

# NW Indian Treaties

*Executive Briefing for  
Navy Region Northwest*

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# WASHINGTON TERRITORY INDIAN NATIONS AND TRIBES adapted from 1854 Lambert Census Map

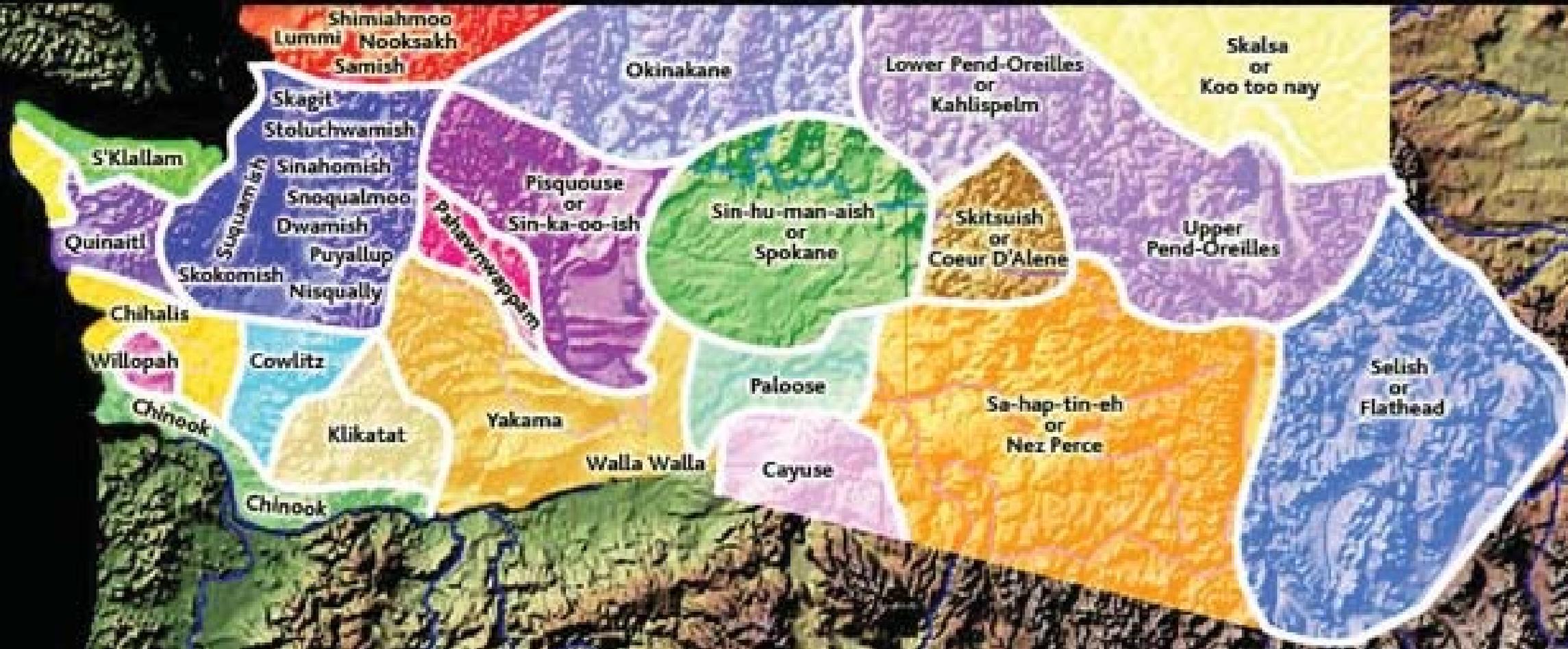


Image: Map of Washington State Territory Indian Nations and Tribes, adapted from the 1854 Lambert Census Map

