
HOUSE BILL 1823

State of Washington

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By Representatives Buck, Doumit, Sump, Cairnes, Schoesler, Benson, Clements, Mastin, Hankins, Skinner, Mitchell, Koster, Hatfield, Mulliken, Lisk, K. Schmidt, G. Chandler, Eickmeyer, Huff, Boldt and D. Sommers

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1 AN ACT Relating to the responsibilities of the department of fish
2 and wildlife in relation to native American fishing rights; adding new
3 sections to chapter 77.12 RCW; and creating a new section.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature recognizes that the right of
6 each treaty tribe to take anadromous fish on their reservations is
7 rooted in the historic Stevens treaties. Federal courts have found
8 this right was reserved and protected under the supreme law of the
9 land, is distinct from rights or privileges held by others, and may not
10 be qualified by any action of the state. Treaty fishing rights are
11 also a right reserved for off-reservation fishing, but it is to be in
12 common with the citizens of Washington state. The legislature also
13 finds that the state has been given the police power to regulate off-
14 reservation fishing only to the extent reasonable and necessary for
15 conservation of the resource. The legislature further recognizes that
16 federal court orders allow treaty tribes to become self-policing of
17 off-reservation fishing by their tribal members if the tribe meets and
18 maintains certain qualifications and conditions. The legislature finds
19 that codification of *United States v. Washington*, 384 F. Supp. 312

1 (1974) (Boldt I) and subsequent case law is in the best interest of all
2 citizens of Washington state, tribal and nontribal alike, in order to
3 minimize misunderstandings, identify costs associated with compliance
4 with federal court orders, clearly define departmental responsibilities
5 in implementing the Boldt decision and subsequent case law, and
6 maximizing opportunity for seeking new areas of fisheries management
7 cooperation between the tribes and states.

8 NEW SECTION. **Sec. 2.** A new section is added to chapter 77.12 RCW
9 to read as follows:

10 It is reasonable and necessary for the conservation of the state's
11 wildlife resources to control poaching. It is therefore necessary for
12 the state to identify those who are fishing legally. To comply with
13 federal court orders and enable the state to readily differentiate
14 between treaty right and nontribal fishers and to assist in minimizing
15 the burden on both treaty and nontreaty fishers:

16 (1) Each tribe must provide for tribal membership certification.
17 At a minimum it shall include a tribal member's identification by
18 photograph in a suitable form that shall be carried on the person of
19 each tribal member when approaching, fishing in, or leaving either on
20 or off-reservation waters. The department shall request from each
21 federally recognized fishing tribe a sample identification document to
22 be carried by its tribal fishers by June 30th of each year.

23 (2) Failure of an individual tribal fisher to have proper
24 identification on his or her person when fishing, or when going to or
25 from the fishing site, will cause the fisher to be subject to state
26 authority.

27 (3) For the purpose of exercising treaty fishing rights, an Indian
28 may only be enrolled in one tribe. The department shall request an
29 officially approved tribal membership roll from each federally
30 recognized fishing tribe by June 30th of each year.

31 (4) A treaty right fisher may secure the assistance of other tribal
32 fishers with off-reservation treaty fishing rights in the same usual
33 and accustomed places, whether or not such fishers are members of the
34 same tribe or another treaty tribe. His or her spouse, forebears,
35 children, grandchildren, and siblings may also assist a fisher, but all
36 assisting the fisher must possess the proper identification.

37 (5) If any person shows identification that he or she is exercising
38 the fishing rights of a treaty tribe, and if he or she is fishing in a

1 usual and accustomed place, he or she is protected under federal law
2 against any state action that effects the time, place, manner, purpose,
3 or volume of their harvest of anadromous fish and naturally occurring
4 clams, oysters, geoduck, shrimp, and sea cucumbers, unless the state
5 has previously established that such an action is an appropriate
6 exercise of its power.

7 NEW SECTION. **Sec. 3.** A new section is added to chapter 77.12 RCW
8 to read as follows:

9 Federal court orders authorize the department to monitor off-
10 reservation fishing by treaty tribes with fishing rights. Monitoring
11 is a reasonable and necessary tool to assist the treaty tribes and the
12 department as comanagers of the anadromous resources of Washington
13 state in readily identifying illegal off-reservation treaty right
14 fishing. The department shall request an officially approved gear
15 identification code from each federally recognized fishing tribe by
16 June 30th of each year so that department personnel and tribal
17 enforcement officers can readily distinguish legal fishing gear on the
18 waters of the state.

