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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28079-9

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

LESTER RAY JIM,

Petitioner.

STATE'S RESPONSE BRIEF

ROBERT M. MCKENNA
Attorney General

Michael S. Grossmann
Senior Counsel
WSBA No. 15293
1225 Washington Street SE
Post Office Box 40100
Olympia, Washington 98504-0100
(360) 586-3550

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I. INTRODUCTION

Petitioner Lester Ray Jim (Mr. Jim) is an enrolled member of the Yakama Tribe who was charged with a violation of fish conservation regulations in connection with his off-reservation treaty fishing activity on the Columbia River. State enforcement officers contacted Mr. Jim shoreside at the Maryhill Treaty Fishing Access Site — a parcel of land owned by the Army Corps of Engineers and managed by the Bureau of Indian Affairs to provide access to off-reservation fishing places for four treaty tribes who share Columbia River fishing resources in common with non-Indians.

United States Supreme Court precedent establishes that the state has regulatory authority over treaty fishers who violate non-discriminatory fishery conservation regulations. This Court is being asked to determine whether the State of Washington has criminal jurisdiction to enforce such regulations within the Maryhill fishing access site.

Washington State assumed criminal jurisdiction over Indians, acting within Indian country, primarily in RCW 37.12.010, adopted to implement Public Law 280.¹ RCW 37.12.010 excludes only those crimes

¹ Washington State's criminal jurisdiction over Indians in Indian country was authorized by Congress in Public Law No. 83-280, 67 Stat. 588; 28 U.S.C. § 1360, et seq. (commonly referred to as "Public Law 280" or "PL 280"). The assumption of state criminal jurisdiction over Indians in Indian country often is referred to as "PL 280 jurisdiction."

of "Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States." The Maryhill site is not within the Yakama reservation and Congress did not direct that it be acquired as either tribal trust land or an Indian allotment subject to a restriction against alienation. Accordingly, Washington's PL 280 jurisdiction applies in this case.

II. COUNTERSTATEMENT OF THE ISSUES

Does the State of Washington have authority, pursuant to RCW 37.12.010, to assume criminal jurisdiction over Mr. Jim in connection with alleged violations of state and tribal fishing regulations for fishing activity that began on the Columbia River and concluded at the Maryhill Treaty Fishing Access Site?

III. COUNTERSTATEMENT OF THE CASE

A. The State Takes Exception to an Unsupported Allegation Within Mr. Jim's Statement of the Case

Sections A and B of Mr. Jim's Statement of the Case are more appropriately characterized as a description of the laws authorizing federal acquisition of Treaty Fishing Access Sites and the genesis of federal Public Law 280 together with Washington's expression of PL 280

criminal jurisdiction within Indian country. This response brief addresses those laws in its discussion of the merits of Mr. Jim's arguments.

However, one of the factual assertions made in connection with Mr. Jim's recitation of the laws is in error and not supported in the record. Mr. Jim asserts that the 1988 federal legislation authorizing the acquisition of Treaty Fishing Access Sites directed that they be "held in trust for the benefit of the tribes" and cites to § 401(b)(2) of Public Law 100-581. Neither § 401 nor any part of Public Law 100-581 makes any reference to the placement of these sites into trust.

B. Respondent's Statement of the Case

The superior court entered the following verbatim findings of fact which are unchallenged on appeal:

The Respondent, Lester Ray Jim, an enrolled member of the Yakama Tribe was commercially fishing on the Columbia River on June 25, 2008. In his gill net Mr. Jim incidentally caught some undersized sturgeon. Although Indians may keep incidentally caught sturgeon for subsistence use, the sturgeon must be between four and five feet in length.

Mr. Jim took the illegal² sturgeon to the Maryhill Fishing Access Site. Officers from the Washington State Fish and

² This case was litigated below upon a motion to dismiss for lack of subject matter jurisdiction. The superior court's opinion reflects generally undisputed facts set forth in the briefs submitted. There is little else in the designated Clerk's Papers that may be referenced regarding the factual background. Respondent State does not assert that the superior court's reference to "illegal" fish was a disposition of the merits of the criminal case. Instead, this reference reflects the undisputed fact that retention of the undersized sturgeon would be illegal. The issue of whether Mr. Jim failed to promptly return fish

Wildlife noticed the undersized sturgeon and cited Mr. Jim for unlawfully retaining five undersized sturgeon under WAC 220-32-05100W.

The East District Court of Klickitat County dismissed the citation finding that the State lacked jurisdiction over Mr. Jim because he was on Indian land when cited.

Clerk's Papers at 50.

The Klickitat County Superior Court reversed the district court's dismissal of the case. This appeal followed.

IV. SUMMARY OF ARGUMENT

While this case was accepted for discretionary review on the question of whether the State may exercise its PL 280 jurisdiction under RCW 37.12.010 at the Maryhill Treaty Fishing Access Site, the Petitioner makes the additional argument that the exercise of such jurisdiction is inconsistent with federal law preserving treaty fishing rights. (Br. Pet'r at 28-32.)

To place this case in better perspective, the State's Response Brief begins by demonstrating that federal law does not preempt all state regulation of treaty fishing. Indeed, United States Supreme Court case law provides that the State retains the ability to regulate treaty fisheries in a non-discriminatory manner to ensure that fishery resources are

that could not be retained will be addressed at a trial on the merits of the State's prosecution.

conserved. That is a longstanding principle of federal law and Congress has taken no action to preempt such regulation.

This response brief concludes by demonstrating why PL 280 jurisdiction under RCW 37.12.010 is effective for the Maryhill Treaty Fishing Access Site. Absent a tribal request for state jurisdiction, the state's jurisdiction over Indians within Indian country under RCW 37.12.010 contains a geographic limitation. With a number of exceptions not germane to this case, Washington's legislature determined that State criminal jurisdiction over Indians would not be exercised where a tribe has a significant presence and a basis for exercising jurisdiction over its own members — tribal lands held in trust by the U.S. government or allotted lands subject to a restriction on alienation that are located within an established Indian reservation. RCW 37.12.010. Because the Maryhill Treaty Fishing Access Site meets none of these criteria, the State's full PL 280 jurisdiction under RCW 37.12.010 applies to the Maryhill site.

V. ARGUMENT

A. The State Fishery Regulation at Issue Here Is Not Preempted by Treaty

The Yakama Nation, of which Lester Jim is a member, is a party to an 1855 treaty with the United States that secures to the Yakama

Nation the “right of taking fish at all usual and accustomed places, in common with citizens of the Territory.” Treaty with the Yakamas, art. III, 12 Stat. 951, 953 (1855). Through this treaty, the Yakama Nation has a reserved right to engage in *off-reservation* fishing at usual and accustomed places located in and along The Dalles Dam Pool of the Columbia River.³

The Yakama Treaty preempts some state fishing regulations as applied to Yakama Indians, but not all. The State of Washington has authority to enforce nondiscriminatory regulations necessary for the conservation of fishery resources against treaty Indians at their usual and accustomed fishing places. *Puyallup Tribe v. Dep’t of Game*, 391 U.S. 392, 398-99, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968); *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).⁴

³ The Yakama Reservation does not border the Columbia River. A general map of Indian reservations within Washington State may be found at http://www.goia.wa.gov/tribal_gov/documents/WASStateTribalMap.pdf (last visited on Dec. 21, 2009).

