HOUSE BILL REPORT
SHB 1939

As Passed House:
March 8, 1995

Title: An act relating to shellfish resources.

Brief Description: Requiring an appeal of the decision regarding tribal shellfish rights.

Sponsors: By House Committee on Natural Resources (originally sponsored Representatives Fuhrman, Beeksma, Chappell, Smith, Campbell, Kremen, Cairnes, Buck, Thompson and Hargrove).

Brief History:
Committee Activity:
Natural Resources: 2/21/95, 2/24/95 [DPS].
Floor Activity:
Passed House: 3/8/95, 96-0.

HOUSE COMMITTEE ON NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Fuhrman, Chairman; Buck, Vice Chairman; Pennington, Vice Chairman; Basich, Ranking Minority Member; Regala, Assistant Ranking Minority Member; Beeksma; Cairnes; G. Fisher; Jacobsen; Romero; Stevens; B. Thomas and Thompson.

Staff: Pam Madson (786-7166).

Background: On May 19, 1989, 16 treaty tribes in Western Washington initiated a new proceeding in the on-going legal case known as the Boldt case (*U.S. v Washington*). The tribes seek a determination of the nature and extent of their off-reservation treaty rights to harvest shellfish.

The state of Washington is a defendant in this case along with private tideland owners and commercial shellfish growers.

Judge Rafeedie issued a decision on December 20, 1994, that affirmed the tribes' treaty right to take shellfish from tidelands and bedlands of Puget Sound and the north coast of Washington. The court determined that shellfish included all species of shellfish. The only limitation on the harvest of shellfish is that contained in the treaty language stating:

"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to the Indians in common with all citizens of the territory; ...: *Provided, however, that they shall not take shellfish from any beds staked or cultivated by citizens*."

The court interpreted "staked and cultivated beds" as those "artificial beds that have been staked and cultivated notwithstanding their location in private tidal lands" and do not include natural or native shellfish beds.

Though Judge Rafeedie issued an oral decision on December 20, 1994, he did not order any immediate action that must be taken to implement his decision. The judge asked all parties to present an implementation plan by February 15, 1995. The parties have not been able to agree on an implementation plan, and the court is expected to issue a final order from which an appeal may be taken.

Prior to February 15, 1995, the state Department of Fish and Wildlife closed the Puget Sound and Strait of Juan de Fuca commercial crab season, effective February 17, 1995. This crab fishing season was scheduled from October 1, 1994 to April 15, 1995.

Under the original Boldt decision of 1974 and during the 20 years of continuing court jurisdiction that has followed, a system of co-management of the fish resource has developed between the state and the tribes. There have been numerous sub-proceedings in which the court has been asked to resolve disputes between the tribes and the state of Washington over implementation.

Summary of Bill: The Legislature strongly encourages and supports the Attorney General in taking an appeal to the Ninth Circuit Court of Appeals from the federal district court decision in *U.S. v Washington*, subproceeding 89-3, and encourages the Attorney General to request a stay of the decision pending outcome of an appeal. The Legislature declares its intent to provide resources necessary to support full prosecution of the appeal and related proceedings.

The departments of Fish and Wildlife, Natural Resources, and the Parks and Recreation Commission must manage the state's shellfish resources in a manner consistent with management policies in place prior to the December 20, 1994, ruling of federal district court, until the court rules otherwise.

The Governor and the relevant executive branch agencies must request that federal agencies make available federally owned tidelands for tribal shellfish harvest as a part of the solution to this conflict. Other parties to the litigation are encouraged to make the same request of the federal government.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Bill: This bill contains an emergency clause and takes effect immediately.

Testimony For: (Testimony was taken simultaneously on both HB 1939 and HJM 4005. This summary reflects comments on HB 1939 only.) The state has signed an agreement to extend the ruling to the coastal tribes. The Legislature may not be aware that this agreement has been made. There are two propositions before the Legislature that might provide relief to citizens. One is to interpret or amend the treaties. The other is for the Legislature to mandate or direct an appeal of this case. People don't trust the bureaucrats to represent them in this litigation or in the signing of deals like the one alluded to. It is necessary and appropriate to have the Legislature direct an appeal. The Attorney General's office has been quoted as going both ways on whether to go forth with an appeal. Any direction should include an appropriation to conduct an appeal and to authorize the use of outside counsel to conduct the state's appeal. Money being spent on bureaucrats on an annual basis to implement this plan will far exceed the cost of going forward with an appeal. It is more important to direct that an appeal go forward than to direct state agencies to do something. As attempts were made to negotiate implementation of this very difficult order, the federal government has been notoriously absent. The state agencies have refused to demand the presence of the federal government in attempting to implement any court order. The cost of implementation should be born by the federal government. Commercial shellfish growers intervened in the lawsuit in 1989. Growers thought their interests were protected by the treaty shellfish proviso. The Indians cannot harvest from beds that are staked and cultivated. It has been the understanding for the last 140 years that the shellfish proviso protected the staked and cultivated tidelands. It hasn't been the policy of the tribes to take any percentage of shellfish from the commercial shellfish beds. The decision now gives 50 percent to the tribes, and growers will have to live with this decision. The implementation plan submitted by the tribes will put the shellfish industry out of business. Commercial growers cannot deal with bureaucratic burdens outlined in the plans requiring growers to seek permissions from a number of separate tribes and the state, and to use dispute resolution processes like those in current co-managed fisheries. Shellfish growers operate like farms to get maximum sustained yield. When the state sold the tidelands, the state never gave notice to commercial shellfish tideland growers that the tribes had a right to 50 percent of the crops. The state has a duty to defend the growers. Certain shellfish species are introduced species and the judge has included them as part of the decision as well.

