BEFORE THE INDIAN CLAIMS COMMISSION

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, et al., Plaintiffs,	)	
v.	)	Docket No. 181-C (Fisheries Claims)
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: September 29, 1978

Appearances:

Abe W. Weissbrodt, Attorney for the Plaintiffs, Weissbrodt & Weissbrodt and Howard L. Sribnick were on the briefs.

James M. Mascelli, with whom was Assistant Attorney General James W. Moorman, Attorneys for the Defendant, Craig A. Decker and Glen R. Goodsell were on the briefs.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

INTRODUCTORY

The claims in this docket were originally presented with others in a general petition filed in 1951 which the Commission designated as Docket 181. In 1956, the Commission ordered the claims in Docket 181 severed into four separate dockets designated Dockets 181, 181-A, 181-B, and 181-C.

In a 1975 decision,[1/] the Commission disposed of preliminary motions regarding at least four of the several claims alleged in the amended petition in this docket. The four claims essentially were for depletion of fisheries, loss of common hunting grounds, unlawful removal of minerals, and compensation for rights-of-way granted across claimants' lands. The Commission dismissed the hunting grounds claim and advanced the other claims to trial on the merits.

In a pre-trial order, filed July 14, 1976, it was agreed that all remaining claims in this docket were reduced to the following four:

1. Claims arising from the depletion of fisheries within and adjacent to the July 2, 1872 Colville Indian Reservation;

2. Claims arising from the removal of minerals from claimants' aboriginal lands prior to extinguishment of claimants' title thereto, except such lands entered under the Act of July 1, 1898, 29 Stat. 9, or the Presidential Proclamation of May 3, 1916, 39 Stat. 1778;

3. Claims arising from the defendant's permitting railroads to enter upon and make use of portions of claimants' lands;[2/]

4. Claims arising from the taking and use of claimants' lands in connection with the construction or operation of the Chief Joseph

---

1/ 36 Ind. Cl. Comm. 183 (1975).

2/ Claimants have apparently abandoned this claim. See claimants' proposed findings filed May 16, 1977, page 5, n. 2.

and Grand Coulee Dams, including the "Indian Zone" of the Grand Coulee Reservoir.[3/]

The Commission has made no prior findings of fact in this docket. Pertinent findings have been made, however, in amended Docket 181. That docket, severed from the original Docket 181 petition filed in 1951, and given the same docket number, dealt with claims for compensation for defendant's taking of aboriginal lands. Extensive findings in that docket regarding claimants' origins, habitations, and culture are corroborated by evidence in this docket. Both sides in this docket have resorted to evidence of record in amended Docket 181. At the December, 1976 trial on the merits of the instant docket, the presiding Commissioner ruled, under Commission Rule 31(a), that relevant exhibits in amended Docket 181 may be used in this case.[4/] Additionally, on our own motion, we make the findings in amended Docket 181 a part of the record in this docket by reference.[5/]

The Commission conducted a trial on the merits on the fisheries and minerals claims in December, 1976. The Commission, by order of February 16, 1977, reopened the trial record to allow the defendant to insert certain

---

3/ These claims were later amended to exclude reference to the Chief Joseph Dam. The claims were then severed by order of the Commission into Docket 181-D. See 39 Ind. Cl. Comm. 159, 166 (1976).

4/ Tr., Vol. IV, at 22, Docket 181-C.

5/ 4 Ind. Cl. Comm. 151 (1956). This includes findings of fact 1 through 42. We also take judicial notice from the 1956 decision that the aboriginal lands, other than those converted into reservation lands, in Docket 181 were taken by defendant July 2, 1872, the date of the Executive order establishing the Colville Indian Reservation.

rebuttal testimony that defendant had been precluded from placing into the record during the course of the trial. Sur-rebuttal was then allowed claimants. Since that time the parties have briefed the issues, filed proposed findings and related pleadings, and the matter is now ready for our decision. The Commission, in the limited time left to it, is unable to decide the mineral claims. For that reason, and under the authority of the Act of October 8, 1976, 90 Stat. 1990, the Commission has certified and transferred the mineral claims to the Court of Claims. 42 Ind. Cl. Comm. 200 (1978). The instant decision, therefore, is confined solely to the fisheries claims.

Before discussing the merits of these claims the Commission will clarify the identity of the parties plaintiff, and resolve a related motion to strike evidence. These matters originated just prior to the trial on the merits with defendant's written motion of December 8, 1976, to strike portions of the report of claimant's expert witness because the report improperly included Columbia, Wenatchee, Chelan, and Entiat Indians as parties to this case. These Indians are of Salish Indian stock, just as are claimants. These tribes, (hereinafter called lower Salish), resided generally downstream from claimants and were placed on the Colville reservation by defendant subsequent to 1872.

Defendant argued the same motion at the trial on the merits which began five days after the motion was filed. The presiding Commissioner decided not to rule on the motion until the claimants had had an opportunity

to respond to it.

Claimants filed a written response after trial, and the defendant filed a reply. The Commission, by order of January 19, 1977, denied defendant's motion to strike but reserved to defendant its right to renew the objection in its brief, and stated that due consideration would be given the question at that time.

In the introduction to its proposed findings and brief, filed October 28, 1977, defendant again contended that the downstream Salish groups were not parties to this suit, and could not now be brought into the case.

In response, claimants argued that the special fishing rights in this case were not the property of any of the aboriginal tribes which were located on the Colville Reservation but were the property of the Confederated Tribes of the Colville Reservation. 6/ Claimants say that the named claimants in this case, i.e., the Colville, Lake, Sanpoil-Nespelem, Okanogan and Methow, properly are not suing for themselves but as representatives of all the tribes that were eventually settled and confederated on the reservation, and that the quantity of fish encompassed by the special rights involved in this case belong to all the Indians living on the

---

6/ In our 1956 decision in Docket 181, supra, we found that the Confederated Tribes of the Colville Reservation was an organization recognized by the Secretary of the Interior as having authority to represent the Indians enrolled on the Colville Reservation.

reservation, not only to the named claimants.

In further support of their position, claimants point out that at the time of establishing the reservation in 1872 the defendant established it for such other Indians as the Department of the Interior should see fit to locate thereon; and that, historically, the lower Salish, whom the Department of Interior saw fit to locate on the Colville Reservation about 10 years after the reservation's establishment, had had the use of the reservation's fisheries, and had had their rights to continue to fish at their usual and accustomed places secured by the Yakima Treaty of June 9, 1855, 12 Stat. 951, and the agreement of July 9, 1883, ratified by the Act of July 4, 1884, 23 Stat. 76, 79-80. Claimants add that the lower Salish were on the Colville Reservation when the agreement of May 9, 1891, ratified by the Act of March 22, 1906, 34 Stat. 80, was negotiated, and that the agreement acknowledged that all of the Indians on the reservation had special hunting and fishing rights, and that the agreement specifically reserved such rights on the north half of the reservation ceded by the agreement.

We disagree with both parties. The expert's report constitutes the expert's direct testimony in this case. It is not a pleading, or a formal motion, such as would set in motion an attempt by claimants to bring in the lower Salish as parties plaintiff. Nor does defendant's motion to strike create such an issue.

The only sensible function we can deduce from defendant's motion is as an objection to the relevance or adducive character of the evidence. Our only concern, therefore, is whether the expert's direct testimony (the report) conforms to our rules regarding admissibility of evidence.