# The Treaties with Washington Tribes

1. Medicine Creek Treaty (December 26, 1854)
2. Treaty of Point Elliot (January 22, 1855)
3. Treaty of Point No Point (January 26, 1855)
4. Treaty of Neah Bay (January 31, 1855)
5. Treaty of Walla Walla (Umatilla) (June 9, 1855)
6. Treaty with the Yakama (June 9, 1855)
7. Treaty with the Nez Perce (June 11, 1855)
8. Treaty of the Quinault River (January 25, 1856)

# NORTHWEST INDIAN RESERVATIONS adapted from U. S. Census Office Map, 1890

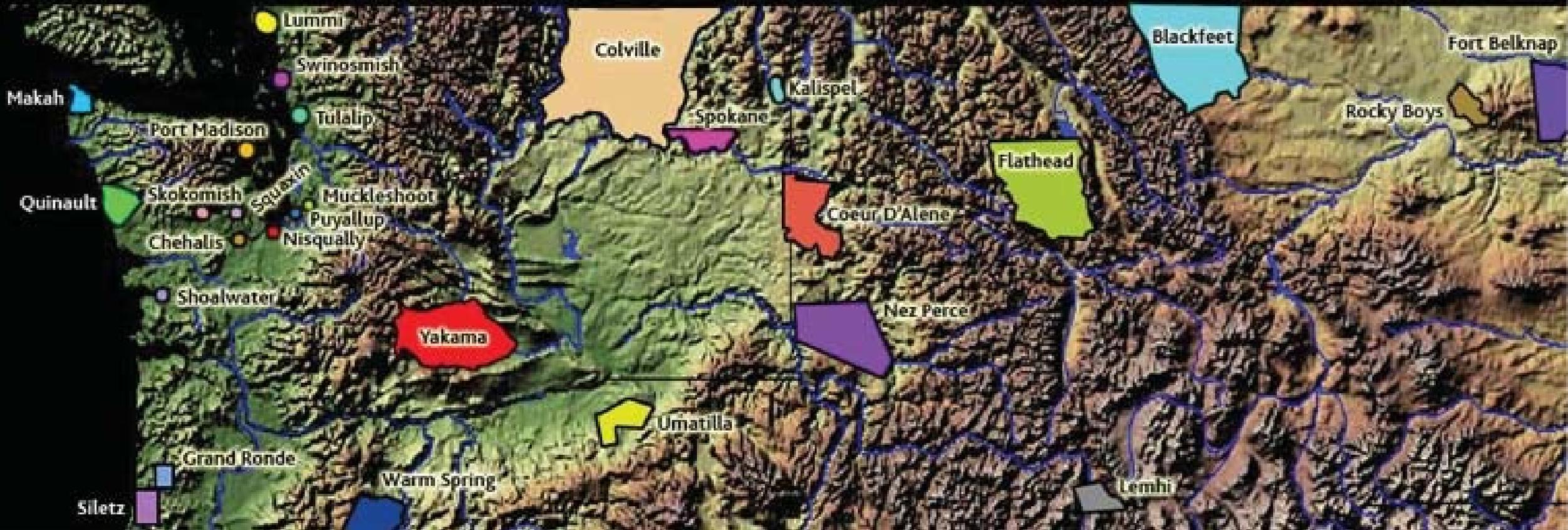


Image: Map of Northwest Indian Reservations, adapted from 1890 U.S. Census Map

## Point Elliott Treaty (January 22, 1855)

### Article 5

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purposes of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.  
*Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens.

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# Indian law Canons of construction

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## Common Canons

A treaty must be liberally construed in favor of the Indians or tribes in question.

Treaties and agreements should be construed as Indians would have understood them at the time they were made.

All ambiguities should be resolved in favor of Indians.

Treaty provisions that are not clear on their face may be interpreted by reference to surrounding circumstances and history.

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# United States v. Taylor

Supreme Court of the Territory of Washington

1887

(fenced off section of the Yakima River preventing access)

The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory and of erecting temporary buildings for curing them: together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Treaty with the Yakama Indians, June 9, 1855

*ISSUE: Reservation of rights by the Yakama Indians, or grant of rights by the United States to the Yakama Indians?*

HELD: the language is a reservation of rights, not a grant, and Taylor took subject to this servitude when he acquired his land from the United States government under the homestead, pre-emption and other land laws of the United States.