⁴ The State anticipates that Mr. Jim will argue in reply that the State must prove conservation necessity. That point is not disputed. Oregon and Washington must find that their Columbia River fishing regulations meet the “conservation necessity” standard before enforcing them against treaty Indians. *Sohappy v. Smith*, 302 F. Supp. 899, 907-08, 911 (D. Or. 1969). However, when, as here, states and tribes jointly issue parallel regulations addressing conservation issues, the existence of a legitimate conservation necessity is generally presumed under the test of *Puyallup Tribe v. Dep’t of Game*, 391 U.S. 392 (1968), and *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969). See *State v. McCormack*, 117 Wn.2d 141, 143-46, 812 P.2d 483, 484-86 (1991), *cert. denied*, 502 U.S. 1111 (1992); *United States v. Williams*, 898 F.2d 727, 729-30 (9th Cir. 1990).

While Mr. Jim is entitled to challenge the State’s showing of conservation necessity, rulings on conservation necessity do not determine the jurisdiction to proceed

The Yakama Nation also has authority to regulate fishing by its members. *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974).

With this shared regulatory interest in mind, the Columbia Basin states and tribes have developed a system of joint regulation that is supervised by the federal district court in Portland through orders adopted in *United States v. Oregon*, Civil No. 68-513 (D. Or.). Regulations for treaty Indian fisheries are developed and adopted through a collaborative process involving the tribes and the states of Washington and Oregon, as generally described in *United States v. Oregon*, 913 F.2d 576, 579 (9th Cir. 1990).⁵ The regulation Washington State seeks to enforce in this

with a criminal prosecution. In a state court prosecution of alleged fishing violations, a treaty right is an affirmative defense on the merits. *State v. Petit*, 88 Wn.2d 267, 269-70, 558 P.2d 796, 797 (1977). First, the defendant has the burden to show that he is a member of a tribe with treaty fishing rights at the place where the alleged violation occurred. There is no dispute that Lester Ray Jim can make that showing in this case. If a defendant demonstrates that he is entitled to exercise a treaty right, the burden shifts to the State to show that the state regulation can validly be enforced against Indians exercising treaty rights. The State must "introduce clear and convincing evidence that the regulation was reasonable and necessary for conservation purposes." *State v. Reed*, 92 Wn.2d 271, 276, 595 P.2d 916, 919, cert. denied, 444 U.S. 930 (1979); see *Dep't of Game v. Puyallup Tribe, Inc.*, 80 Wn.2d 561, 574, 497 P.2d 171, 179 (1972), rev'd on other grounds, 414 U.S. 44 (1973); *State v. James*, 72 Wn.2d 746, 752-53, 435 P.2d 521, 525 (1967). That showing may be made at the trial on the merits. See *Reed*, 92 Wn.2d at 276, 595 P.2d at 919. Those rules apply in prosecutions of Yakama Indians for violations of fishing regulations in the Columbia River. See *United States v. Sohapp*, 770 F.2d at 823-25; *James*, 72 Wn.2d at 752-53.

⁵ The Yakama Nation is a signatory to the 2008-17 *United States v. Oregon* Management Agreement (2008), which acknowledges, on pages 24-25, that the states and the tribes have overlapping jurisdiction to regulate fishing by treaty Indians in the Columbia River. A copy of the Management Agreement is available at http://www.critfc.org/text/press/2008-17USvOR_Mngmt_Agrmt.pdf. The Management Agreement has been adopted as an order of the federal district court. *United States v. Oregon*, Civil No. 68-513 (D. Or.), Stipulated Order Approving 2008-2017 *United States v. Oregon* Management Agreement (Aug. 12, 2008) (Doc. No. 2546).

case — WAC 220-32-05100W — was adopted pursuant to that process. See WSR 08-14-029.

State fishing regulations consistent with *United States v. Oregon* court orders can be enforced against Yakama tribal members. See *State v. Jim*, 725 P.2d 365 (Or. Ct. App. 1986). WAC 220-32-05100W is consistent with the Yakama Nation's treaty "right of taking fish" and is enforceable against Mr. Jim. This principle is reflected in a recent order in *United States v. Oregon* providing that "[u]nless specified otherwise in the referral agreements entered into under this Part I.E., the states of Oregon and Washington shall retain authority to prosecute violations of applicable laws or regulations in state court."⁶

B. There Is No Sweeping Federal Preemption of State Fishery Regulations in the Context of Treaty Fishing Activity

To support his proposition that RCW 37.12.010 must be interpreted as excluding state jurisdiction over treaty fishing, Mr. Jim cites the provisions of PL 280 and RCW 37.12 that preserve existing treaty fishing rights. Those provisions — 18 U.S.C. § 1162(b) and RCW 37.12.060 — do not support his argument, either as a matter of

⁶ The order that was entered is referenced in footnote 5. The relevant section is attached to this brief as Appendix 1. As noted above, the states and tribes contemplate the possibility of future prosecution referral agreements that will result in state enforcement officers referring alleged violations of fishing regulations to tribes in certain cases. This provision of the stipulated order does not disclaim PL 280 jurisdiction and indeed preserves state regulatory authority over such activity. Referral agreements have not yet been developed.

statutory construction or federal preemption. The parallel savings provisions in state and federal law do not preempt state regulation; they maintain the existing regulatory paradigm which has long contemplated the possibility of nondiscriminatory state regulation of treaty fishing where there is a conservation necessity. *See, e.g., United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985).

United States v. Sohappy involved federal prosecution of Indian fishers under the Lacey Act, 16 U.S.C. §§ 3371-3378. The Lacey Act contains a provision similar to the one found in 18 U.S.C. § 1162(b) preserving existing treaty rights. *See* 16 U.S.C. § 3378(c)(2). The defendants argued that the Lacey Act provision preserved a treaty reservation by tribes of “exclusive jurisdiction over enforcement of tribal fishing law against Indians.” *Sohappy*, 770 F.2d at 818 (emphasis in the original text). The Court rejected this proposition, noting that the reserved right to take fish was shared in common with the citizens of the Territory and thus implicated state and federal interests along with those of treaty fishers. Accordingly, there was no support for the proposition that the Lacey Act preserved any “theory that the tribes retained by treaty exclusive jurisdiction over Indians committing fishing offenses.” *Id.* at 819 (emphasis in the original text). There is similarly no reason to conclude that comparable language in § 1162 of PL 280 preserved or

created any federal preemption of state conservation laws that pass muster under the conservation necessity standard for state regulation of treaty harvesting.

For both his preemption argument and his discussion of the breadth of RCW 37.12.010, Mr. Jim relies heavily on the following statement in the Federal Register notice adopting regulations for Treaty Fishing Access Sites, 62 Fed. Reg. 50866, 50867 (Sept. 29, 1997) (Br. Pet'r at 23, 29):

The Bureau agreed that the States do not have regulatory jurisdiction or authority over the in-lieu fishing sites. The sites are federal properties held by the United States for the benefit of the Indian Tribes with treaty fishing rights in the Columbia River. The Bureau regulates and manages the sites as a matter of federal law, but, in the absence of specific Bureau regulations governing health, sanitation and safety requirements, the regulation provides for the incorporation by reference of state or U.S. Public Health Service standards.