19 NEW SECTION. **Sec. 4.** A new section is added to chapter 77.12 RCW
20 to read as follows:

21 The legislature recognizes that federal court orders provide legal
22 descriptions of usual and accustomed fishing grounds for the federally
23 recognized fishing tribes in Washington. The legislature also
24 recognizes that disputes exist between western Washington treaty tribes
25 over the federally adjudicated usual and accustomed fishing places
26 designated for each tribe. It is the responsibility of the treaty
27 tribes to resolve these disputes, have the federal courts approve the
28 decisions, and have the courts transmit the changes to the state. The
29 state has no ability to recognize claims of changes to these usual and
30 accustomed fishing places unless federal court action changes the
31 boundaries.

32 NEW SECTION. **Sec. 5.** A new section is added to chapter 77.12 RCW
33 to read as follows:

34 The legislature recognizes that federal court orders stipulate the
35 conduct of treaty fishing in usual and accustomed places. The
36 department shall recognize:

1 (1) That the exercise of a treaty tribe's right to take anadromous
2 fish and naturally occurring clams, oysters, geoduck, shrimp, and sea
3 cucumbers is limited only by the geographical extent of the usual and
4 accustomed places, the limits of the harvestable stock, the tribes fair
5 need for these species, and the opportunity for non-Indians to fish in
6 common with Indians outside reservation boundaries.

7 (2) That in order for Washington anadromous fishing rules not to
8 discriminate against treaty tribes, the department's harvesting plan
9 must provide for an opportunity for treaty tribes to take, at their
10 off-reservation usual and accustomed fishing places, a share of the
11 harvestable fish as defined under *United States v. Washington*, 384 F.
12 Supp. 312 (1974) (Boldt I) and contemplated under RCW 75.08.530.

13 (3) That the state of Washington, or its officers, is authorized to
14 arrest a member of one of the federally recognized treaty tribes
15 fishing in contravention of state law outside of the area of his or her
16 tribe's usual and accustomed ground, even though the individual may
17 prove, in their defense in any criminal proceeding resulting from his
18 or her arrest, that such an area in which they were fishing is a usual
19 and accustomed fishing ground of their tribe.

20 (4) That in order to achieve the monitoring requirements of section
21 2 of this act, it is reasonable and necessary for the department to be
22 apprised of all arrangements between tribes with overlapping usual and
23 accustomed fishing areas to avoid overharvest of the fisheries
24 resource. The department shall request that the treaty tribes provide
25 details on the arrangements between tribes with overlapping usual and
26 accustomed fishing areas to avoid overharvest of the fisheries
27 resource.

28 NEW SECTION. **Sec. 6.** A new section is added to chapter 77.12 RCW
29 to read as follows:

30 The legislature recognizes that federal court orders stipulate the
31 number of fish allowed for ceremonial purposes is limited to the number
32 of fish actually used for traditional tribal ceremonies. The
33 department shall count ceremonial fish in the share of fish that treaty
34 right fishers have an opportunity to take. To minimize
35 misunderstandings and simplify comanagement responsibilities, the
36 department shall request tribes taking ceremonial fish off-reservation
37 to notify the department as to time and area of ceremonial fishery.

1 NEW SECTION. **Sec. 7.** A new section is added to chapter 77.12 RCW
2 to read as follows:

3 The legislature recognizes that federal court orders stipulate that
4 fish taken for subsistence shall be limited to the number of fish
5 actually used for personal subsistence consumption by tribal members
6 and their immediate families. The department shall count subsistence
7 fish in the share of fish that treaty right fishers have an opportunity
8 to take. To help minimize public misunderstandings of the tribal
9 subsistence harvest right, the department shall seek to develop jointly
10 with each federally recognized fishing tribe, as a component of its
11 comanagement plan, agreements as to how subsistence fish will be
12 separated from commercial fish harvests and how the combined
13 ceremonial, subsistence, and commercial catch will impact the
14 watersheds in which the harvest occurs.