# United States v. Winans

Supreme Court of the United States  
1905

(the fishing wheels at Celilo Falls blocking passage of the salmon)

“the treaty was **not a grant of rights to the Indians, but a grant of right from them, [and] a reservation of those not granted**”

“The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, **to every individual Indian, as though named therein.** They imposed **a servitude upon every piece of land as though described therein.**”

# United States v. Winans

Supreme Court of the United States

1905

“There was **an exclusive right** of fishing reserved within certain boundaries.” [namely, on the boundaries of their Reservation]

“There was a **[non-exclusive] right** outside of those boundaries reserved **‘in common with citizens of the territory’, . . . . a right in the land**---the right of crossing it to the river, the right to occupy it to the extent and for the purpose mentioned.” [namely, fishing & erecting temporary buildings for curing the fish)

And the right was intended to be continuing **against the United States and its grantees** as well as **against the state and its grantees.**

# United States v. Seufert Bros. Co.

Supreme Court of the United States

1919

(land owners preventing access to fishing grounds near Celilo Falls)

“This recital of the facts and circumstances of the case renders it unnecessary to add much to what was said by this court in *United States v. Winans*.”

“The difference upon which the appellant relies to distinguish this from the former case is that the lands of the Yakima Indians were all to the north of the river and therefore it is said that their rights could not extend beyond the middle of that stream.” [i.e., not part of the area ceded by the Tribe]

# United States v. Seufert Bros. Co.

Supreme Court of the United States

1919

‘We will construe a treaty with the Indians as ‘that unlettered people’ understood it, and ‘as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,’ . . .”

“During all the years since the treaty was signed they have been accustomed habitually to resort for fishing to the places to which the decree of the lower court applies, and they have shared such places with Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right to resort to these fishing grounds and make use of them in common with other citizens of the United States.”

In other words, the rights reserved extend beyond the ceded areas.

# The Fish Wars

**1945.** Billy Frank Jr., a member of the Nisqually Tribe and a treaty rights activist, is arrested at the age of 14 for fishing on off-reservation property owned by his family on the Nisqually River.

**1960s.** This property becomes known as Frank's Landing and is the site of unlicensed "Fish-ins". Many members of Treaty tribes were arrested and convicted for violating State fishing laws. In 1964, Marlon Brando participates in a Fish-in, as they gain the national attention.

**1970.** Armed Puyallup tribal members challenge government authorities approaching their fishing nets. A protester sets off a fire bomb on a bridge to block the approach of government officials. The authorities raid the protester's camp with clubs and tear gas.

The federal government finally intervenes and files a series of lawsuits against the State of Washington on behalf of the Western Washington Treaty tribes.

# ***Puyallup Tribe v. Department of Game of Washington (Puyallup I)***

Supreme Court of the United States

**(1968)**

(Steelhead salmon and conservation: sportmen's hooks vs. tribal nets)

“**the manner of fishing**, the size of the take, the restriction of commercial fishing, and the like **may be regulated by the State in the interest of conservation**, **provided** the regulation meets **appropriate standards** and **does not discriminate** against the Indians.”

# ***Department of Game of Washington v. Puyallup Tribe (Puyallup II)***

Supreme Court of the United States

(1973)

**There is discrimination here** because all Indian net fishing is barred and only hook-and-line fishing, entirely pre-empted by non-Indians, is allowed.

**Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species.** If hook-and-line fishermen now catch all the steelhead which can be caught within the limits needed for escapement, then that number must in some manner **be fairly apportioned between Indian net fishing and non-Indian sports fishing** so far as that particular species is concerned. **What formula should be employed is not for us to propose.** There are many variables . . .