With regard to claimants' response, it is simply not true that the fishing rights in this case were not the property of any of the aboriginal tribes on the Colville Reservation but were, and are now, the property of the Confederated Tribes of the Colville Reservation. The Confederated Tribes appear in this case in a representative capacity just as we stated in our amended Docket 181 findings. Moreover, the reverse is true as to claimants' next argument that the named claimants are not suing for themselves but as representatives of all the tribes on the reservation. The named claimants did sue, and have sued, for themselves, but in doing so they are represented by the Confederated Tribes in a representative capacity, not vice versa.

Claimants do not impress us with their other arguments wherein they attempt to include the lower Salish in this case. The fact that the defendant added other Indians to the reservation population, the fact that those added Indians shared the fishing with the named claimants, and the fact that they may have depended on fish for subsistence do not make the added Indians parties in interest in this case. Nor does it matter that the Yakima Treaty may have secured to the lower Salish fishing rights, or that they may have been upon the Colville

Reservation at the time of the 1891 agreement. That treaty and the 1891 agreement are not the subject of this litigation.

As we have said, our only concern is whether the expert's testimony conforms to our rules regarding admissibility of evidence. It does. Testimony regarding the downstream or lower Salish objected to by defendant is competent, relevant, and material insofar as it tends to prove or disprove elements of, or the merits of, the existence of fishing rights of the named claimants. Defendant's motion to strike is denied.

In reaching this conclusion, we do not decide whether the lower Salish are to share in any award that may be made in this docket or whether that tribe may have had a claim similar to that of the named parties which has been lost by the prescription of our act. These points are not at issue in this motion, and we make no ruling regarding them.

THE FISHERIES CLAIMS

In this case claimants allege that they had special fishing rights in the waters on or adjacent to the Colville Indian Reservation in the present-day State of Washington; that a special relationship existed between claimants and the defendant whereby the defendant was bound in fairness and honor to protect them in their rights; that defendant breached that obligation by dealing with claimants unfairly and dishonorably; and that, consequently, under Clause 5 of

Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, the defendant is liable in damages to claimants for losses caused them by defendant.

Defendant denies claimants' essential allegations, contending that the evidence plainly shows that fishing for claimants was a mere privilege to fish which was not exclusive and no more "special" than the fishing privilege accorded to Indian tribes generally. Defendant also repeats its arguments regarding claimants' right to proceed in this case which was decided against it in our 1975 decision. In short, defendant has presented no new arguments regarding the applicability of clause 5 of section 2 of our act that convince us that we erred on the issues disposed of in our 1975 decision.

In its 1975 decision the Commission held that, in the absence of a treaty, as in this case, the existence of special fishing rights is a question of fact. We will therefore examine the evidence in this case to determine the questions presented by claimants' allegations. For convenience, we have divided our opinion into six parts.

Part A. Aboriginal Fishing.

The evidence, which we have summarized in our findings, shows generally that the claimant tribes, along with the Columbia, Wenatchee, Chelan, and Entiat Tribes, belonged to what we called in our 1956 decision in Docket 181, supra., an Interior Salish dialectic group of Salish speaking

Indians. These Interior Salish groups occupied aboriginally the central portion of what is now designated the Plateau Cultural Area, and which in earlier anthropological literature was called the Salmon Area. The Plateau Cultural Area is located between the Rocky Mountains and the Cascade Mountains in the Pacific Northwest region of the United States.

Claimants occupied large areas in what is today northeastern Washington State. These areas, taken together, comprise what is now all or part of Okanogan, Douglas, Grant, Ferry, Lincoln, and Stevens counties. 7/

Aboriginally the Colville tribal group lived along both sides of the Columbia River from above Kettle Falls, Washington, down the Columbia River to just above the present-day town of Hunters, Washington. Most of the Colville tribesmen were east of but near the Columbia River. Many lived in the Colville River Valley. The Colville River is a tributary of the Columbia.

The Lake Tribe lived upstream from the Colville, and extended their habitations along both sides of the Columbia River as far north as the Canadian border. The San Poil-Nespelem 8/ lived downstream from the Colville on both sides of the Columbia River, and on tributaries

---

7/ We considered the location and extent of claimants' aboriginal areas in great detail in our 1956 decision in Docket 181, supra.

8/ In the Commission's 1956 decision, supra, the Commission determined that the San Poil (also called San Poel, or San Poeil) tribe included the Nespelem Tribe.

of the Columbia, in an area known as the Big Bend country, named after an abrupt change in direction in the Columbia River from south to west. The main tributaries in this area were the Nespelem River and the San Poil River.

The Okanogan Tribe lived downstream from the San Poil-Nespelem near the mouth of the Okanogan River, and along both sides of this tributary of the Columbia northward. One group of Okanogans on the Okanogan River lived as far north as the Canadian border. The Methows lived generally downriver from the Okanogan on the Columbia around the mouth of the Methow River, and along both sides of that tributary as far north as the town of Twisp, Washington.

The physical environment these Indians lived in shaped their culture. The Plateau Cultural area was basically open and riverine in character, with great variations in altitude, climate, and types of ground cover. The Columbia river system with its abundance of edible fish determined settlement patterns, and provided these Indians with common access to fishing -- their prime source of subsistence. Claimants also gathered food and hunted. Agriculture was of no significance to them aboriginally.

As we explained in our 1956 decision in Docket 181, supra, at 157, the dominant unit of habitation for claimants was the village. They located their villages along the rivers at relatively permanent sites, and used them year after year, and generation after generation. Claimants' villages ranged in size from only two or three lodges to those which

extended more than a mile along the land benches that bordered the rivers. The Lakes had 10 such villages, the Colville 7, the San Poil 13, the Nespelem 8, the Okanogan almost 40 and the Methow more than 15.

Claimants spent more time in their villages during the fall and the cold winter months than during the rest of the year. Winter was the best season for hunting and meat was needed to supplement their diet of dried fish.

In the spring the women dug for roots and the men hunted small game. In summer claimants spent most of their time fishing at the great salmon fishing grounds along the rivers. The main fishing season lasted about 5 months, from May through September. In the fall some of the Indians moved to other fishing grounds, while some went into the mountains to gather roots, or to hunt, before the winter cycle of village living recurred.

The evidence shows that from time immemorial, claimants' culture, economics, and religion were inextricably interwoven with the abundance of fish in the waters in or adjacent to their aboriginal lands. Their reliance on fish for food influenced the beliefs and behavior of claimant tribes more than any other factor. It governed their yearly round of activities, the location of their villages, their religious beliefs, and their political system.

The principal source of planitiffs' food supply was the anadromous fish. They ascended the rivers from the sea to spawn. The main types of anadromous fish of the Columbia River basin were the Pacific salmon and the steelhead trout. Claimants were most familiar with three of the four principal subspecies of Pacific salmon that used the Columbia. They were the spring

and fall chinook, blueback or sockeye, and silver of Coho salmon. The fourth sub-specie, the chum, seldom made its way to waters fished by claimants, preferring to spawn in the lower reaches of the Columbia near the ocean. All sub-species were excellent food fish. The most popular and largest was the chinook, followed by the blueback.

Claimants also caught the steelhead trout, another excellent anadromous food fish. There were other species of food fish available to claimants, the most important of which was the sturgeon.