15 NEW SECTION. **Sec. 8.** A new section is added to chapter 77.12 RCW
16 to read as follows:

17 The legislature recognizes that federal court orders stipulate that
18 the regulation of off-reservation Indian fishing by the United States,
19 the state of Washington, or northwest Indian tribes does not preempt
20 the regulation by either of the other two. Jurisdiction of each entity
21 to regulate is unimpaired by the exercise of another entity's
22 jurisdiction.

23 NEW SECTION. **Sec. 9.** A new section is added to chapter 77.12 RCW
24 to read as follows:

25 The legislature recognizes that federal court orders permit
26 federally recognized treaty tribes to become self-policing under the
27 following conditions:

28 (1) Treaty tribes may become self-policing off the reservation if
29 they meet and maintain specific qualifications and conditions as
30 specified under *United States v. Washington*, 384 F. Supp. 312 (1974)
31 (Boldt I) and subsequent case law. Before self-regulation is
32 authorized, a tribe must establish to the satisfaction of the
33 department or the court, that the tribe has:

34 (a) A competent, responsible, and well-organized tribal government
35 able to adopt and apply off-reservation fishing regulations that, if
36 strictly enforced, will not adversely affect conservation;

1 (b) Personnel trained for and competent to provide effective
2 enforcement of all tribal fishing regulations;

3 (c) Qualified experts in fishery science and management who are
4 either on the tribal staff or whose services are arranged for and
5 readily available to the tribe;

6 (d) An officially approved tribal membership roll;

7 (e) A provision for tribal membership certification. Each
8 individual must have photographic identification in a suitable form,
9 and each individual must carry the photographic identification when
10 approaching, fishing in, or leaving either on or off-reservation
11 waters;

12 (f) Full and complete tribal fishing regulations, which before
13 adoption, have been discussed in their proposed final form with the
14 department and include in the regulations any state rule that has been
15 established to the satisfaction of the tribe, or upon hearing by or
16 under direction of the court, to be reasonable and necessary for
17 conservation;

18 (g) A provision for the monitoring of off-reservation Indian
19 fishing by the department to the extent reasonable and necessary for
20 conservation; and

21 (h) Fish catch reports, as to both on and off-reservation treaty
22 right fishing, when requested by the department for the purpose of
23 establishing escapement goals and other reasonable and necessary
24 conservation purposes.

25 (2) When a tribe has fully met the qualifications and conditions of
26 subsection (1) of this section, the tribe shall be relieved of state
27 regulation except to the extent specified in the stated conditions.
28 Failure of a tribe to either maintain its required qualifications or to
29 abide by and adhere to prescribed conditions when established and not
30 promptly corrected, shall suspend self-regulation by such tribe until
31 that time as all required qualifications and conditions are fully
32 established.

33 (3) A self-regulating tribe does not have the authority to enforce
34 its off-reservation fishing regulations against persons who are not
35 members of the tribe. However, tribes should report an apparent misuse
36 of the fishery to the state if a non-Indian is involved or to the tribe
37 of a treaty fisher. If appropriate action is not taken by the state,
38 the report should be brought to the court for such action as the court
39 deems appropriate.

1 NEW SECTION. **Sec. 10.** A new section is added to chapter 77.12 RCW
2 to read as follows:

3 The legislature recognizes that federal court orders permit state
4 regulation of the treaty fishing right in certain circumstances.

5 (1) Except for tribes entitled to self-regulation of tribal
6 fishing, the right of treaty tribes to take anadromous fish may be
7 regulated by the department in the following manner:

8 (a) State regulation of fishing rights must not discriminate
9 against Indians and must meet appropriate due process standards;

10 (b) Every regulation of treaty right fishing must be strictly
11 limited to specific measures that before becoming effective have been
12 established by the department, either to the satisfaction of all
13 affected tribes or upon hearing by or under direction of the district
14 court, to be reasonable and necessary to prevent demonstrable harm to
15 the actual conservation of fish. In order for a state fishing rule to
16 be reasonable and necessary for conservation, it must, when considered
17 in the context of the total regulatory plan, be designed to preserve
18 and maintain the resource;

