Habitat Protection and Native American Treaty Fishing in the Northwest

by Alan Stay

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In 1854, several Native American tribes occupied and sustained their lives and livelihood from lands and waters within in what is now the Northwestern portion of the United States. Fisheries, while occurring throughout their territories, were centered on the Columbia River, Puget Sound, the rivers and waters flowing into Puget Sound, and the ocean waters. For these Native American people, fishing and fish were an integral part of their lives and culture. Fish and fishing infused their religion and very society. Indeed, fishing was no less important to these Native American people "than the atmosphere they breathed."[1] It is not an overstatement to say that, without the continued ability to fish and harvest and use fish resources, the Native American society and culture that existed the Pacific Northwest in 1854 could not have continued to persist.[2]

This article traces how several Native American tribes acted to protect this centrally important activity—fishing—at the time treaties were made and in the decades that followed. It highlights the forward thinking of tribes today who are the modern day successors to treaties made in 1854 and 1855 to not only secure continued protection of the right to take fish, but also to understand and implement steps to protect the fish habitat as the central and most important step in ensuring that the right to take fish persisted into the future. While the reservation of fishing rights in other treaties in other parts of the United States may differ from those found in the treaties of Northwest tribes and may lead to a somewhat different analyses, the general principles described here are likely to apply in other areas, especially the Upper Midwest, where several tribes have been held to have off-reservation treaty rights.[3]

In The Beginning

Before the arrival of non-Indian settlers, Native Americans had unfettered use and occupancy of their lands. Early on, the United States Supreme Court recognized the exclusive right of native peoples to use and occupy their lands and provided that only the United States could bargain with Native Americans to sell or transfer their lands, making them available for settlement or other non-Indian use.[4] By 1854, there had been a trickle of non-Indian settlers into the Pacific Northwest. But, if history was to be a good predictor of the future, that trickle would soon be a river and then a torrent. Both Native Americans and the United States saw a looming problem. For native people, the unregulated and unmitigated onslaught of settlers could mean the end of traditional life and society. The United States faced both a legal issue and a practical issue—how to acquire title to native lands to facilitate settlement and the real possibility of war if the interests of the native people were not protected.

To the credit of the United States, it chose to make treaties with the native people rather than wage war. These were not treaties of conquest but negotiations between governments—tribal nations and the United States.[5] While the negotiations of treaties were at arms-length, they were not exactly fair. The native negotiators spoke little or no English, the treaties were written in English, and the negotiations were conducted using a limited trade language of only a few hundred words known as Chinook Jargon.[6]

In 1854 and 1855, the United States negotiated five treaties with Indian tribes that resided in what is now Western Washington. Each of those treaties included provisions that were intended to preserve and protect the tribes and Native American peoples' right to continue to fish. The language from Article III of the Point Elliott treaty is typical:

> 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 purpose of curing….[7]

As noted above, for the tribes, this provision was central to the preservation of their society and way of life and its inclusion in the treaties was critical to successful treaty negotiations.

United States v. Washington

The hope that the simple language of the treaty would

be fully implemented for the benefit of the tribes and Native American people vanished within a few short decades. Over time the tribes found themselves often in court seeking to preserve and implement the treaty fishing language.[8] In 1970, the United States filed *United States v. Washington* in an effort to finally resolve the scope and extent of the treaty right to take fish. Many tribes immediately intervened on the side of the United States to ensure that their interests would be properly represented. Ultimately, more than 20 tribes became a party to *United States v. Washington*. The final decision in 1974, coupled with many subsequent interpretative decisions by the federal district court, the court of appeals, and the United States Supreme Court, have largely resolved the vast majority of the major issues surrounding the treaty right to take fish.[9] I was honored to represent several tribes during these early *United States v. Washington* proceedings and to argue the case for the treaty habitat right the first time it was litigated in the early 1980s.

The tribes exhibited courage in joining the case. A loss would in effect terminate a right crucial to supporting the very nature of the tribes; they could have lost everything. Second, while having the United States as a partner in treaty litigation is generally helpful, the United States, given its diverse responsibilities, cannot always be counted on to breathe full life into a right such as the habitat right while litigating on behalf of tribes.[10] However, in this case, once on board with the habitat right, the United States proved to be a stalwart partner even through the appellate argument a that took place a few months ago.

The 1974 decision in *United States v. Washington* was successful and affirmed the central tenets of treaty fishing: the state could regulate treaty fishing only when reasonable and necessary for conservation; tribes had a right to take a share of the harvestable fish of up to 50 percent of the available harvestable fish[11]; and tribes could regulate their own fisheries. Over time, tribes have evolved as co-managers with Washington with regard to fishery resources.