This statement does not support Mr. Jim's argument. It simply recognizes the absence of state civil regulatory authority over land use activities at the Treaty Fishing Access Sites. Public Law 280 makes a distinction between state "civil regulatory" authority and state criminal jurisdiction. Public Law 280 does not authorize states to apply their full array of civil regulatory laws, such as general health and safety regulations, to Indians within Indian country. *Bryan v. Itasca Cy.*, 426

U.S. 373 (1976); *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991) (RCW 37.12.010 did not authorize enforcement of civil traffic infractions against a Colville tribal member on a state highway within Colville Reservation), *cert. denied*, 503 U.S. 997 (1992); *State v. McCormack*, 117 Idaho 1009, 793 P.2d 682 (1990) (finding PL 280 jurisdiction over the crime of drunk driving on a state highway within the Nez Perce Reservation under statute similar to RCW 37.12.010). As the federal register notice explains, land-use issues such as health, sanitation, and general safety will be regulated by the federal government and incorporate “state or U.S. Public Health Service Standards.” 62 Fed. Reg. at 50867.

This case, however, is about the State’s criminal jurisdiction under PL 280, not its civil regulatory authority. Indeed, with regard to treaty fishing activity, the federal regulations associated with these fishing access sites contemplate the possibility of state regulation. *See, e.g.*, 25 C.F.R. § 247.5(c) (the regulations do not “subject[] any Indian properly exercising tribal treaty rights to state fishing laws or regulations that are not compatible with those rights” — a proposition consistent with case law recognizing the absence of any preemption where the state regulates in a nondiscriminatory manner for conservation purposes).

The federal regulations do not purport to preempt state laws dealing with criminal conduct. Indeed, a federal agency would exceed its authority by promulgating regulations purporting to eliminate federal statutory grants of criminal jurisdiction to states. For example, the regulations cited by Mr. Jim apply to a wide range of sites, some of which are in Washington and some of which are in Oregon. Oregon's PL 280 jurisdiction is federally mandated under PL 280 for all Indian country within that state, with the exception of the Warm Springs Indian Reservation. 18 U.S.C. § 1162(a). Under Mr. Jim's interpretation, the regulations would negate both the mandatory provisions of PL 280 and the specific grant of criminal jurisdiction to the states. A federal regulation implementing a congressional limit on state civil regulatory authority should not be interpreted to go beyond civil land-use regulatory matters and preclude jurisdiction over criminal activity that Congress determined a state could assert pursuant to PL 280.

C. The State Has Law Enforcement Jurisdiction over Columbia River Treaty Fishing Access Sites under Public Law 280 and RCW 37.12.010

The jurisdictional issue presented in this case relates to breadth of Washington's assumption of criminal jurisdiction over Indian crimes arising within Indian country. PL 280 provided Washington State with a basis to assert such jurisdiction over criminal cases that would previously

have been limited to exclusive federal jurisdiction. *See, e.g., Arquette v. Schneckloth*, 56 Wn.2d 178, 182-83, 351 P.2d 921 (1960) (observing that there is only federal criminal jurisdiction over Indian crimes in Indian country where state jurisdiction under PL 280 is not asserted).

In 1963, after *Arquette*, Washington affirmatively accepted jurisdiction over Indian crimes within Indian country, but provided a limited geographic exception to the scope of that assertion for a subset of tribal trust lands and restricted allotted lands within Indian reservations established in Washington State. The scope and application of Washington's exception to its assumption of PL 280 jurisdiction is a question of state statutory construction.

Mr. Jim seeks to bring the Maryhill site within the geographic exception to Washington's assumption of PL 280 jurisdiction. His argument begins with the proposition that all Columbia River Treaty Fishing Access Sites, including the Maryhill site, are within "Indian country" for purposes of federal criminal jurisdiction under 18 U.S.C. § 1151. From there, he relies upon case law to conclude that the basis for establishing federal Indian country criminal jurisdiction — the general characterization of these lands as having been reserved for the exclusive use of several Indian tribes — is determinative of Washington's very

specific and narrowly tailored geographic exclusion of certain lands within Indian country from state PL 280 criminal jurisdiction.

That argument should be rejected because federal law providing for specific federal criminal jurisdiction in Indian country is not helpful to the interpretation of a state law asserting PL 280 criminal law jurisdiction within that same Indian country.

The State does not dispute that Columbia River Treaty Fishing Access Sites, including the Maryhill site, are probably "Indian country" for purposes of federal criminal jurisdiction under 18 U.S.C. § 1151.⁷ That does not mean the State of Washington is without criminal jurisdiction. Under RCW 37.12.010, "[f]ull criminal and civil jurisdiction to the extent permitted by Pub. L. 280 was extended to every Indian reservation and to trust land and allotted lands therein when non-Indians were involved." *Washington v. Confederated Tribes & Bands of Yakima Indian Nation*, 439 U.S. 463, 475, 99 S. Ct. 740, 58 L. Ed. 2d 740

⁷ Under the general federal definition set forth in 18 U.S.C. § 1151, Indian country comprises three categories of land:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(1979). When Indians are involved in an alleged crime, as is the case here, a more limited assumption of state jurisdiction was asserted by Washington State. Within an established Indian reservation, "state jurisdiction was not extended to Indians on allotted and trust lands unless the affected Tribe so requested." *Id.* at 475-76.⁸

The district court erred and was properly reversed when it concluded Mr. Jim's allegedly unlawful fishing activities could not be prosecuted by the State utilizing PL 280 jurisdiction on the basis that the Maryhill Treaty Fishing Access Site is within a "reservation." As explained below, Treaty Fishing Access Sites are not a part of any Indian tribe's established reservation.

Furthermore, even if federal case law addressing the breadth of federal criminal jurisdiction embraces a conception of the word "reservation" that includes a wider array of lands than the individual reservations established for each of the tribes entitled to make use of the Maryhill site, utilizing that broad federal conception to interpret RCW 37.12.010 ignores other parts of the State's statute that narrows the breadth of that term and the corresponding breadth of any exception to the State's asserted criminal jurisdiction. General state criminal

⁸ This limited exception to the State's assertion of criminal and civil jurisdiction within Indian country is further narrowed by excluding from the exception eight specified causes of action, none of which are at issue here. *See* RCW 37.12.010(1)-(8).

jurisdiction authorized by PL 280 is not preempted by a specific assumption of federal criminal jurisdiction in a different statute unless Congress indicates its intent to preempt state jurisdiction.

RCW 37.12.010 limits the breadth of any exception to its otherwise broad assertion of PL 280 criminal jurisdiction to those tribal trust lands and restricted allotted lands within an established Indian reservation. Both the district court and Mr. Jim fail to address the fact that the Maryhill site was not acquired under federal legislation designating it as trust land and it is not a restricted Indian allotment.