19 (c) State treaty right fishing rules shall be published either
20 separate and apart from other state fishing rules or as a separate and
21 plainly labeled part thereof readily distinguishable from other fishing
22 rules;

23 (d) No state fishing rules applied to off-reservation treaty
24 fishing can be valid unless and until it has been shown to be
25 reasonable and necessary for conservation;

26 (e) Arrest or seizure of property owned or in permitted custody of
27 a treaty right fisher under a rule not previously established to be
28 reasonable and necessary for conservation is unlawful and may be
29 actionable as to any official or private person authorizing or
30 committing such an unlawful arrest or seizure; and

31 (f) To meet appropriate standards, state fishing rules that affect
32 the harvest by Indian tribes on future runs must receive a full, fair,
33 and public consideration and determination in accordance with the
34 requirements of chapter 34.05 RCW.

35 (2) If any person shows identification that he or she is exercising
36 the fishing rights of a treaty tribe and if he or she is fishing in a
37 usual and accustomed place, they are protected under federal law
38 against any state action that affects time, place, manner, purpose, or
39 volume of his or her harvest of anadromous fish, unless the state has

1 previously established that such an action is an appropriate exercise
2 of its power.

3 (3) If a member of a nonself-regulating tribe is alleged to be
4 guilty of misuse of the treaty fishery, such an incident is to be
5 reported to his or her tribe for adjudication, and failing prompt and
6 appropriate action there, the matter must be brought to the court for
7 such action as the court finds appropriate.

8 (4) Any person who would qualify under chapter 34.05 RCW as having
9 standing to obtain judicial review of the department's failure to
10 enforce any provision of sections 2 through 13 of this act may file a
11 petition for civil enforcement seeking an order requiring performance
12 and reasonable attorneys' fees.

13 NEW SECTION. **Sec. 11.** A new section is added to chapter 77.12 RCW
14 to read as follows:

15 The legislature recognizes that it is in the best interest of all
16 of the citizens of the state to have rules that clearly spell out
17 tribal and nontribal fishing responsibilities.

18 (1) The department shall meet with federally recognized fishing
19 tribes to develop a state treaty right fishing agreement. The
20 agreement shall be completed annually in time to be incorporated into
21 the submission of tribal regulations as required by federal court order
22 for tribes seeking to obtain or maintain off-reservation self-policing
23 authority.

24 (2) The department shall annually publish a state treaty right
25 fishing agreement that is either separate and apart from other state
26 fishing rules or as a separate and plainly labeled part that is readily
27 distinguishable from other fishing rules.

28 (3) The department shall assist federally recognized Indian tribes
29 to meet the federal court-ordered requirements to become self-policing
30 of off-reservation fisheries enforcement. An Indian tribe, seeking to
31 satisfy the qualifications that its fishing regulations will not
32 adversely affect conservation, must promptly prepare its regulations
33 and submit them to the department, which will examine the proposed
34 regulations for alleged inadequacies. Failing agreement between the
35 parties, the proposed regulations will be reviewable by the court on
36 application of either party.

37 (4) The department may adopt fishing regulations of a
38 self-regulating tribe, but only if state adoption is consistent with

1 chapter 34.05 RCW. Before a state rule can be enforced against any
2 treaty fisher, the state must demonstrate that the rule is designed to
3 preserve, conserve, and maintain the resource.

4 NEW SECTION. **Sec. 12.** A new section is added to chapter 77.12 RCW
5 to read as follows:

6 The department shall review a tribe's application to obtain or
7 maintain off-reservation self-policing authority within forty-five days
8 and provide the tribe, the governor, the leadership of the legislature,
9 and the attorney general with the findings of the review in writing.
10 The department shall deny the tribal request for self-policing
11 authority solely for failure to meet the federal court-ordered
12 requirements in section 9 of this act.

13 NEW SECTION. **Sec. 13.** A new section is added to chapter 77.12 RCW
14 to read as follows:

15 The department shall determine which department activities are
16 directly attributable to compliance with *United States v. Washington*,
17 384 F. Supp. 312 (1974) (Boldt I) and its subproceedings and provide a
18 cost for those activities to the natural resources committees of the
19 house of representatives and senate annually.

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