Moreover, the decision upholding tribal treaty fishing rights in *United States v. Washington* did more than secure the tribes' fish, it became a catalyst in the modernization of tribal governments. The Supreme Court made clear that, if tribes were to take their rightful place as co-managers, they would have to develop the scientific, enforcement, and legal infrastructures to carry out that role. Tribes rose to the challenge with the result that virtually all tribes party to the case developed modern government structures capable of managing the fishery while at the same time not undermining or destroying the traditions that underpinned the importance of fishing in the first place and for which the case was brought. This more indirect consequence of the case should not be overlooked.

Habitat Protection

When the United States initiated *United States v. Washington* in 1970, it did not mention habitat protection in its pleadings. Tribes did. They recognized that it was not sufficient to protect their ongoing right to fish merely by ensuring a share of the fish now present. Rather, full assurance would only come by protection for the source of the right—the fish—and that could only exist with the protection of the habitat that was required to ensure fish abundance. This tribal claim was reserved for trial after the first issues of allocation and regulation were resolved, in what was denominated as Phase II. The district court characterized the tribal habitat claim as follows:

> Plaintiffs [tribes] also assert claims for relief concerning alleged destruction or impairment of treaty right fishing due to state authorization of, or failure to prevent, logging, and other industrial pollution and obstruction of treaty right fishing streams.[12]

While the United States ultimately joined in the habitat portion of the case, one should not lose sight of the fact that it was the forward thinking of the tribes that propelled the United States to do the "right thing."

The unresolved habitat protection issue concerned whether it was implicit in the treaty that the right to take fish also included protection from habitat degradation that resulted in loss of the fish necessary to meet the purposes and intent of the treaty right. This issue was not resolved merely from looking at the treaty language. Rather the intent of the parties and the purpose of the treaties had to be addressed. This required application of the canons of treaty construction.[13]

While there is a danger of oversimplifying the issue, the tribes' view can be set out as based on two lines of Supreme Court authority. First, when a reservation is made in a treaty, there is an implicit reservation of sufficient resources to carry out that reservation. Thus, in *Winters v. United States*,[14] the Court held that the reservation of a land impliedly reserved sufficient water to carry out the purposes of the reservation. Second, a third party may not remove fish that would otherwise be available for tribal harvest, depriving the tribes of an opportunity to harvest. For example, in *United States v. Winans*,[15] the Court would not allow the continued operation of a fish wheel below a tribal fishery site where the wheel intercepted all

fish, denying the tribes an opportunity to harvest fish in a traditionally utilized area.

Applying these straightforward federal Indian law principles, the conclusion follows that the treaty contains an implicit right to habitat protection. First, the resource that is critical to carrying out the treaty-reserved right to fish is fish. And without adequate suitable habitat, the fish cannot be maintained and the right is lost. Placing a barrier in a stream that kills adult or juvenile salmon or interferes with reproduction is no less a prior take than a fish wheel that intercepts the fish before they are available for tribal harvest. In both cases, the tribes are deprived of an opportunity to take fish and to exercise their treaty fishing right.

The tribes and the United States first litigated the habitat issue in Phase II of *United States v. Washington*. The district court in a strongly worded decision agreed and affirmed that the right to take fish embraced a right to habitat protection. On appeal, the district court ruling upholding the right was vacated as not ripe based on the court's perception that the record was insufficient to demonstrate a current, particularized threat to the habitat.[16] In other words, the court of appeals demanded a more concrete set of facts upon which to base its analysis of the implied right to habitat protection. This was a disappointing result, but the tribes and their lawyers continued to believe in the integrality of the habitat right and to look toward the day when the courts would directly affirm it.

In 2001, tribes and the United States returned to court with the more specific fact pattern requested by the court of appeals. This second attempt became known as the "culvert case." There, the tribes and the United States, which continued to join the tribes in the habitat case, challenged the state in its construction and maintenance of state-owned culverts on rivers and streams. The tribes asserted (1) that the culverts limited fish passage of upstream adults and/or downstream juveniles such that the number of harvestable fish was so reduced that tribes could not make a moderate living (the Supreme Court allocation standard) and (2) that this interference with tribal fishing rights constituted a violation of the treaties.

The U.S. District Court for the Western District of Washington first addressed the issue of whether the right to habitat protection in the context of culverts existed at all. The court declared:

> [T]he right of taking fish, secured to the tribes in the Stevens Treaties, imposes a duty on 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.[17]

Initially, the court left for further proceedings the determination of the appropriate remedy for any state violation.