1. State criminal law jurisdiction over Indians in "Indian country" arises under Public Law 280 and RCW 37.12.010.

Before the 1950s, states did not have jurisdiction over crimes involving Indians within Indian country. In 1953, Congress enacted Public Law 83-280 (PL 280), authorizing states to assume criminal and civil jurisdiction in Indian country. *See generally Washington v. Confederated Tribes & Bands of the Yakima Indian Nation*, 439 U.S. 463, 470-74 (1979). In 1957 and 1963, Washington enacted legislation implementing PL 280. *See generally id.* at 474-76; *State v. Cooper*, 130

Wn.2d 770, 772-73, 928 P.2d 406, 407 (1996). The 1963 legislation, codified at RCW 37.12.010, applies here.⁹ It provides:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but *such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States*, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

- (1) Compulsory school attendance;
- (2) Public assistance;
- (3) Domestic relations;
- (4) Mental illness;
- (5) Juvenile delinquency;
- (6) Adoption proceedings;
- (7) Dependent children; and

⁹ Laws of 1963, ch. 36. Washington's first expression of PL 280 jurisdiction occurred in 1957. Laws of 1957, ch. 240. At that time, Washington did not affirmatively accept full jurisdiction over all Indian country, choosing instead to accept jurisdiction for those tribes that requested state jurisdiction. See *Arquette v. Schneckloth*, 56 Wn.2d 178, 182-83, 351 P.2d 921 (1960). The *Arquette* court observed that, in the absence of such a tribal request, there was exclusive federal criminal jurisdiction over the criminal acts of an Indian acting within the exterior boundaries of his or her reservation and thus no state jurisdiction. *Id.* The 1963 version of Washington's PL 280 jurisdiction assumed full jurisdiction over Indians acting within Indian country with the exception of a subset of lands within an established Indian reservation — tribal trust lands and restricted allotted lands.

- (8) Operation of motor vehicles upon the public streets, alleys, roads and highways

(Emphasis added.)

Accordingly, under RCW 37.12.010, as adopted in 1963, Washington assumed full criminal jurisdiction over all crimes involving Indians within Indian country that do not arise “on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States.” *See also Cooper*, 130 Wn.2d at 775-76, 928 P.2d at 408-09.

2. **Because the Maryhill Treaty Fishing Access Site was not acquired as tribal trust land or a restricted Indian allotment “within an established Indian reservation,” Washington State courts have full criminal jurisdiction under RCW 37.12.010.**

Trust lands and allotted lands subject to a restriction against alienation comprise the subset of tribal areas within an established Indian reservation that are excepted from Washington’s PL 280 jurisdiction. *Washington v. Confederated Tribes & Bands of the Yakima Indian Nation*, 439 U.S. at 502. That subset is defined in RCW 37.12.010 which explicitly references tribal lands or allotments held in trust by the federal government or subject to a restraint on alienation and located within an “established Indian reservation.” The Court described this exception as a reasoned decision “allowing scope for tribal self-government *on trust or*

restricted lands” within a tribe’s established reservation. *Id.* (emphasis supplied)

In 1988, Congress authorized the U.S. Army Corps of Engineers to acquire and improve certain federally owned uplands along the Columbia River “to provide access to usual and accustomed fishing areas and ancillary fishing facilities for members of the [Nez Perce, Umatilla, and Warm Springs Tribes, and] the Yakama Indian Nation.” Pub. L. No. 100-581, § 401(a), 102 Stat. 2938, 2944.¹⁰ Public Law 100-581 authorized the Corps of Engineers to turn the developed sites over to the Bureau of Indian Affairs (BIA) for maintenance. The BIA has adopted regulations governing use of the sites, called Treaty Fishing Access Sites, in 25 C.F.R. Part 247. The Maryhill Treaty Fishing Access Site is one of those sites.

The Treaty Fishing Access Sites acquired by the U. S. Army Corps of Engineers provide four separate treaty tribes with access to their off-reservation usual and accustomed fishing places. They are not located within an established Indian reservation and the federal

¹⁰ A 1996 amendment that authorized boundary adjustments cleared the way for development of the current Maryhill site. Pub. L. No. 104-303, § 512, 110 Stat. 3658, 3762. Background about the development of Columbia River Treaty Fishing Access Sites is available on the U.S. Army Corps of Engineers website, <https://www.nwp.usace.army.mil/Pm/Projects/crtfas/home.asp>, and the Columbia River Intertribal Fish Commission website, <http://www.critfc.org/text/inlieu.html>. (Internet sites last visited Dec. 21, 2009.)

legislation under which they were acquired does not direct that they be placed into trust for any tribe or treated as allotted lands subject to a restriction against alienation.

a. The Maryhill site is not “within an established Indian reservation.”

The Maryhill Treaty Fishing Access Site is not “within an established Indian reservation” as that phrase is used in RCW 37.12.010. It is not part of the Yakama Indian Reservation, which was established by article II of the Yakama Treaty of 1855. 12 Stat. at 952. Nor is it part of any other reservation established for a particular tribe entitled to use that site to access off-reservation fishing places.

Neither Public Law 100-581 nor the Code of Federal Regulations refers to Treaty Fishing Access Sites as “reservations” or parts of reservations. The Yakama Nation does not have a right to exclude non-Yakamas from the sites, as it does in some parts of the Yakama Reservation. Instead, federal law provides that members of four separate tribes have equal access to the sites. Pub. L. No. 100-581, § 401(a), 102 Stat. at 2944; 25 C.F.R. § 247.3.

The nature of the eight subject areas in which the State *has* taken full PL 280 jurisdiction over Indians even “when on their tribal lands or allotted lands within an established Indian reservation” suggests that the

legislature intended the phrase "established Indian reservation" to mean a place where Indian people live in permanent communities. Those are the places where issues relating to school attendance, public assistance, adoption proceedings and similar community issues are likely to arise. Treaty Fishing Access Sites are not such places. They are to be used strictly for access to fishing and other fishing-related purposes. Permanent dwellings, and commercial enterprises not connected with fishing (e.g., fireworks stands) are not allowed. 25 C.F.R. §§ 247.7, 247.9(a), 247.19(b); *see* 62 Fed. Reg. 50866, 50867 (Sept. 29, 1997) (explaining why dwellings and "non-fish oriented commercial enterprises" are not allowed).

Celilo Indian Village in Oregon, where Mr. Jim lives, is similar to the Maryhill Treaty Fishing Access Site in that it is not reserved for the use of any one tribe. The United States government holds that site in trust for Indian people with traditional ties to Celilo Falls, including members of several tribes. Pub. L. No. 80-247, 61 Stat. 460, 466 (1947).¹¹ The Oregon Court of Appeals has held that Celilo Indian Village is not a "reservation" for purposes of Oregon's version of PL 280.

¹¹ As discussed in this brief, the legislation authorizing the acquisition of Treaty Fishing Access Sites did not place those lands in trust nor are those sites Indian allotments subject to a restraint against alienation. *See* Pub. L. No. 100-581, § 401(a), 102 Stat. at 2944. That stands in contrast to the legislation authorizing federal acquisition of Celilo Indian Village to be placed in trust for three tribes. Pub. L. No. 80-247, 61 Stat. 460, 466 (1947).

State v. Jim, 37 P.3d 241, 243-44 (Or. Ct. App. 2002). Oregon State courts thus had jurisdiction to hear and decide a criminal prosecution against Mr. Jim for a crime that occurred within Celilo Indian Village.

Mr. Jim argues that *State v. Jim* can be distinguished as an Oregon case dealing with its own PL 280 jurisdiction. However, because Mr. Jim raised arguments in that case that parallel those he raises here, the case is instructive as to the normal conception of the phrase “reservation.”

