups [the commercial fishing associations and their members] are citizens of the State of Washington, which was a party to the relevant proceedings, and they, in their common public rights as citizens of the State, were represented by the state in those proceedings, and, like it, were bound by

the judgment.' Tacoma v. Taxpayers, 357 U.S. 320, 340-1, 2 L.Ed. 2d 1345, 78 S.Ct. 1209.

Fishing Vessel, 443 U.S. at 693 n. 32 (emphasis added). These fishing organizations included members of at least the ISCA (ER at 085,Visser Declaration).

Thus, the Crabbers must make a substantial demonstration - not a minimal showing - to overcome the presumption that their interests are not already adequately represented by the State as the primary defendant.

2. The Crabbers' Assertions Of Lack of State Representation Are Really Policy Disputes With State Shellfish Management.

The relief sought by the Crabbers illustrates why the present claims of inadequate representation are without merit.[20]

Paragraph two of the Crabbers Proposed Complaint (Supp. ER at 119) seeks permission to participate in implementation negotiations, and to "litigate any and all proceedings affecting their fishery . . ." (Supp. ER at 119). This is nothing more nor less than a desire to impeach the State's management of public resources before the district court. The State's sovereign interests are at issue here, and as a result, the law is clear that only the State is a proper party to negotiate or litigate these rights on behalf of all of its citizens. Fishing Vessel, 443 U.S.

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[20] The Crabbers' Proposed Complaint In Intervention completely fails to comply with Fed.R.Civ.P.8(a), which requires a short and plain statement of jurisdiction of the Court, the facts underlying the claim for relief, and prayer for judgment. For this reason alone, intervention could be denied. See: Fed.R.Civ.P.24(c).

at 693-94. A fishing license does not give the Crabbers a seat at the negotiating or counsel table when their due process rights to that license are not at issue. This subproceeding concerns the existence and scope of the Tribes' Treaty rights to shellfish, not the removal of a privilege to harvest a public resource.

Paragraph three of the Crabbers' Proposed Complaint seeks an injunction against the application of State laws and regulations that do not conform to this Court's orders or "convene" [sic] the "established legal rights of applicants for intervention to sharing of the dungeness crab harvest." This is nothing more than an attempt to sue the State in this court for disagreeing with the Crabbers' ideas of their ephemeral "right" to a share of the crab. See: Footnote 15, supra. The state courts, not the federal courts, open their doors to suits against the state by its citizens in such matters. The state courts have already decided the Crabbers have no "rights" to the crab other than what the Legislature grants. Id.

Paragraph four seeks a decree that the Crabbers' have a right to a share of the crab harvest, and further orders protecting that right. This is a frivolous request under both State law, see Section C.1, supra, and federal law. See, Fishing Vessel, 443 U.S. at 692 n.32.

Paragraph five asks this Court to enforce State law and policy against the State. Such disputes, if they arise, are totally outside of the pleadings and issues of this case, and, of course, the State court forum is available for enforcement of State law.

Finally, paragraph six of the Crabbers' Proposed Complaint seeks, once again, to resurrect the "equal opportunity fishery" which the Supreme Court has rejected. Fishing Vessel, 443 U.S. at 676-685.

None of the relief sought by the Crabbers is part of this case. None of the relief sought by the Crabbers is appropriate to this case. Four of the five prayers for relief are properly set in State court; the fifth is foreclosed by Supreme Court precedent.

The Crabbers' response to the 1995-6 interim crab management plan negotiated by the State and the Tribes illustrates once again both the intent of the ISCA to relitigate settled issues and to meddle with the governmental decisions regarding management of a public natural resource.

On August 2, 1995, the District Court entered an agreed crab management plan. (ER at 135) The ISCA took almost three weeks to ask the Court for a hearing (Supp. ER at 121), citing as its substantive reasons for a hearing the interim plan's opening of the tribal commercial fishery on August 2, several weeks before the non-Treaty opening (i.e. no 'equal opportunity fishery), and an unspecified threat to the health of the crab.[21] The 'facts' stated in the ISCA pleading are disputed by the Tribes (Supp. ER at 178) and the State (Supp. ER at 183, 186, 192). For example, the

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[21]The request for hearing was not accompanied by any affidavits attesting to any of the 'facts' alleged by the ISCA. This violates Fed. R. Civ. P. 7, and WD Wash. Local Rule 7(b)(1).

asserted threat to the health of the crab is denied by biologists who participated in the process (Supp. ER at 179). The "threat" posed by the Crabbers from a tribal opening does not explain how the non-Treaty sports crab fishery which opens in mid-July, does not pose the same threat.

The August, 1995, pleading filed by the ISCA supports the District Court's denial of intervention for the substantive reason that the ISCA "would provide no helpful information to the Court in regard to how to implement the Tribes' 50% share." (ER at 131-2).

E. PERMISSIVE INTERVENTION SHOULD BE DENIED.

The Crabbers should be denied permissive intervention as well. Lack of timeliness in itself defeats permissive intervention as well as intervention as of right. United States v. Oregon, 913 F.2d at 589. Moreover, an applicant for permissive intervention must allege an independent jurisdictional basis for its intervention. Beckman Ind. v. Internat. Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992). The Crabbers do not allege any independent jurisdictional ground, and one does not exist. Of course, to the extent that the Crabbers attempt to assert a claim directly against any of the Tribes or the United States, such claim is also barred by the doctrine of sovereign immunity. Oklahoma Tax Comm'n v. Citizen Band of Potawatomies Indian Tribe, 498 U.S. 505, at 509 (1991).

Notwithstanding the above, the Crabbers' plainly do meet the substantive requirement of Fed.R.Civ.P. 24(b)(2) that their complaint have a common question of law or fact with the issues

already present in the action. As discussed above, their first four issues are solely between the State of Washington and themselves, as licensees of the State. None of these matters are congruent with the questions already litigated and yet to be resolved between the State and the Tribes. The sole issue which actually touches the Treaty shellfishing right - an 'equal opportunity fishery' - was conclusively decided against the Crabbers 19 years ago. Fishing Vessel, supra, at 675-685.

The District Court's denial of permissive intervention is reviewed for an abuse of discretion. County of Orange v. Air California, supra, 799 F. 2d at 539. There was no abuse of discretion in prohibiting the Crabbers from intruding their frivolous legal positions and unsupportable factual claims into this already substantial subproceeding.

VII. CONCLUSION

For the foregoing reasons, the district court's denial of the Crabbers' Motion for Intervention should be affirmed.

Dated: September 28, 1995.

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STATEMENT OF RELATED CASES

The Plaintiff-Appellee Tribes are aware of the case of the appeal of the Harvest Divers Association, et al., Docket No. 95-35442 now pending before the Ninth Circuit. That appeal has been consolidated for argument with this case.

Dated: September 28, 1995.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of the Appellee and one copy of the Supplemental Excerpts of Record by personal service or by causing to have been mailed a copy of the same, postage prepaid on September 28, 1995, to the persons required to be served in this matter and whose names appear on the attached Service List.

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