The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

**(Civ. No. 9212, Phase I, 1974)**

(clarifying the meaning of “fairly apportioned”)

“off reservation fishing by other citizens and residents of the state is not a right but merely a privilege which may be granted, limited or withdrawn by the state as the interests of the state or the exercise of treaty fishing rights may require.

In the present case a basic question is the amount of fish the plaintiff tribes may take in off reservation fishing under the express reservation of fishing rights recorded in their treaties.

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

## **Exemption of Ceremonial and Subsistence Use from Fair Apportionment**

“fish taken to serve ceremonial and subsistence needs shall not be counted in the share of fish that treaty right fishermen have the opportunity to take. Such needs shall be limited to the number of fish actually used for: (a) Traditional tribal ceremonies; and (b) Personal subsistence consumption by tribal members and their immediate families.”

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

**Fair Apportionment means 50/50**

“as intended and used in the Indian treaties and in this decision ‘in common with’ means sharing equally the opportunity to take fish at ‘usual and accustomed grounds and stations’; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations and treaty right fishermen shall have the opportunity to take up to the same percentage of harvestable fish

“The number of harvestable fish . . . means the number of fish remaining to be taken by any and all fishermen, at usual and accustomed grounds and stations, after deducting the number of fish required for spawning escapement and tribal needs.”

# Washington v. Washington State Commercial Passenger Fishing Vessel Association

Supreme Court of the United States

(1979)

## Affirmation of Fair Apportionment with a Qualification

It bears repeating . . . that the 50% figure imposes a maximum but not a minimum allocation. . . . [T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

**(Civ. No. 9212, Phase II, 1980)**

## **The 2 Issues Reserved from Phase I**

The Court considers the hatchery and environmental issues which were raised in Phase I but reserved for decision in Phase II.

### **Do tribes have a treaty-based right to a fair apportionment of hatchery-bred salmon?**

“Hatchery-reared winter-run steelhead make up a high percentage of the catch of steelhead in the state with some of the heavily planted rivers showing hatchery returns contributing up to 90% of the catch \* \* \*. Overall it appears likely that hatchery steelhead will continue to contribute significantly to the harvests, while the numbers of wild fish will most likely decline.”

The inescapable conclusion is that if hatchery fish were to be excluded from the allocation, the Indians' treaty-secured right to an adequate supply of fish<sup>45</sup> the right for \*199 which they traded millions of acres of valuable land and resources would be placed in jeopardy. The tribes' share would steadily dwindle and the paramount purpose of the treaties would be subverted.

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

**(Civ. No. 9212, Phase II, 1980)**

**Do tribes have a treaty-based right to have the fishery habitat protected by the State (and federal) governments?**

**”implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation.**

The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. In order for salmon and steelhead trout to survive, specific environmental conditions must be present. . . . It is [] undisputed that these conditions have been altered and that human activities have seriously degraded the quality of the fishery habitat.

The Supreme Court all but resolved the environmental issue when it . . . held that treaty assures the tribes something considerably more tangible than ‘merely the chance \* \* \* occasionally to dip their nets into the territorial waters.’ ”

# ***United States v. Washington***

U.S. Court of Appeals for the Ninth Circuit

**(Appeal of Civ. No. 9212, Phase II, 1985)**

## **Affirmance on the Hatchery Issue and Vacation of Relief on the Environmental Issue**

We affirm the district court's declaratory judgment on the hatchery fish issue. We hold that **declaratory relief on the environmental issues must be denied and vacate that part of the judgment** of the district court. \* \* \*

We choose to rest our decision in this case on the proposition that issuance of the declaratory judgment on the environmental issue is contrary to the exercise of sound judicial discretion. The legal standards that will govern **the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case. . . . These necessary predicates** for a declaratory judgment **have not been met with respect to the environmental issues in this case.**

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

**(C70-9213, 2007)**

(The Culverts Case)

## **The Environment Issue upon Concrete Facts in a particular case**

The federal government and the tribes filed suit to compel the State of Washington to **repair or replace any culverts that are impeding salmon migration** to or from the spawning grounds, **arguing** that **the State has a treaty-based duty to preserve fish runs** so that the Tribes can earn a **“moderate living”**.