Oregon’s PL 280 jurisdiction is mandatory under federal law, 18 U.S.C. § 1162(a), and applies to “[a]ll Indian country within the State, except the Warm Springs Indian Reservation.” Mr. Jim argued that Celilo Indian Village was held in trust for three tribes — the Yakama, Umatilla and Warm Springs Tribes — and was thus an extension of the Warm Springs Reservation and excepted from Oregon’s PL 280 jurisdiction. *State v. Jim*, 37 P.3d at 243-244. He cited the same United States Supreme Court cases cited in his opening brief here for the proposition that Celilo Indian Village was meant to be part of a reservation for the Warm Springs Tribe and thus outside Oregon’s jurisdiction. *See, e.g., United States v. John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978). The *Jim* court rejected that argument, concluding that while property held in trust for a tribe might be thought of as a “reservation” in a very general sense, it is not the reservation of

any particular tribe and not excluded from Oregon's PL 280 jurisdiction. *Jim*, 37 P.3d at 243. As the court explained, "Congress has defined the boundaries of the Warm Springs Reservation by statute, and Celilo Indian Village is not within those boundaries. That ends the matter." *Id.* at 243-44.

This conclusion is significant for purposes of interpreting Washington's own limitation on its PL 280 jurisdiction which excepts jurisdiction over criminal acts of Indians "on tribal lands or allotted lands within an established Indian reservation." If the purpose of this exception is to provide "protection to non-Indians living within the boundaries of a reservation while at the same time allowing scope for tribal self-government on trust or restricted lands," *Washington v. Confederated Tribes & Bands of the Yakima Indian Nation*, 439 U.S. at 502, it makes little sense to extend this exception beyond the Yakama reservation to a site where no person — Indian or non-Indian — is allowed permanent residence and that is maintained solely to provide access to the off-reservation fishing places of four separate tribes. There is no reason to suppose that this kind of federal property was the sort of specific reservation land that Washington's legislature wanted to except from its otherwise broad assumption of state criminal jurisdiction under PL 280.

b. The Maryhill site was not authorized for acquisition as trust land or granted as an Indian allotment.

From time to time the federal government, through treaties, executive orders, and federal statutes, has specified that land is to be acquired or set aside for Indians. Reservations were established in this manner and allotments of lands within reservations were deeded to individual Indians under the provisions of various treaties and the Dawes Act¹² during the period of the federal government's assimilation policies from 1887 to 1934. Thereafter, the federal government pursued a new policy favoring the preservation of reservation lands. Allotted lands within reservations that had not been sold out of Indian ownership were subjected to a more permanent form of restraint against alienation in order to preserve what was left of the established Indian reservations. *See, e.g.,* 25 U.S.C. § 349; *Cy. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-56, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992).

The Washington legislature used terms of art such as allotment in its exception to PL 280 jurisdiction to reflect a focus on lands that have been retained by a tribe or Indian member within a communal

¹² Act of Feb. 8, 1887, 24 Stat. 388 (also referred to as the General Allotment Act).

reservation. *See, e.g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972) (recognizing that “[a]llotment is a term of art in Indian law” and “means a selection of specific land awarded to an individual allottee from a common holding”). Treaty fishing access sites such as the Maryhill site are not lands selected for an individual Indian from within a common tribal holding, and are thus not “allotted lands” as that term is used in RCW 37.12.010.

Similarly, the legislation authorizing the acquisition of Treaty Fishing Access Sites makes no reference to placing such lands in trust for a tribe. While the Secretary of the Interior may be able to place non-reservation lands into trust pursuant to 24 U.S.C. § 465, RCW 37.12.010 is more properly interpreted as excepting state jurisdiction over only those trust lands that were originally part of an “established Indian reservation.”

Accordingly, because the Maryhill Treaty Fishing Access Site was not acquired by legislation designating it as tribal trust land, is not an Indian allotment, and is not “within an established Indian reservation” as those terms are used in RCW 37.12.010, Washington State courts have full criminal jurisdiction over crimes committed by Indians in that location. *See Cooper*, 130 Wn.2d at 775-76.

3. More than alleged fishing violations are at stake in this case. The loss of state jurisdiction over Treaty Fishing Access Sites would leave a gap in enforcement authority over a wide range of activity.

Mr. Jim was prosecuted for a fishing-related offense. However, under Mr. Jim's conception of RCW 37.12.010, the State would have no jurisdiction over any crime involving Indians at the Maryhill Treaty Fishing Access Site. That interpretation would produce a significant vacuum in terms of criminal enforcement authority.

Families often fish together, and families are permitted to camp at Treaty Fishing Access sites. 25 C.F.R. § 247.3(c). Where there are families, there can be domestic violence. Family members are not necessarily tribal members. Moreover, these sites may be used by tribal members in connection with treaty harvest of fish and non-members may be invited to these sites to purchase treaty harvested fish. 25 C.F.R. § 247.11(g).¹³ Tribal courts do not have criminal jurisdiction over non-Indians or people of Indian ancestry who are not enrolled in a tribe. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978); *In re Garvais*, 402 F. Supp. 2d 1219 (E.D. Wash. 2004). If state courts do not have jurisdiction, federal courts may be the only courts with jurisdiction.

¹³ The web site for the Columbia River Intertribal Fish Commission describes this practice. See <http://www.critfc.org/text/critfe/inlieu.html> (last visited Dec. 21, 2009).

Furthermore, members of four different Indian tribes are equally entitled to use the sites, and it is doubtful that any of the four tribal governments would have authority to prosecute members of the other three for crimes committed at these off-reservation access sites. *Cf. United States v. Lara*, 541 U.S. 193, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) (tribes' inherent power to prosecute non-member Indians "concerns a tribe's authority to control events that occur upon the tribe's own land"). As discussed above, these sites were not set aside or placed in trust as a specific reservation for any one tribe.

Public Law 280 and RCW 37.12.010 were enacted to solve such problems. *Washington v. Yakima Nation*, 439 U.S. at 471. The only limit on Washington's exercise of the authority granted in PL 280 was for tribal trust and restricted allotted lands within a reservation, because Washington's legislature determined that, in the absence of a request for state jurisdiction, it would be appropriate to maintain tribal jurisdiction over a tribe's own members where that tribe normally has a significant presence and can actually exercise its jurisdiction effectively — i.e., on tribal (trust) and allotted lands that are within a traditional reservations established for that tribe. *Washington v. Confederated Tribes & Bands of the Yakima Indian Nation*, 439 U.S. at 502. Mr. Jim's broad interpretation of the State's exception to jurisdiction is inconsistent with

the purpose of the limited exception to the State's assertion of PL 280 criminal jurisdiction contained in RCW 37.12.010.

4. *State v. Sohappy* does not control the outcome in this case.

Mr. Jim argues that all federally acquired Indian fishing access sites on the Columbia River are "established Indian reservation[s]" as that term is used in RCW 37.12.010, and that state jurisdiction is thus excepted. He relies on *State v. Sohappy*, 110 Wn.2d 907, 757 P.2d 509 (1988), which in turn referenced *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985), *cert. denied*, 477 U.S. 906 (1986). Neither case helps Mr. Jim's argument.

In the state *Sohappy* case, the Washington Supreme Court held that Cooks Landing — an "in lieu" fishing access site — was a "reservation" under RCW 37.12.010, but said that its holding was "narrowly limited to the in-lieu site here involved." 110 Wn.2d at 909, 757 P.2d at 510; *see Cooper*, 130 Wn.2d at 776-78, 928 P.2d at 409-10. The state *Sohappy* decision predates the enactment of the federal law that authorized the creation of the Maryhill Treaty Fishing Access Site, Public Law No. 100-581. The court could not have intended its "narrowly limited" holding to apply to a site that did not yet exist.