The most plentiful salmon that passed through claimants' aboriginal areas were the chinook. They divided themselves into two, and sometimes three, migrations upstream each year. The main runs came in the spring and fall. They passed through claimants areas annually with the spring chinook in runs which began as early as February. Later runs lasted through November when the last of the Coho were running. The Steelhead migrated upstream all year long.

Fish traps were the most efficient means of catching the fish and they were in common use and frequently were used communally, although the construction of them entailed considerable danger. At Kettle Falls, the best fishing site of all, claimants caught fish in tremendous quantities by using huge basket traps.

Much individual fishing was also done by members of claimant tribes, not only at primary locations, but at numerous locations along the banks of rivers, or at the mouth of smaller tributaries in, near, or adjacent to their aboriginal lands. Their methods included spearing, hooking, netting, trapping, and seining. Regardless of the method used, all

claimants took great pride in their fishing ability, and enjoyed this activity immensely.

At the more important fishing sites, which generally were located at rapids or falls or were at or near the mouths of the larger tributaries of the Columbia, there were fish chiefs who directed the operations. Their primary duty was to see that there was equitable distribution of the catch. They kept claimants' fisheries open to everyone. These fisheries often were visited by members of other tribes. Claimants generally shared their catch with all comers, a practice characteristic of their culture. They traded fish as a commodity to obtain other food and non-food items and to supplement the pemican they had salted and stored.

The annual First Salmon Ceremony marked the beginning of the fishing season in May. It lasted five days, and was always observed in a meticulous and sober manner, because it was believed that any neglectful or irreverent conduct would constitute a threat to the salmon runs, the consequence of which might be a famine.

Salmon held other religious significance for these tribes. They believed in the Guardian Spirit concept which meant that each tribesman, in his youth, should seek a personal tutelary, who spoke as a man but had characteristics of some non-human living being. The salmon was the tutelary of many of the Salish Indians. The salmon chiefs, who directed the fishing operations, nearly always had a salmon as their guardian spirit.

In summary, salmon fishing was the principal source of claimants' subsistance and the salmon was an important factor in their religious and spiritual life.

Part B. Relations between Claimants and Defendant. Relationships between claimants and defendant began developing soon after defendant took undisputed sovereignty over the Oregon Country from the British in 1846. For example, in the Act of August 14, 1848, 9 Stat. 323, which created the Territory of Oregon out of the treaty area, it was provided that nothing therein was to be construed to impair the rights of Indians in the territory so long as such rights remained unextinguished by treaty. The act also specifically reserved to defendant authority to make any regulations respecting Indians, their lands, property, or other rights, by treaty, law, or otherwise which it would have been competent to do had the 1848 act never passed. The Act of June 5, 1850, 9 Stat. 437, extended the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, to the Oregon Territory, and authorized establishment of a federal superintendency over Indian affairs in the territory with up to three Indian agents to assist the tribes.

Defendant established the Territory of Washington by the Act of March 2, 1853, 10 Stat. 172. This act reserved to the Federal Government exclusive authority over the Indians and their property, and appointed a territorial governor as its superintendent of Indian affairs. A separate superintendent was later provided for, and additional agents were authorized by later legislation. These enactments made it clear that defendant clearly had a responsibility for the Salish in that region. Defendant continued this course of action by legislation and negotiations and treaties, which precipitated events that changed forever the circumstances and rights of the Salish Indians. In all of this defendant was attempting to effect its national Indian policy while endeavoring to cope with the surge of white settlement that engulfed the region.

Defendant's national Indian policy, which had its origin years before authority was asserted over the Salish tribes, was to cause the Indians to move onto reservations. Lands which were thus vacated under defendant's policy were generally settled by white men under defendant's land laws. Another result was to turn the Indians from their native way of life to the more settled ways of the white man; often destroying the Indians' cultures and forcing the white man's culture upon them.

The defendant encouraged centralization of the plaintiffs' political structure and sought chiefs who could and would speak for the entire tribe so that negotiations with the tribe could be simplified.

In 1855 the defendant began an intensive effort to acquire the aboriginal lands of all Indians east of the Cascade Mountains and west of the Rocky Mountains, and negotiated several treaties during that year. 9/ In each of these treaties the defendant set aside reservations for the Indians and guaranteed to them exclusive rights to take fish in the streams running through and bordering the reservations which were created. The treaties also reserved fishing rights to them at all other usual and accustomed stations in common with defendant's citizens. In the treaty with the Walla Walla Indians the defendant also reserved a specific fishing location 6 miles square and known as the "Wenatshapam fishery."

9/ Treaty of June 9, 1855, 12 Stat. 945, with the Walla Walla, Cayuses, and Umatilla Tribes and bands; Treaty of June 9, 1855, 12 Stat. 951, with the Yakama Nation; Treaty of June 11, 1855, 12 Stat. 957, with the Nez Perce; Treaty of June 25, 1855, 12 Stat. 963, with the confederated tribes and bands of Indians of Middle Oregon. In another treaty around the same time, the Treaty with the Quinaielt of July 1, 1855, and January 25, 1856, 12 Stat. 971, exclusive fishing rights were not reserved -- only rights in common with defendant's citizens.

Although no treaty between claimants and defendant was ever made, there is evidence that representatives of the Okanogans and the Colville were present at the proceedings held with the Yakima Nation. There is also evidence that agents of defendant met with claimants, and that claimants expressed their willingness to treat with defendant.

Not long thereafter, hostilities broke out between defendant and several of the Indian tribes, but claimants were not among the participants. Congress had not yet ratified the treaties, and the Indians, alarmed at the increased intrusions of white men, took up arms. Congress finally ratified the treaties in 1859, however, and order was restored.

As we have seen, defendant never concluded a treaty with claimants. Claimants became known as "non-treaty" Indians. They remained friendly with defendant, and lived peacefully. The defendant ultimately deemed that claimants had no right whatsoever to their aboriginal lands, and eventually took them from claimants without payment of compensation. 10/

The evidence in this case is clear, however, that defendant knew about claimants' fishing, did not interfere with it, and countenanced it.

Defendant's agents had visited claimants' homelands as early as 1853, and made reports concerning claimants' customs, habits, and their main sources of subsistence. In 1855 the Superintendent of Indian Affairs for the Territory of Washington visited claimants' general area and reported that the main source of food for the Salish tribes was the salmon. This fact was reported the same year in Congress.

10/ See our 1956 decision in Docket 181, supra.

From the year 1859 on, agents of the defendant charged with the responsibility therefor made annual reports concerning claimant Indians in the territory. These reports repeatedly showed the heavy reliance of claimants and other Indians on fish for susbistence.

There is evidence in the record which indicates that claimants never enjoyed the protection offered Indians generally by the extension of the Trade and Intercourse Act. Controversy arose over whether the extension act, the Act of June 5, 1850, supra, applied to claimants, and other Indians in the region, and whether the liquor provisions of the Trade and Intercourse Act applied to white men dealing with the Indians. Little, if any, attention was given to the merits of land claims, and other legal rights, of the Indians in the area.

Being non-treaty Indians did not exempt claimants from troubles with white men, or alter their needs for survival. There were many intrusions of whites upon their lands. The influx became much greater once gold was discovered near Fort Colville where mining began in 1855.