The situation in the 1970s was completely different than the situation now. The Boldt decision was appealed to the Ninth Circuit and then appealed to the U.S. Supreme Court taking a total of seven or eight years. It was at that point that the court began criticizing the state agencies for not implementing the fully adjudicated decision of

Judge Boldt. The original decision was modified in certain important respects through this process. At this point, the court's decision in this case is not final and the status quo remains in effect. The order should not be implemented before it is final. When a court decision is appealed, the decision can change. The Attorney General argued that certain species are beyond the treaty right. The state should take action to support its position. Closing the crab season before the decision is final is pre-mature. Sea urchin harvesters had their season closed early also. This had a devastating impact.

The language of the bill is too broad. It needs to recognize the validity of court orders, recognize the on-going appeal process, and direct that all issues need to be appealed.

Those impacted by the implementation plan were never allowed to sit in on any meaningful discussion on the implementation plan. A message needs to be sent to the bureaucracy that citizens need to be talked to in an honest and open way. The state's implementation plan proposes allocating shellfish between tribal and non-tribal harvest on the date of the court's adoption of the plan. The court hasn't ordered an implementation plan yet. The crab season was shut down on February 9, 1995. The effects of the state's action may cause some fishermen to go into bankruptcy.

Testimony Against: Testimony was taken simultaneously on both HB 1939 and HJM 4005. This summary reflects comments on HB 1939 only.) The federal court under its continuing jurisdiction has had management of the state's fishery for 20 years. For the first decade, the state was viewed as obstructing every court order directed at it. The consequences of this activity are that there are things that are part of salmon management that the state would rather live without. On the coast was a ruling that forced salmon to be managed on a river by river, run by run basis. This came out of the state's attempt to aggregate salmon harvest for the state's purpose eliminating the harvest by the Hoh tribe on the Hoh river. The tribe challenged this and they won. The result is an example of the extreme constraints today that would not be there if there had been a way to manage the fishery to meet the treaty rights cooperatively. As a result, the state is stuck with a numeric accounting system for allocating salmon. Equitable adjustment is another example where if either tribal or non-tribal fishers catch too many fish, the over harvest has to be paid back in the next season. These adjustments may result in the tribal fishers gaining more than 50 percent of the harvest. As a direct result of the approach the state took in implementation of the court's orders during this time, the agencies and tribes went to court one and a half times a week over day-to-day management issues implementing the court orders. It was clear what the state's attitude was and the state could rarely overcome that burden placed upon it by the court in order to prevail on any given issue. In 1983, attempts at cooperative management began to take control of management back from the court. The decisions made by managers today will determine how the court will look at the state's implementation of its order. A potential consequence of establishing in the

court's mind the same attitude that was established in the 1970s is in the crab fishery. The 1994 season was an extremely high harvest year. The season was a success in harvest and dollars despite an early closure. The court asked for an implementation plan which all four parties submitted. The tribes asked the state to close this fishery but they did not require it as part of what they asked the court to include in an implementation plan. The judge has ruled the tribes have a right to half the shellfish resource. If the season is closed, the non-tribal fishery will already get 74 percent. If the fishery were not closed and if the tribes asked the court to order implementation of their share, the entire commercial and recreational fishery could be closed and the state would be effecting the future views of the court regarding how the state will implement the court's order. The court could ignore the current crab season's activity including any continued non-tribal harvest, or close commercial and recreational crab fishing or order the state to equitably adjust for the current crab season harvest. If abundance goes back to regular levels, the result could be to close both commercial and recreational fisheries in the future. It seemed prudent to close the commercial fishery, retain the recreational fishery, and maintain options for future decisions.

Thirty-nine of state's tidelands remain in public ownership. It is from these publicly owned tidelands that most of the public recreates. The state's objective in the litigation and negotiations is to protect the public's right to access for recreational purposes. Geoduck is a shellfish species found on state owned tidelands. The market is very volatile. The state has negotiated with the tribes to maintain stability in the market, and currently the price per pound for geoduck is at an historic high. During litigation and negotiations there has been concern that a prohibition against harvest on state lands could cause the market to collapse. An aspect of the bill is cause for concern in that it could include in its prohibition these negotiations with the tribes over things like this. A little less than 5 percent of the tidelands in greater Puget Sound are managed by the Parks and Recreation Commission. Much of the recreational intertidal shellfish harvest is done by the general public on these beaches. Three hundred thousand new recreational shellfish licenses have been sold. This is a measure of the large amount of recreational harvest that takes place. The goal is to continue to be able to manage an orderly recreational use fishery. A fear is being caught in the conflict between the state law and federal court orders.

Treaties are protected as the supreme law of the land and are referred to in the U.S. Constitution. Federal courts have said that treaty rights are reserved rights and cannot be qualified by actions taken by the state. This bill would do that. It constrains the executive branch. Implementation plans submitted to the court are all very different and complicated. Quinaults chose to work with the state to develop a stipulation to get out of this volatile climate and sit down and work with the parties to iron out the difficulties on the coast. It's better to work together than to sit in court.

Testified: Senator Ann Anderson; Jim Johnson, United Property Owners of Washington; Matt Ryan, Kitsap County Commissioner; Bill Dewey, Taylor United;

John Woodring, Washington Harvest Divers Association; Larry Coniff, Washington Harvest Divers Association; Tom Burton, Washington Harvest Divers Association; Jerry Fingason, Inside Puget Sound Crabbers (all in favor). Bob Turner, Department of Natural Resources; Kalene Cottingham; Department of Natural Resources; Cleve Pinnix, Washington State Parks and Recreation Commission; Guy McMinds, biologist and member of the Quinault Indian Nation; and Phillipe Martin, Quinault Indian Nation (all oppose).