Furthermore, the *Sohappy* court's explicit limitation on the precedential value of its decision was made in reflection of the fact that it was relying on the federal *Sohappy* case, that the State's limited briefing to the court had failed to cite any cases, *id.* at 909, and the State had thus failed to provide any basis to distinguish the federal *Sohappy* case. *Id.* at 911. We provide that missing briefing here.

In the federal *Sohappy* case, the Ninth Circuit held that Celilo Indian Village in Oregon, and Cooks Landing, an in-lieu fishing site in Skamania County, Washington, were "Indian country" under the federal Indian country statute, 18 U.S.C. § 1151. *Sohappy*, 770 F.2d at 822-23. The court said nothing about RCW 37.12.010 or Public Law 280. Indeed, as discussed in previous sections of this brief, Oregon courts have held that Celilo Indian Village is not a "reservation" for purposes of Oregon's version of Public Law 280. *State v. Jim*, 37 P.3d 241 (Or. Ct. App. 2002); *State v. Jim*, 725 P.2d 365, 366-67 n.4 (Or. Ct. App. 1986).

The Ninth Circuit's construction of 18 U.S.C. § 1851 in *United States v. Sohappy* does not apply here. See *State v. Cooper*, 130 Wn.2d 770, 777, 928 P.2d 406, 409 (1996). Nor is it helpful in terms of interpreting Washington State's assertion of PL 280 jurisdiction over Indian crimes within Indian country. The federal *Sohappy* court was focused upon the application of federal criminal jurisdiction under the

Lacey Act, which is dependent upon the existence of a crime within "Indian country." *Sohappy*, 770 F.2d at 822. It defined "Indian country" for the purpose of determining federal criminal jurisdiction.

In contrast, Washington's expression of PL 280 jurisdiction applies broadly to all Indian country with a limited and detailed geographic exception for activities arising on certain types of land within Indian country — tribal trust lands and restricted allotments within an established Indian reservation. If a treaty fishing access site is Indian country, then both federal and Washington State criminal jurisdiction are implicated.¹⁴ There is no basis for concluding that Washington's expression of PL 280 jurisdiction is eliminated simply because a federal statute defines Indian country broadly for purposes of federal criminal jurisdiction.

Because the term "reservation" is not defined by statute, *United States v. Sohappy*, 770 F.2d at 822, the federal court looked to United States Supreme Court cases, all of which addressed whether crimes had

¹⁴ PL 280 divests the federal government of criminal jurisdiction under the General and Major Crimes Acts — 18 U.S.C. § 1162 and § 1163 — for those six states with mandatory PL 280 jurisdiction. See 18 U.S.C. § 1162(c). No similar provision applies with respect to other states who accept PL 280 jurisdiction leaving the distinct impression that federal jurisdiction is concurrent with state jurisdiction in those cases. Moreover, PL 280 does not affect federal criminal statutes of general applicability. See *United States v. Pemberton*, 121 F.3d 1157, 1164 (8th Cir. 1997). Accordingly, it would be erroneous to conclude that state and federal criminal jurisdiction in Indian country are always mutually exclusive as the state *Sohappy* court appears to presume (relying upon a prior decision — *Arquette v. Schneckloth*, 56 Wn.2d 178, 182-83, 351 P.2d 921 (1960) — that dealt with an earlier 1957 version of Washington's PL 280 statute which did not affirmatively assert state criminal jurisdiction over *any* Indian country). See *Sohappy*, 110 Wn.2d at 910.

occurred within “Indian country” in order to preserve federal criminal jurisdiction. None dealt with the question of how to interpret state expressions of criminal jurisdiction in Indian country pursuant to PL 280. Accordingly, the federal *Sohappy* court’s holding was tightly limited: “in-lieu” fishing access sites are a reservation “at least *for the purposes of federal criminal jurisdiction . . .*” *Id.* (emphasis supplied).

Considering the limited scope of the federal *Sohappy* case, Mr. Jim’s reliance upon it to interpret state law should be rejected. His argument inappropriately conflates two disparate jurisdictional determinations: (1) a federal criminal jurisdictional determination that Indian country includes any general reservation of land for Indian use; and (2) a separate state statutory provision defining a narrow exception to criminal jurisdiction in Indian country.

Mr. Jim argues that the similarity between the Maryhill Treaty Access Fishing Site and the “in lieu” sites at issue in the *Sohappy* cases mandates a similar outcome — exclusive federal criminal jurisdiction — on the basis that the Maryhill site might also be characterized as Indian country for purposes of federal jurisdiction. That argument fails to provide any reasoned basis for using cases that define the scope of federal

criminal jurisdiction to interpret a state statute assuming state criminal jurisdiction over Indian country pursuant to PL 280.¹⁵

Mr. Jim's brief cites the same case law relied upon in the federal *Sohappy* case to suggest that Treaty Fishing Access Sites like Maryhill are "reservations" as that term is used for federal jurisdictional purposes and thus excepted from the State's own assumption of PL 280 criminal jurisdiction. However, those cases focus on the trust nature of Indian lands or their status as continuing allotments subject to a restriction on alienation, together with some "superintendence" by the federal government, as a basis for asserting federal criminal jurisdiction. As discussed in previous sections of this brief, Congress did not direct that Treaty Fishing Access Sites be placed into trust and these sites are not restricted Indian allotments. The absence of both a congressional trust designation and any status as a restricted Indian allotment means that

¹⁵ This argument fails to give credence to the explicit limitation of the holding in *Sohappy* to the "in lieu site [th]ere involved," as discussed above. It also fails to recognize that there are some significant differences between the two classes of fishing sites. For example, Treaty Fishing Access Sites are not open to year-round tribal dwellings. 25 CFR § 247.9. In contrast, "in-lieu" sites are open to year-round dwelling. 25 C.F.R. § 248.6; 59 Fed. Reg. 16757 (April 7, 1994); see 62 Fed. Reg. 50866, 50867 (Sept. 29, 1997) (distinguishing between in lieu sites and Treaty Fishing Access Sites); *Sohappy v. Hodel*, 911 F.2d 1312 (9th Cir. 1990) (regulation prohibiting dwellings at in lieu sites declared invalid). This brief does not emphasize these factual differences because it takes the position that, with the exception of the Cook's landing site addressed in *State v. Sohappy*, Washington has full PL 280 criminal jurisdiction over both "in lieu" and Treaty Fishing Access Sites.

Washington State's assumption of criminal jurisdiction under PL 280 is complete.

The State's interpretation of RCW 37.12.010 is consistent with the cited Supreme Court cases to the extent that reservation status was generally viewed as being related to trust lands and Indian allotments "within an established Indian reservation." *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541, 57 L. Ed. 2d 489 (1978), dealt with an Indian crime committed within lands that Congress had set aside "as a reservation for the Choctaw Indians residing in central Mississippi" and "declared by Congress to be held in trust" for those Indians. *Id.* at 634 and 649. Similarly, *United States v. Pelican*, 232 U.S. 442, 34 S. Ct. 396, 58 L. Ed. 676 (1914), dealt with a part of the Colville reservation established in Washington State that had been opened to non-Indian settlement and addressed federal jurisdiction over an Indian crime that took place upon an Indian allotment within that established reservation. *Id.* at 444.

The federal regulations providing for exclusive use of Treaty Fishing Access Sites by four tribes may be enough to preserve federal criminal jurisdiction under the Lacey Act, *United States v. Sohapp*y, 770 F.2d at 823, but that is not the distinction that Washington's legislature used when it excepted a limited subset of Indian lands within an established Indian reservation from its assumption of PL 280 criminal

jurisdiction. Indeed, the fact that RCW 37.12.010 focuses upon specific tribal trust lands and allotments "within an established Indian reservation," demonstrates that the Washington legislature intended to create a limited rather than a broadly applied exception to state jurisdiction.