## **Culverts are Barriers**

“The State does not dispute the fact that a certain number of culverts under State-owned roads present barriers to fish migration.”

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

(C70-9213, 2007)

## **Evidence of Diminished Fish Runs**

“The Tribes have . . . produced **evidence of greatly diminished fish runs**. While there may be other contributing causes for this, the conclusion is inescapable that **if culverts block fish passage** so that they cannot swim upstream to spawn, or downstream to reach the ocean, **those blocked culverts are responsible for some portion of the diminishment**. It is not necessary for the Tribes to exactly quantify the **numbers of “missing” fish** to proceed in this matter.”

## **The Legal Issue**

“**whether the Tribes' treaty-based right** of taking fish **imposes upon the State a duty** to refrain from diminishing fish runs by constructing or maintaining culverts that block fish passage.”

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

(C70-9213, 2007)

**A Right to Take Fish = A Duty to Refrain from Blocking the Passage of Salmon**

“It was [] **the right to take fish, not just the right to fish**, that was secured by the treaties. \* \* \*

It was thus **the government's intent, and the Tribes' understanding, that they would be able to meet their own subsistence needs forever**, and not become a burden on the treasury. \* \* \*

The Tribes have presented sufficient facts regarding the number of blocked culverts to justify a declaratory judgment regarding the State's duty to refrain from such activity.

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

(C70-9213, 2007)

## **The Declaratory Judgment**

The Court hereby declares that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest. The Court further declares that the State of Washington currently owns and operates culverts that violate this duty.

# ***United States v. Washington***

U.S. District Court for the Western District of Washington

(C70-9213, 2013)

## **The Permanent Injunction**

The State's duty to maintain, repair or replace culverts which block passage of anadromous fish does not arise from a broad environmental servitude against which the Ninth Circuit Court of Appeals cautioned. Instead, it is a narrow and specific treaty-based duty that attaches when the State elects to block rather than bridge a salmon-bearing stream with a roadbed. The roadbed crossing must be fitted with a culvert that allows not only water to flow, but which insures the free passage of salmon of all ages and life stages both upstream and down. That passage is best facilitated by a stream simulation culvert rather than the less-effective hydraulic design or no-slope culvert.

An injunction is necessary to ensure that the State will act expeditiously in correcting the barrier culverts which violate the Treaty promises. The reduced effort by the State over the past three years, resulting in a net increase in the number of barrier culverts in the Case Area, demonstrates that injunctive relief is required at this time to remedy Treaty violations. \* \* \*

The Court shall accordingly GRANT the Tribes' motion for a Permanent Injunction (Dkt.# 660) and adopt the proposed Order presented by the Tribes. [to remove and replace the culverts having the greatest adverse impact on fish habitat by 2030]

# ***United States v. Washington***

U.S. Court of Appeals for the Ninth Circuit

**(Appeal of C70-9212, 2017)**

**The Permanent Injunction is affirmed in 3-0 Decision**

The Court of Appeals held that:

- treaties required that state ensure that fish would, in fact, be available;
- state violated treaty as result of its construction of barrier culverts under its roads; and
- injunction did not impermissibly and significantly intrude into state government operations.

***United States v. Washington***  
Supreme Court of the United States  
**(2018)**

**Supreme Court affirms 9<sup>th</sup> Circuit *per curiam*  
in a 4-4 vote, Justice Kennedy recusing himself**

**“Opinion**

PER CURIAM.

The judgment is affirmed by an equally divided Court.

Justice KENNEDY took no part in the decision of this case.”

[this is the entire opinion]

A tie is binding on the parties to the case, here, the tribes, the federal government, and the State of Washington, but is not entitled to precedential weight.