The defendant did not consider the white men intruders since, by the Act of July 17, 1854, 10 Stat. 305, defendant extended the privileges of the Preemption Act of September 4, 1841, 5 Stat. 453, to lands in the Oregon and Washington Territories, and also provided that these privileges applied to all public lands whether surveyed or unsurveyed, whether held under color of right or otherwise, i.e., by squatters, and whether entered or reserved. The effect of this act was to open the entire region to settlement since defendant deemed claimants' aboriginal lands to be public lands. Thus claimants suffered many hardships, including a

diminution of population due to deaths from disease, and a large decline in the supply of fish and available game. They had never been adept at farming nor did they have very much arable land. Nevertheless, some of them expressed a willingness to turn to subsistence farming to improve their lot.

The first agreement of any kind between defendant and claimants was made on May 9, 1891, 19 years after claimants were placed on a reservation. By this agreement claimants ceded the north half of the Colville Reservation to defendant. The matter became controversial after negotiations were completed. Agents of the defendant, in this instance the Secretary of the Interior, ordered that the lands taken in the agreement be returned to the public domain while at the same time Congress refused to pass the ratifying legislation which had been prepared by the Commission appointed to negotiate the agreement. By enactment of the Act of July 1, 1892, 27 Stat. 62, 64, which opened the north half of the reservation to settlement, Congress repudiated any claim claimants may have had to the entire reservation.

Congress finally ratified the agreement of May 9, 1891, by the Act of June 21, 1906, 34 Stat. 325, 377-378, which also appropriated the consideration called for in the 1891 agreement. Thereafter, defendant's agents disagreed among themselves concerning the validity of the 1906 act as a ratification, and continued to dispute the agreement itself. All doubt was removed, however, by the United States Supreme Court in Anthony v. United States, 420 U.S. 194 (1974), in which the court ruled that the 1906 Act indeed ratified the 1891 agreement. Of particular interest to us in that

decision is the discussion beginning at page 206 thereof of Article 6 of the 1891 agreement relating to the preservation of fishing rights of claimants. The court characterized claimants' fishing rights thus guaranteed as of even greater dignity than those resulting from many other treaty provisions securing to Indians the right to take fish in the usual and accustomed places.

Claimants, by and large, continued to live after 1855 by fishing, hunting, and root-gathering as best they could. Hardships and complaints grew more intense. The Colville, and sometimes the Lakes, turned to defendant's agents with their troubles, while the San Poil, Nespelem, and to some extent the Okanogans, tended to avoid contact entirely with any white men, while blaming them for their troubles.

Defendant's response to claimants' unfortunate situation was to apply its established Indian policy which eventually placed claimants on an Indian reservation. No effort was made by defendant to pay compensation to claimants for any legal rights they may have had in their aboriginal lands and of which they were deprived by defendant's actions.

Part C. The Establishment of the Colville Indian Reservation. In our findings we detail the background of events leading to the establishment of claimants upon a reservation. In sum, it took the defendant years to provide a reservation for claimants, and in the course of dealings leading up to establishing the reservation it became clear that the defendant desired primarily to remove the Indians from the areas being settled by its white citizens. In actuality, it was the encroachment of white men

upon claimants' aboriginal lands which precipitated the events resulting in the establishment of a reservation.

The evidence shows that for years the district agents recommended that a reservation be established for claimants. These recommendations were considered by higher ranking agents of defendant. For example, in 1869, the Superintendent of Indian Affairs for the Territory of Washington wrote the Commissioner of Indian Affairs in Washington, D. C., recommending a reservation "of suitable dimensions, including the fisheries south and west of Old Fort Colville" The superintendent went on to mention that Kettle Falls was "a favorite fishery, where thousands of Indians resort every year during the fishing season, and this fact makes the locality all the more valuable as an Indian reservation."

In the same year, in his annual report to Congress, the Commissioner of Indian Affairs, after pointing out that claimants, along with other Indians in the area should not be dealt with by treaty, and that they should be dealt with as wards of the Government, recommended that they be located upon a suitable reservation somewhere south and west of the Colville tribal group's area "near to a favorite salmon fishery, resorted to by thousands of Indians." The Commissioner also recommended that a full-time agent be appointed for the claimants, and that an arrangement be made with them for a surrender of their lands. This and other evidence in the record clearly shows that defendant considered claimants to be without rights of any kind in and to their lands.

Prior to 1872 the claimants were never consulted or formally treated with concerning the establishment of a reservation for them. Nevertheless, great controversy arose among defendant's agents over the location of the proposed reservation.

Defendant's district agents, who were in direct charge of claimants, reported that the best reservation for the Indians was one carved out of claimants' aboriginal lands, west and north of the Columbia River, which included land west of the Okanogan River, and a six mile wide strip of land east of the Columbia at Kettle Falls. This area included claimants' most productive fishing sites and the homes of most of the claimants, many of whom had long been settled in permanent homes near the river banks.

Other agents of defendant, including some high in defendant's governing structure, wanted entirely different lands east of the river for claimants. This land was more arable, they contended, and more suitable, therefore, to foster an agricultural way of life for claimants. They contended that it also contained adequate fishing grounds. The latter group initially won out when defendant, by Executive order of April 8, 1872, set aside land east of the Columbia River as the reservation.

Claimants rejected the selection and refused to consider moving voluntarily from their aboriginal lands. Their main objection was that the site chosen in the April Executive Order was not carved out of their homelands. They also complained because they were not offered any

consideration for their lost lands.

White men protested also. Many of them were already permanently settled east of the Columbia and did not want to give up their lands. Defendant, reacting to the protests, rescinded its April 8, 1872 Executive Order by the Executive Order of July 2, 1872. In lieu of lands east of the river defendant chose most of the lands west and north of the Columbia River previously recommended by district agents. The lands west of the Okanogan River and the six mile strip east of the Columbia which had been recommended for inclusion by the agents were not included.

For years after the final selection of lands constituting the reservation, agents of defendant directly in charge of claimants tried unsuccessfully to get the boundaries changed so as to include the six mile strip east of the Columbia, and a strip of land west of the Okanogan River. They never succeeded. Nevertheless, the claimants, continued to fish in their usual places, on and off the reservation.

Claimants who were living outside boundaries of the reservation were reluctant to move onto it despite the fact that defendant exerted great pressure on them, and even planned to employ troops, to move them. However, by 1892, newly appointed agents succeeded in moving most of the off-reservation Indians onto the reservation. During the period of removal, claimants continued to rely on fishing as their main source of subsistence. While some of claimants' tribesmen, particularly some of the Okanogans, turned to farming, the bulk of them shared the fishing locations already in use in the waters on or adjacent to the reservation.

Part D. Conclusions on Fishing Rights.

Having assumed responsibility for these Indians, defendant through its agents established a special relationship with claimants whereby it was morally responsible for the welfare of these Indians, including the matter of their subsistence. Fishing, of course, was the mainstay of claimants' subsistence.

In an attempt to meet its responsibilities, the defendant, even as it was neglecting claimants' land rights, took steps to assure the welfare of claimants through the establishment of a reservation for them where they could be secure and have food and shelter. Claimants' fishing activity may not have been as controversial a factor in establishing the reservation as was the reservation's location, but its importance in the eventual establishment of the reservation cannot be seriously doubted. Such being the case, we hold as a matter of law that implicit in the creation of the Colville Indian Reservation, defendant undertook an obligation to claimants to assure them the right to take fish in the waters on and adjacent to the reservation for their subsistence.