Mr. Jim may assert that the Maryhill site is effectively the same as formally designated trust property in that it is held for the exclusive use of four tribes, but Washington's legislature more likely understood that trust or allotted lands have historically been associated with, and located within, a previously established Indian reservation. Accordingly, it would be inappropriate to define the phrase "established reservation" broadly by simple reference to whether lands are capable of being held in trust-like status or later designated as trust lands by the Secretary of the Interior. That interpretation fails to give any meaning to the additional phrases that speak in terms of trust and allotted lands within an established reservation.

Furthermore, some lands are acquired and set aside for Indians outside the exterior boundaries of a tribe's reservations and later designated as trust lands. 25 U.S.C. § 465.¹⁶ There is no reason to conclude that Washington's legislature intended to limit its criminal

¹⁶ Today, "trust" lands are those lands acquired by the United States on behalf of individual Indians and tribes pursuant to 25 USC § 465. Enacted as part of the Indian Reorganization Act of 1934, Pub. L. No. 73-383, § 5, 48 Stat. 984, 985 (1934), § 465 authorizes the Secretary of the Interior to acquire land for Indians both within and without reservations and to hold such land in trust.

jurisdiction based upon a transitory determination by the Secretary of the Interior that it is appropriate to place lands held for the use of one or more tribes into trust without any limitation on the reasons for such trust designation.¹⁷ But that is precisely what would happen under Mr. Jim's argument that relies upon the potential breadth of federal criminal jurisdiction arising from a general interpretation of the word "reservation" within the federal definition of Indian country.

Instead, as discussed in previous sections of this brief, Washington's legislature chose a geographic limitation based upon historical conceptions of a tribal presence associated with tribal trust land or restricted Indian allotments within an Indian reservation established for a particular tribe. Those are the locations where tribal criminal jurisdiction might be applied effectively by that tribe.

VI. CONCLUSION

The State of Washington asks this Court to affirm the Klickitat County Superior Court's determination that Washington State's PL 280

¹⁷ 25 U.S.C. § 467 provides that: "The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations." This demonstrates that the notion of an established Indian reservation is also commonly thought of as a place of communal residence. In 2006, the Secretary of the Interior acted under 25 U.S.C. § 467 to proclaim the Snoqualmie Indian Reservation. 71 Fed. Reg. 63347 (Oct. 30, 2006). The Secretary has issued no such proclamation for any Treaty Fishing Access Site.

jurisdiction, as expressed in RCW 37.12.010, applies within the Maryhill
Treaty Fishing Access Site.

RESPECTFULLY SUBMITTED this 24th day of December,
2009.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Robert M. McKenna", written over a horizontal line.

MICHAEL S. GROSSMANN
Senior Counsel
WSBA No. 15293
Attorneys for Respondent
State of Washington
1125 Washington Street SE
Post Office Box 40100
Olympia, Washington 98504-0100
(360) 586-3550

RONALD J. TENPAS
Assistant Attorney General
FRED R. DISHEROON
Special Litigation Counsel
E-mail: fred.disheroon@usdoj.gov
U.S. Department of Justice
Environment & Natural Resources Division
Ben Franklin Station, P.O. Box 7397
Washington, D.C. 20044-7397
Telephone: (202) 616-9649
Facsimile: (202) 616-9667
Attorneys for Plaintiffs

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

UNITED STATES OF AMERICA, et al.

Civil No. 68-513-KI

Plaintiffs,

v.

STATE OF OREGON, et al.

Defendants

ALL PARTIES' JOINT MOTION
AND STIPULATED ORDER
APPROVING 2008-2017
UNITED STATES v. OREGON
MANAGEMENT AGREEMENT

All parties to this case,¹ listed below, are pleased to move this Court for an order approving the 2008-2017 *United States v. Oregon* Management Agreement, attached hereto as Exhibit 1:

- The United States of America, which initiated this lawsuit against the State of Oregon in a Complaint filed on September 13, 1968;

¹ The Confederated Tribes of the Colville Reservation is currently involved in proceedings relating to injunctive motions brought by the Yakama Nation under the *United States v. Oregon* caption. The Colville Tribes has not been granted intervention as a party, however.

JOINT MOTION AND STIPULATED
ORDER ADOPTING 2008-17 U.S. v.
OREGON MANAGEMENT
AGREEMENT

Page 1

- The Confederated Tribes of the Warm Springs Reservation of Oregon, which was granted intervention as a plaintiff on December 13, 1968;
- The Confederated Tribes of the Umatilla Indian Reservation, which was granted intervention as a plaintiff on December 18, 1968;
- The Nez Perce Tribe, which was granted intervention as a plaintiff on January 8, 1969;
- The Yakama Nation, which was granted intervention as a plaintiff on December 5, 1968;
- The State of Washington, which was granted intervention as a defendant orally on April 29, 1974, and by written order on May 20, 1974;
- The State of Oregon, defendant;
- The State of Idaho, which was granted intervention on May 20, 1985 (Doc. No. 1281); and
- The Shoshone-Bannock Tribes, which was granted intervention orally on July 25, 1986 (Doc. No. 1380), and whose intervenor status the Court reaffirmed on December 5, 2002 (Doc. No. 2322).

BACKGROUND

The United States filed this case in 1968 to seek relief concerning the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory," that is secured to the Warm Springs, Umatilla, Nez Perce, and Yakama Tribes in treaties that the United States executed with those Tribes in 1855. On July 8, 1969, this Court issued a memorandum opinion declaring the rights of the parties. *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).² On October 10, 1969, the Court entered a Judgment in accordance with that opinion. On May 10, 1974, the Court issued an Order Amending Judgment, which was affirmed by the Ninth Circuit. *Sohappy v. Smith*, 529 F.2d 570 (9th Cir. 1976).

² *Sohappy v. Smith*, Civil No. 68-409, was a companion case to *United States v. Oregon*. The two were consolidated on November 18, 1968. The court terminated continuing jurisdiction over *Sohappy v. Smith* on June 27, 1978. Since then, all pleadings have borne the caption *United States v. Oregon*.

To this day, the Court has retained continuing jurisdiction to implement the 1969 Judgment. 302 F. Supp. at 911; Judgment ¶ 4. The Court has encouraged the parties to work out for themselves the details of how its Judgment should be implemented. *E.g.*, 302 F. Supp. at 912. On February 28, 1977, the Court approved a five-year Plan for Managing Fisheries on Stocks Originating From the Columbia River and its Tributaries Above Bonneville Dam. On October 7, 1988, the Court approved a ten-year Columbia River Fish Management Plan (1988 CRFMP) (Doc. No. 1594). *United States v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990). The Court has also approved many other interim agreements of shorter duration, most recently in May 2005 (Doc. No. 2407).

In 1997, as the expiration date of the 1988 CRFMP neared, the parties began an effort to negotiate a new or renewed long-term agreement. The 2008-2017 *United States v. Oregon* Management Agreement is the result of more than ten years of negotiation.

In April 2008, the parties' Technical Advisory Committee completed a biological assessment on the joint fishery proposal described in the 2008-2017 *United States v. Oregon* Management Agreement under 16 U.S.C. § 1536(c), and submitted it to the National Marine Fisheries Service (NOAA Fisheries). On May 5, 2008, NOAA Fisheries issued a biological opinion on the proposal under 16 U.S.C. § 1536(b). In that biological opinion, NOAA Fisheries determined that the agreement would not cause jeopardy to any listed species.

The parties are pleased to present the 2008-2017 *United States v. Oregon* Management Agreement for approval and adoption as an order of the Court.³

³ The parties would like to recognize the substantial contributions of Laurie Jordan, Policy Analyst II, Columbia River Intertribal Fish Commission. Ms. Jordan kept the parties organized and focused, and provided intellectual and material assistance in many ways over a long time.

STIPULATION

All parties stipulate that the 2008-2017 *United States v. Oregon* Management Agreement should be approved and adopted as an Order of the Court.

RESPECTFULLY SUBMITTED this 11th day of August, 2008.



FRED R. DISHEROON
Special Litigation Counsel
U.S. Department of Justice
Environment & Natural Resources Division
Ben Franklin Station, P.O. Box 7397
Washington, D.C. 20044-7397
(202) 616-9649
Attorney for Plaintiffs



JOHN W. OGAN, Oregon State Bar #065940
Karnopp, Peterson, Noteboom *et al.*
1201 N.W. Wall Street, Suite 300
Bend, OR 97701-1957
(541) 382-3011
Attorney for the Confederated Tribes of the Warm Springs Reservation of Oregon



BRENT HALL, Oregon State Bar #992762
Associate Attorney General
Confederated Tribes of the Umatilla Indian Reservation
P.O. Box 638
Pendleton, OR 97801
(541) 966-2336
Attorney for the Confederated Tribes of the Umatilla Indian Reservation

David Cummings by TW per phone authority
DAVID CUMMINGS, Oregon State Bar #922695
Office of Legal Counsel
Nez Perce Tribal Executive Committee
P.O. Box 305
Lapwai, ID 83540
(208) 843-7355
Attorney for the Nez Perce Tribe

Tim Weaver
TIM WEAVER, Washington State Bar #3364
P.O. Box 487
Yakima, WA 98907
(509) 575-1500
Attorney for the Yakama Nation

Fronda Woods
FRONDA WOODS, Washington State Bar #18278
Assistant Attorney General
Washington Attorney General's Office
P.O. Box 40100
Olympia, WA 98504-0100
(360) 586-2872
Of Attorneys for the State of Washington

Stephen E.A. Sanders
STEPHEN E.A. SANDERS, Oregon State Bar #853213
Assistant Attorney General
Oregon Department of Justice
1515 S.W. 5th Ave., Suite 410
Portland, OR 97201
Of Attorneys for the State of Oregon

Clay R. Smith *by JED*
CLAY R. SMITH, Idaho State Bar #63857 *w/permission*
Deputy Attorney General
Idaho Attorney General's Office
Natural Resources Division
P.O. Box 83720
Boise, ID 83720-0010
Of Attorneys for the State of Idaho

Bill Bacon *by JED*
BILL BACON, Idaho State Bar #2766 *w/permission*
Tribal Attorney's Office
The Shoshone-Bannock Tribes
P.O. Box 306
Fort Hall, ID 83203
(208) 478-3815
Attorney for the Shoshone-Bannock Tribes

ORDER

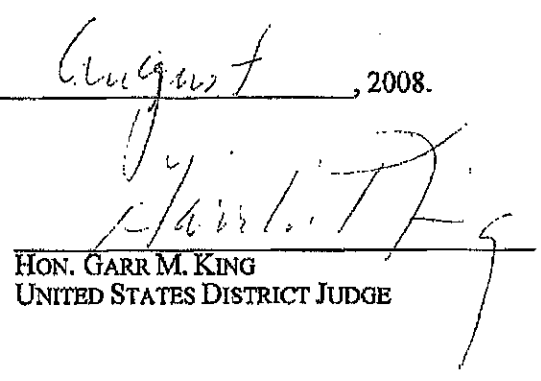
1. The Court has examined the 2008-2017 *United States v. Oregon* Management Agreement in light of the Court's Judgment of October 10, 1969, as amended May 10, 1974, and other materials in the case files. The Court concludes that the 2008-2017 *United States v. Oregon* Management Agreement is fundamentally fair, adequate, and reasonable, both procedurally and substantively, in the public interest, and consistent with applicable law, and that it has been negotiated by the parties in good faith. See *Firefighters v. Cleveland*, 478 U.S. 501 (1986); *United States v. Oregon*, 913 F.2d 576, 580-81 (9th Cir. 1990).

2. The parties' joint motion to approve the 2008-2017 *United States v. Oregon* Management Agreement is GRANTED. The 2008-2017 *United States v. Oregon* Management Agreement is hereby approved and adopted as an Order of the Court.

3. This Court retains jurisdiction to resolve disputes concerning the 2008-2017 *United States v. Oregon* Management Agreement as described therein.

IT IS SO ORDERED.

DONE this 11 day of August, 2008.



HON. GARR M. KING
UNITED STATES DISTRICT JUDGE

2008-2017

United States v. Oregon

Management Agreement

May 2008

**2008-2017 United States v. Oregon
MANAGEMENT AGREEMENT
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E. PROSECUTION REFERRAL AGREEMENTS

1. The Columbia River Treaty Tribes, Oregon and Washington agree that the Tribes should bear primary responsibility for enforcing agreed-upon regulations applicable to mainstem Treaty Indian fisheries.

2. To carry out this responsibility, the Columbia River Treaty Tribes agree to commit, to the maximum extent possible, the police, prosecutorial, and judicial resources necessary to ensure compliance with Tribal regulations governing mainstem fisheries.

3. To assist the Columbia River Treaty Tribes in carrying out this responsibility, Oregon and Washington may negotiate with each tribe for agreements to refer to the tribes for prosecution under tribal law those tribal fishermen cited by state enforcement officers for violating agreed upon mainstem fishing regulations and to cooperate with tribal authorities in making evidence and testimony available in tribal court proceedings. As part of each referral agreement, the tribe shall report the disposition of the tribal prosecution to the state law enforcement agency making the referral. The enforcement referral agreements filed with the Court on May 8, 1992 (Docket No. 1964) may provide models for implementation of this paragraph.

4. Unless specified otherwise in the referral

agreements entered into under this Part I.E., the states of Oregon and Washington shall retain authority to prosecute violations of applicable laws or regulations in state court.

5. If Oregon or Washington believes that a tribe or tribes is not carrying out its responsibilities under this section to enact and enforce agreed-upon mainstem fisheries regulations, it may refer the matter to the Policy Committee for dispute resolution as provided in Part I.C.6.c.

F. PERFORMANCE MEASURES, COMMITMENTS AND ASSURANCES

1. General

The Parties enter this Agreement based, in part, on their expectation that the measures in Parts II and III will help upriver stocks rebuild over time. The Parties also recognize that other laws and processes outside the scope of the Agreement, as well as the actions of public and private entities not signatory to this Agreement, may affect their ability to fulfill rebuilding and harvest sharing objectives. The Parties anticipate that their efforts will focus primarily on implementation of the specific measures in Parts II and III. This section establishes procedures to monitor progress toward rebuilding and to seek consensus on actions to address the circumstances where activities that are beyond the scope of the Agreement may affect the achievement of rebuilding and