Claimants ability to subsist were dependent upon their right to fish, therefore, that right was of utmost importance in the establishment of a reservation for them. It thus became a moral obligation of the defendant inherent in its special relationship with these Indians to protect and maintain them in such a way that they might continue their fishing activities. This moral obligation of defendant is not unlike its acknowledged legal obligation to insure that the reservation land was preserved for the use, benefit and enjoyment of the Indians living thereon, in this case the claimants. In a suit such as this, brought under clause 5 of section 2 of the Indian Claims Commission Act claimants' fishing right become entitled to the same protection and in effect those rights had been made legal ones. We hold as a matter of law that in the circumstances of this case, defendant was required to protect claimants' fishing right against all infringements.

We do not say that claimants had any rights of ownership to free swimming fish in the rivers, or to the beds of navigable streams; or that claimants had legally enforceable rights to fish at the time the reservation was established. Nor do we hold that claimants had legal title to the particular fishing locations they used, or that there was an essential element of exclusivity to claimants' fishing rights. We merely hold that a special relationship existed between the defendant and claimants whereby the defendant was obliged to protect and maintain claimants undisturbed in the enjoyment or pursuit of their fishing activities.

Claimants argue that in addition to the fishing rights inherent in the establishment of the reservation initially, Congress, in the agreement of May 9, 1891, acknowledged and confirmed special fishing rights of all the tribes located on the Colville Reservation. We agree that under the 1891 agreement claimants' fishing rights were corroborated. Article 6 of this agreement, for example, bears out what the evidence shows: that claimants and defendant had a special relationship long before the 1891 agreement was made whereby defendant undertook an obligation to protect claimants' fishing activities. Claimants, of course, were not the only beneficiaries under the 1891 agreement. The lower Salish, who were moved on to the reservation, were fishermen too, and the agreement benefited them as well. The rights of the lower Salish are not an issue in this case.

Defendant argues that no fishing rights at all are established by the evidence in this case. Defendant first points out that the 1872 Executive orders plainly omitted from the reservation the waters of the Okanogan and Columbia Rivers, that such waters were owned by the sovereign, and that claimants had no rights therein. This position raises legal issues not involved in this case. We are not dealing here with property rights, or title to the rivers, or to the fish in them.

Defendant relies on certain cases where the Indians were denied recovery for various reasons, but we find that none of those cases are apposite. In the case of Seneca Nation v. United States, Dockets 342-B, etc., 20 Ind. Cl. Comm. 177 (1968), the Senecas alleged that they had acquired a

compensable interest in the bed of the Niagara River by virtue of the Treaty of November 11, 1794, 7 Stat. 44, between the United States and the Six Nations. The Seneca's right, if any, to recover was based on the Government's obligation under the Indian Trade and Intercourse Act to prevent cessions to the states or individuals of Indian land unless those cessions were made pursuant to a treaty convened by the United States itself. The Commission held that the Seneca Indians did have compensable rights under the 1894 treaty in certain lands in the vicinity of the Niagara River and that the United States was liable under clause 5 of section 2 of the Indian Claims Commission Act for not stopping treaties from being negotiated between the Senecas and New York State whereby the Senecas parted with those lands for what was undoubtedly an inadequate consideration. With respect to the bed of the Niagara River, however, the Commission held that no part of the river bed was granted to the Indians under the 1794 treaty under the well established rule that there was a presumption against the sovereign's alienation of title to land under a navigable river unless such rights have been acquired by express grant or prescription. Accordingly, this claim was dismissed. Sioux Nation v. United States, Docket 74-B, 33 Ind. Cl. Comm. 151 (1974), involved the identical question of the Indians' possible title to the bed of a navigable river without any express grant of such right in a treaty, statute, or agreement.

In Bay Mills Indian Community v. United States, Docket 18-F, 35 Ind. Cl. Comm. 32 (1974), aff'd 208 Ct. Cl. 1001 (1975), there was involved a

claim for unconscionable consideration under clause 3 of section 2 of the Indian claims Commission Act for the alleged cession of fishing rights at certain falls and places of encampment near the falls. The Commission held that the price paid, determined by an appraisal made pursuant to a treaty, was conscionable. It noted that no evidence of the value of the fishing rights ceded was offered at the trial and it was unable to assign a separate value for the fishing rights for that reason.

In Makah Tribe v. United States, Docket 60, 7 Ind. Cl. Comm. 477 (1959), the plaintiff tribe presented a claim based on a provision in an 1855 treaty which stipulated that "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." The plaintiffs contended that the United States by entering into certain international agreements with Canada, Japan and Russia, had deprived the tribe of its reserved treaty rights to take fur seal and deep sea fishing for halibut. The Commission ruled that the tribe had been reserved fishing rights under the treaty but that the Government's efforts to conserve and protect the seal and fish which comprised those rights, and which did not interfere with the tribes ability to capture the quantity of fish needed for subsistence, did not breach its rights.

Defendant's final argument is that the evidence does not establish any intent on the part of the defendant to grant to the claimants compensable fishing rights in the navigable waters adjacent to the Colville Reservation.

A grant of such rights is not the basis of the plaintiffs claim, but rather the Government's obligation to deal fairly and honorably with claimants concerning the right to fish which had been indulged in from time immemorial by the claimants. The most that can be said for Government's argument is that absent clause (5) of section 2 of the 1946 Indian Claims Commission Act, such a right would not be compensable.

In United States v. Oneida Nation, App. No. 5-76 (Ct. Cl. May 17, (1978) slip. op. at 11, aff'g Dkt. 301, 37 Ind. Cl. Comm. 522 (1976), Judge Davis stated that a special relationship can rest on obligations arising from statutes, treaties, governmental acts and representations, citing Gila River, Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790, 799, 427 F.2d 1194, 1199, cert denied, 400 U.S. 819 (1970) and Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 502 (1967). He also stated that whether such a relationship existed for the purposes of the Indian Claims Commission Act is a function of the entire course of dealing between the parties.

A special relationship in this case arose with the statute asserting authority over the Indians in the newly-acquired country and culminated with the Government's act establishing a reservation for the claimants under circumstances where the Government well knew that the claimants had long relied on fishing as their principal means of subsistence, and where, according to their customs and habits, they had no other reliable means of existing. Since the Government did establish a reservation for these Indians in the vicinity of their aboriginal homes knowing that they

would be required to continue fishing to exist on lands that were not suitable to agriculture,we conclude that a special relationship between the defendant and the Indians existed regarding the Indians right to fish and that it stemmed from the defendant's responsibility to these Indians.

Part E. Dealings Subsequent to the Establishment of the Reservation. After establishing a reservation and moving the Indians on to it, the defendant made great efforts to convert the claimants into an agricultural people but without notable success. Fishing continued to be the main occupation of the claimants and their primary source of livelihood. While defendant did not overtly suppress the claimants' right to fish after establishing their reservation, defendant did nothing to protect and maintain the plaintiffs' right and ability to continue fishing. Accordingly, claimants allege that defendant is liable for damages resulting from the defendant's allowing commercial fisherman to take excessive amounts of anadromous fish down-stream from claimants' reservation from 1872 to 1939, so that fish sufficient to satisfy the claimants' special rights did not reach the waters on or adjacent to their reservation; and damages resulting after 1939 because defendant built or allowed to be built dams which obstructed forever the runs of anadromous fish up the Columbia River.

Commercial fishing was carried on as the most significant enterprise of the lower Columbia River from 1861 on. Our findings detail the commercial fishing operations from the time the first cannery began operating in 1866 and includes the ups and downs of the commercial fishing industry. The cyclical catch pattern which persisted over the years went into a general decline after a high of 42,000,000 pounds in the year 1925. In 1943

the catch had reached a low of less than 15,000,000 pounds. Our findings also deal with the patterns relative to the kinds of fish caught by commercial fishing companies. As certain species of the fish were depleted commercial fishermen would turn to catching other kinds of fish.

Government regulation of the fishing industry in this area began as early as 1866. The State of Oregon and defendant's Washington Territory established a fishing season and gear regulations. Other regulations followed and by 1918 defendant authorized a fishery compact between the states of Washington and Oregon which permitted joint efforts for the regulating, protecting, and preservation of fish in the Columbia River over which both states had concurrent jurisdiction and in other waters within either state which would effect that concurrent jurisdiction. 40 Stat. 515. The regulations were primarly directed towards conservation of anadromous specie of fish and were not designed to benefit the claimant Indians.

The defendant, through its agents attempted to assist the states in conservation by means of studies, surveys and reports to Congress. At no time did the defendant do anything to protect the Indian claimants' fishing rights.

As indicated in our findings the activities of the commercial fishing industry in the area resulted in a decline in the number of fish in the waters on or adjacent to the claimants' reservation. Commercial overfishing was not the sole cause of the diminution in the number of fish.

As indicated earlier in this opinion and as detailed in our findings, defendant permitted its white citizens to develop the Pacific Northwest

at a rapid rate during the same years when the development of the commercial fishing industry was taking place. This included the development of mining, lumbering, farming, towns and settlements in the Columbia River area where the anadromous fish spawned. The waters of the Columbia and the Okanogan rivers were adversely affected by the run-off of chemicals from mines and mills in the vicinity. Lumber cutters, farmers, and other land clearing activities which cut away the foliage over spawning waters protecting the natural conditions, further harmed the plaintiffs' fisheries. Settlers dammed up tributary streams for the purpose of irrigation and all these develop ments contributed to the decline of the fish in the claimants' waters.

The evidence establishes that defendant was well aware of the suffering caused claimants by the diminution of fish in the waters on and adjacent to the reservation because of the rapid settlement of the Northwest and the Government's failure to take any steps to protect the waters in which the plaintiffs fished or to control the over-fishing by commercial interests. In short, the defendant failed in its moral duty to protect the Indians' right to subsist by taking fish from the waters on and adjacent to their reservation.

Defendant was fully aware of the decline of the number of fish in claimants' waters and the resulting impact thereon on plaintiff. The claimants ar agents of the defendant made these facts known to the defendant as early as 1877 and frequently thereafter, as outlined in our findings. The plaintiff's complaints were considered at high-decision making levels of Government

and defendant, through its agents, concluded that the plaintiffs had no fishing rights which were exclusive, protected by treaty, or different from those of defendant's white citizens. Accordingly, defendant made no attempt to protect the Indians' fishing rights.

Defendant seeks to avoid liability for the depletion period by arguing that the depletion of fish was not caused by the United States but by other persons. The rule is clear, however, that where the Government assumes an obligation imposed by a special relationship it is liable even if third parties actually inflict the injuries complained of. Aleut Community of St. Paul Island v. United States, 202 Ct. Cl. 182, 189 (1973). See also our decision on remand in Aleut Community, 42 Ind. Cl. Comm. 1, 31 (1978), where we applied this concept to profits realized by third parties as well as to injuries inflicted by third parties.

There is much that the United States could have done to protect the plaintiffs, but it chose not to do so. Under the circumstances it is remarkable that these Indians continued to survive and it is not surprising that their quality of life was badly damaged by Government neglect and by unrestricted white settlement on their lands.

The second allegation of lack of fair and honorable dealings made by plaintiff has to do with defendant's dam building activities or its allowing the building of dams which obstructed forever the runs of anadromous fish up the Columbia River. The evidence establishes that the defendant was responsible for three dams which were built after 1930 and which caused serious diminution of fish in two instances and complete

destruction of fishing in the third instance in waters on or adjacent to the reservation. The details of defendant's involvement in dams on the Columbia River are in our findings.

In brief, the Federal Power Commission, a regulatory agency of defendant created in 1920, issued a license in 1930 to the Washington Electric Company, a private utility company, to build the Rock Island Dam on the Columbia River some 453 miles from the ocean, or about 65 miles downstream from claimants' reservation.

Among the conditions of the license were requirements that the licensee provide free passage for migrating fish both up and down the river during construction, to safeguard fish life and propagation in accordance with plans approved by the Secretary of Commerce. The licensee built two fish ladders under plans approved by defendant's Secretary of Commerce. The ladders were completed by the beginning of the 1932 anadromous fish runs. The dam was completed in 1933.

The blue back salmon readily found the ladders, and arrived upstream to spawn in reasonably good condition, though delayed and fewer in number. Most of the blueback, however, spawned below the Colville reservation, though many in earlier times had used the Okanogan River. By 1930 this river had little spawning capacity because of the onslaught of civilization, and claimants' fishing therein became negligible.

The chinook and steelhead had great difficulty in passing the Rock Island Dam because they preferred the swifter waters of midstream where no fish ladders were built. These fish had spawned in waters on, near or above claimants' reservation, and were the most numerous fish available to claimants for their subsistence.

The problem regarding the chinook and steelhead was alleviated somewhat by the Secretary of Commerce who required the licensee to install a third fish ladder. This ladder, opened in 1938, partially restored the chinook and steelhead runs. It was built, however, not to protect and maintain claimants in their subsistence fishing but as a means of preservation of the species.

The second dam built on the Columbia River affecting claimants' fishing rights was the Bonneville, a dam built by the defendant. The location of this dam was about 500 miles downstream from claimants' reservation, or about 145 miles from the Pacific Ocean. Defendant spent large amounts of money in fish protection, and in maintainance thereafter, not to protect claimants' fishing rights,but for the preservation of the species.

The third and last dam built that affected claimants' rights was the Grand Coulee. Defendant, as builder, anchored this enormous dam on the southern boundary of the claimants' own reservation at a point about 40 miles upstream from the mouth of the Okanogan River. The dam impounded water 370 feet above the low-water level of the Columbia and, because of its extraordinary height, fish ladders were deemed infeasible. By 1939, the structure reached a point that blocked the river completely and ended forever the upstream migration and spawning of anadromous fish in the upper Columbia above the dam, as well as the downstream migrations of fry.

In our findings we outline briefly the several protests that claimants made to defendant regarding dam building and claimants' need for defendant's protecting their fishing rights. As in 1924 plaintiffs protested the effect

of a proposed dam planned for Priest Rapids far downstream from the reservation. In 1932, the Indians of the Colville Reservation, among whom were claimants, protested vigorously the proposed Grand Coulee Dam because of fear that the dam would destroy their right to fish at Kettle Falls and on the San Poil. Agents of the defendant in charge of claimants took up the matter of claimants' rights to compensation at various times with other agents of defendant in Washington, D. C., who advised claimants that their rights would be considered. It was ultimately decided that the claimants had no compensable rights and that their rights were no greater than those enjoyed by whites. There is no evidence to indicate that defendant ever considered whether it had a moral obligation to protect claimants' fishing rights.

Defendant was concerned about the loss of spawning grounds due to the construction of the Grand Coulee Dam, but sought to solve this problem by transferring the spawning grounds from the upper Columbia to a spawning area below the Grand Coulee Dam site which included the Okanogan River. This action did not benefit the plaintiffs since there was very little spawning ground available in the Okanogan system which had not been destroyed by the advance of defendant's civilization in that area. Rehabilitation of the Okanogan River was attempted and some small success was achieved but claimants' fishing rights were never restores. Claimants have been deprived of virtually all of their fishing rights since the construction of the Grand Coulee Dam.

On the basis of the above discussion, our findings, and the evidence in this case, we conclude that it was neither fair nor honorable for defendant to build the dams or to permit the dams to be built in total disregard of its moral obligation to protect and maintain the claimants in their reservation fishing rights. Therefore, under clause 5 of section 2 of the Indian Claims Commission Act defendant is liable to claimant in measurable damages.

Defendant contends that the evidence in this case shows that although pristine fishing conditions may not have been preserved in the Washington State region, including claimants' reservation area, the United States did make a conscientious effort to preserve as many fishing benefits for the claimants as it was reasonably possible to do. The evidence in the case does not support defendant's contention. As shown by our findings and pointed out earlier in this opinion, defendant's entire fish preservation program was for the benefit of others, not the claimant Indians, and in fact it benefited only the others. In addition the claimants, in this case are not contending that the United States had an obligation to preserve the same pristine fishing conditions which had prevailed a hundred years ago, but only that the defendant should have done all that it reasonably could have done to protect the claimants' fishing rights in its reservation lands.

Defendant's remaining arguments have little merit. It contends that the United States did not give any special fishing rights to the plaintiff and in view of its general generosity there was no duty for the government to give special and compensable fishing rights to the plaintiffs. It

points out that it provided claimants with the privilege of fishing in adjacent rivers and since it had no duty to do this, its dealing with the claimants were honorable rather than dishonorable as claimed by the plaintiff. There was no grant of fishing rights to the claimants. Has such a grant been made, this case would not have been cast under clause 5 of section 2 of the Indian Claims Commission Act because it would have been a case arising in law or equity. Once the Government established the Colville Reservation it was morally obligated to protect and maintain the plaintiffs in their subsistence fishing since it required them to live on that reservation.

Finally defendant argues that the United States received nothing of monitary value from these claimants and therefore should not respond in damages in this case. This is indeed a novel defense in a fair and honorable dealings case and defendant cites no precident for it. We know of none.

Part E. Ascertainable Damages. The Commission has the authority to determine the appropriate measure of damages to compensate plaintiffs because of defendant's lack of fair and honorable dealings. Seminole Nation v. United States, 203 Ct. Cl. 637 (1974), aff'g in part, rev'g in part, Dkt 247, 27 Ind. Cl. Comm. 141, 175-76 (1972). The appropriate measure of damages in this case is the value of the subsistence lost. Thus, if

during a particular period the plaintiffs, because of defendant's failure to protect their fishing rights, caught fewer fish than they needed to meet their normal subsistence needs, they are entitled to be paid the difference between the few fish caught and the value of what their normal subsistence catch would have been during that period. This would be the measure of damages during the depletion period, which was from 1872 to 1939.

During the termination period, claimants are entitled to the capitalized value of their subsistence from fishing as an annual income as of 1940.

For the depletion periods plaintiffs employed a method of calculation which resulted in total proposed damages of $6,776,330.00, an amount which, because of what we believe to have been flaws in plaintiffs' methodology, has no substantial relation to the true value of the subsistence which plaintiffs lost. Plaintiffs' catch losses, for example, are based on scientific data which is unrelated to the plaintiffs' actual catches. This method creates such enormous losses that when accurate population figures are used to establish realistic subsistence requirements, the fish losses far exceed the subsistence requirement of the claimants for each year of the depletion period.

Furthermore, the population figures which plaintiffs used to establish their daily subsistence requirements are inaccurate. The figures include other Indians as well as what we feel are an excessive number of claimants. The evidence in this case indicates that the average annual population of claimants was much smaller than the figures which claimants used.

Plaintiff also claimed a portion of the "escapement losses" due to depletion. Escapement losses are the amount of fish lost because depletion

was so severe that insufficient number of fish escaped fishermen to preserve the species. There is no doubt that in this case escapement diminished due to depletion; but plaintiffs are not entitled to claim damages for any portion thereof unless they owned the fish which, of course, they did not.

We have outlined claimants method of calculating damages in our findings and will not repeat it here.

Defendant urges that the claimants have failed to prove damages during the depletion period and have offered no reliable method of measuring such damages. On the basis of the record we must agree with the defendant. We had no difficulty in determining the population of claimant tribes for each of the years of the depletion period, and from this we were able to determine an average annual subsistence requirement. However, the evidence did not contain facts establishing claimants' actual catches during each year of the depletion period. There is evidence from an old timer who signed an affidavit in which he stated that he remembered the early days of big catches compared to later days of lean catches, but there are no dates, no catch figures or corroborating facts to establish actual catches. There is some evidence of catch records for Kettle Falls for the years 1928-1938. However, we have no way of apportioning these catch figures so that we can determine a compensable loss for the entire 67 year depletion period. We are therefore forced to conclude that the claimants have failed to prove damages for the depletion period.

In arriving at damages resulting from the termination of their fishing

rights after 1940, the plaintiffs propose that the value of the catch for the year 1939 be discounted or funded as an annual subsistence income would be. To reach a proposed value for the year 1939 plaintiffs employ a methodology whereby the actual subsistence catch of fish in the year 1939 is calculated to be 47% of the fish in the reservation waters during that year. This percentage has its origin in the data employed by plaintiffs for the depletion period and has no relation to the true catch plaintiffs would have had in 1939 had there been no depletion in prior years.

From the data used, claimants arrived at a 1939 catch of 2,174,925 pounds of fish. Claimants then multiplied the poundage times a "raw fish price" of 9 cents a pound to reach a subsistence income for 1939 or $195,743.25. The "raw fish price" used by claimants is not realistic. This price was that paid by commercial canners downstream around 1939 for fresh fish at the cannery. It is far too low to represent the price of fish, either fresh or dried, as subsistence to an Indian tribe.

Claimants then discounted, or funded, the $195,743.25 figure at a rate they believed would have furnished the investment needed to produce that much income annually. For a discount rate, they adopted the yield on long-term federal bonds in 1939, or 2.9 percent. The investment needed, using such a discount rate, would be $6,749,767. To this claimants urge that interest be added on the ground that the destruction of their fishing rights was the taking of recognized constitutionally protected title to those rights; and, moreover, argue claimants, fair redress under clause 5 of section 2 of our Act in this instance merits the payment of interest as fair and equitable.

We disagree with claimants' discount rate and interest claim, as well as with their proposed annual catch for 1939, and the "raw fish price." The discount rate is much too low and does not reflect an appropriate discount for an annual income based on fish and subsistence. The interest claim is without merit because there has been no "taking" in the constitutional sense under the facts of this case, and we do not believe that our power to award damages in fair and honorable dealings cases transcends the well established principal which does not permit the awarding of interest in claims against the Government absent authorization therefor in a statute or applicable contract.

Defendant, while not admitting liability, calculated the damages by assuming a subsistence catch for the year 1940. To do this, defendant relied on meager catch records for one fishing site for 1929-1938. Using the 1930 figures for the last full year of fishing, defendant arrived at a catch of 2,055 fish for 1940. To establish the weight of this catch, defendant multiplied its 1940 catch by 22 pounds, the average weight of salmon in reservation waters established by the evidence, to arrive at a figure of 45,210 pounds.

From the evidence defendant arrived at a price of 20 cents a pound for salmon as subsistence. This price, multiplied by the weight in pounds produced a figure of $9,042 as the value of the 1940 catch. Defendant, however does not capitalize the 1940 catch value. Defendant reasons that the owner of the fishing rights was the owner of a resource, and, unless he planned to go into the fish business, would receive a royalty based on the fair market value of the resource.

After considering the royalties paid for several known resources, defendant concluded that the sale of claimants' fishing rights in 1940 would have commanded a premium royalty of 15 percent. This royalty, multiplied by the annual catch value of $9,042, produce for claimants a purported annual income of $1,356.

Defendant's final step was to determine the funded value of the $1,356 in royalty income at an acceptable rate. After considering various discount and risk factors for a fishing business, defendant settled upon a final rate of 10 percent. The capitalized value of a resource producing a royalty income of $1,365 annually at 10 percent would be $13,560, rounded by defendant to $13,600, the amount defendant proposes as the final award, if any, in this case.

We agree in part and disagree in part with defendant's approach. We accept defendant's assumption that claimants' fishing rights are to be valued as of the effective date of the termination of such rights, which is 1940, the year following the damming of the Columbia River. We accept defendant's theory that the proper method of determining the value of claimants' rights is the funded value of those rights as of 1940. We also accept as reasonable the 20 cents per pound price defendant used in determining an estimated annual subsistence catch value.

We disagree with defendant in all other aspects. First, we cannot accept the 1929-38 catch figures. These figures are completely unrealistic because they represent the catch at only one place, during a limited period,

and at a time when fishing in the upper Columbia was greatly depleted, the result of years of neglect by defendant. Moreover, claimants' 1940 population was not taken into account by defendant. In our view, an appropriate annual catch figure for 1940 must reflect the amount needed by all members of claimant tribes and which they would have consumed had there been no depletion.

We have no problem in arriving at an appropriate catch value for 1940. Claimants established by a preponderance of the evidence that the average Indian on the Colville reservation, prior to the depletion that took place, consumed about a pound of fish per day. We accept this figure.14/

The record does not reveal the annual reservation population of claimants in 1940. We observe, however, that during the years 1900 to 1913 the five claimant tribes averaged about 80 percent of the reservation population. We also note that the Colville Business Roll of 1954 shows that the percentage of claimants to the entire Indian population on the reservation was just over 80 percent. It is not unreasonable to conclude that the claimants' population for 1940 amounted to about 80 percent of the reservation's population. There are in evidence annual reservation population figures for 1933 and 1943. Eighty percent of the 1933 figure

---

14/ We note the conservative aspect of this consumption when we compare the findings of fact No. 151 in United States, et al. v. State of Washington, 384 Fed. Supp. 312, 380 (1974), wherein the court found that the Yakima Indians, who lived downriver from claimants, and who had a similar culture to claimants, annually consumed in the "neighborhood of 500 pounds per capita."

indicates a population of 2,453 claimants on the reservation in that year. A similar computation for the 1943 reservation population of 3,468 produces a figure of 2,774, or a 321 member gain over the 10 years (1933-1943).

By adding to the 1933 population of 2,453 claimants one-tenth of the increase during the 10 years between 1933 and 1943, or 32 claimants a year, we arrive at a figure of 2,677 as claimants' population on the reservation in 1940.

These 2,677 tribesmen would have taken, for subsistence during 1940, at a rate of 1 pound each per day, a total of 977,105 pounds of fish, had there been no depletion. This poundage, multiplied by defendant's figure of 20 cents per pound, produces the $195,425, the subsistence value of claimants' fishing rights for 1940.

The amount of damages becomes a simple matter of computation in which we fund the value of the annual dollar equivalent of subsistence produced, or which should have been produced, from claimants' fishing rights in 1940.

We find that the rates of capitalization proposed by both parties are inappropriate. Claimants' rate of 2.9 percent, the interest rate for long-term Federal bonds in 1939, is not justified in a situation such as claimants' whose indefinite income equivalent may vary from year to year, depending, as it logically does, on population.

Defendant's rate, 10 percent applied to a royalty income concept, is an accumulation of several percentage factors not all of which reflect funding of claimants' rights in terms of subsistence. Defendant started with a 4 percent factor, which represented the interest rate of a high grade, safe investment of indefinite duration, then added 1 percent for liquidity, 1 percent for management, and 4 percent for risk due to the nature of the fish business. We agree with the first 4 percent factor, and the 1 percent added for lack of liquidity, but reject the other two factors. The claimants did not incur any management expense. It was built into their social structure. The 4 percent factor for risk is simply not applicable in this case since our valuation does not involve funding an annual fish business income.

Having accepted the first two of defendant's factors, we add a factor of 1 percent to account for the risk in variation from year to year of claimants' income. Our capitalization rate, therefore, is 6 percent, a rate we consider reasonable under the circumstances of this case. Therefore, the investment necessary to produce $195,425 annually at a 6 percent rate would be $3,257,083. This sum was the value of claimants' fishing rights in 1940.

Part G. Conclusion.

Considering the foregoing, the findings of fact, and the entire record of this case, the Commission concludes that the defendant is liable

in damages to claimants for the destruction of its fishing rights in the sum of $3,257,083. A final award, in that amount, subject to offsets, if any, is granted to claimants.

Jerome K. Kuykendall, Chairman

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Commissioner Blue dissenting in part and concurring in part.

I concur in all portions of the opinion except the denial of damages for the 67 year depletion period, wherein the majority denies damages because of the methodology used by plaintiffs.

I believe this to be a case of first impression before the Commission wherein a duty of this nature was imposed on the defendant and a method of establishing damages ascertained and acted upon by the Commission.

It appears to me that the questions of liability and the methodology for damages should have been separated. The plaintiffs, the defendant and the Commission should have all approached the methodology of damages together, resulting in guidelines being established by the Commission so that all might better know the road to take in establishing damages. That is the way it was handled by the Commission in a somewhat similar situation in Soboba Band of Mission Indians v. The United States of America, 37 Ind. Cl. Comm. 326 (1976).

The plaintiffs should have been aware of the methodology to be used by the Commission in measuring damages, so that they could have avoided winning the case but still losing it, because they chose one of many uncharted roads, completely unguided, by the Commission, respecting the measure of damages.

I, therefore, dissent to that part of the opinion denying damages for the 67 year depletion period. The question of those damages should remain the principles enunciated for the first time by the Commission, in this opinion.

Brantley Blue

Brantley Blue, Commissioner