In 2013, following several good-faith efforts to settle and a seven-day trial, the court entered its remedial order in the culvert case, enjoining the continued operation of the state's most harmful culverts. The court's injunction: (1) set precise deadlines for the various state agencies owning culverts to correct those culverts; (2) prescribed the default method to be used in remediating or building new culverts, subject to adjustment in emergent circumstances; (3) provided that the standards set out in the order would apply to culverts that failed in the future or were newly discovered as blocking culverts; (4) required the state to maintain culverts so as not to become blocking culverts; and (5) affirmed that the tribes would have a significant role in the implementation of the order.[18] The State of Washington appealed the culvert decision to the Ninth Circuit Court of Appeals. On June 27, three years after the district court entered its injunction, sixteen years after the culvert sub-proceeding was initiated within *United States v. Washington,* and more than forty-six years after the United States and Tribes first filed *United States v. Washington* to secure compliance with the Treaties, the Ninth Circuit issued its unanimous decision in the culverts case. Relying on equity and the strong factual predicate established by the tribes below, it held:

> In sum, we conclude, that in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties. The United States has not waived the rights of the Tribes under the Treaties . . . . The district court did not abuse its discretion in enjoining Washington to correct most of its high-priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons.

Slip op. at 59. One could have hoped that the Court of Appeals' unanimous decision in the culvert sub-proceeding could have been the end of the matter, and that the State could have gotten on with the business of implementing the Treaty rights. But that was not to be. The State of Washington has requested rehearing/rehearing en banc, and that request has been echoed by several entities seeking amicus status. As of this writing, the Court has not responded to this request.

No stay was issued by the court and the state did not request one. While the appeal was pending, the state took efforts to meet the requirements of the remedial decision. Three state agencies—fish and wildlife, natural resources, and parks—expect to meet a 2016 deadline for repairing all of their blocking culverts. The Washington State Department of Transportation (WSDOT), the remaining state agency with blocking culverts, has additional time to repair its culverts as the number involved is substantially greater. WSDOT reports some progress, but it is too early to tell if it will complete its task as required by the court. However, it is clear even at this stage of implementation that the culvert case has substantially improved the fish habitat, as was its goal. The tribes' ultimate success in the case is key to maintaining the meaningfulness of treaty rights into the future. With threats from climate change and habitat degradation resulting in diminishment of fish runs to a level never before experienced, the recognition of the habitat component of the treaty right is more vital than ever before.

I would like to end this article with some personal observations of the tribal fight to affirm treaty fishing rights as someone who was honored to provide assistance, in some small way, to this cause.

What struck me from the beginning was the courage of the tribes to prod the United States to bring the case and then to join. When the case was won, tribes transformed their governments to meet the new challenge of managing the resource. And they accomplished this transformation almost overnight. Today, tribes have vibrant science departments to ensure that good science guides fish management; well-trained law enforcement and modern judicial systems to ensure

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proper resource use; and tribal governments skilled in ensuring that the treaty rights are well protected. Indeed the evolution of tribal governments into modern government was perhaps the most overlooked benefit flowing from *United States v. Washington*.

And finally one cannot ignore the political climate that existed during much of this tribal fight. It was toxic. One federal court described the public and private response to the affirmance of the tribal treaty fishing right as follows: "Except for some desegregation cases …, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."[19] The successful struggle of tribes and tribal fishers in the face of such vitriol is all the more striking.

Today the climate has softened, but efforts to limit or make it more difficult for tribes to exercise their treaty fishing rights persist. One thing is clear to this writer: If history is any guide to the future, tribes will meet every new challenge and persist until each is overcome. For to do otherwise is not an option if tribes are to persist and flourish, which they will. ⊙

The opinions set out herein are mine alone and do not necessarily represent the views of any Indian tribe I know, represent, or did represent in the past. And, while I am labeled the author, Indian treaty cases are fought first on the backs and with the courage of Indian tribes and people and second by the many, many attorneys representing tribes. The case was only won by the concerted effort of all of these players, especially the tribes.

Endnotes

[1] *United States v. Winans*, 198 U.S. 371, 381 (1905).

[2]Hunting and gathering were also of critical importance to Native Americans in the Pacific Northwest.

[3]*See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983).

[4]*See, e.g., Johnson v. McIntos*h, 21 U.S. 543 (1823).

[5]*United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974).

[6]*Id.* To compensate for the language disadvantage suffered by native people at the treaty negotiations, certain canons of construction have been employed by courts to interpret treaties. *See* Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 Buff. Pub. Int. L.J. 147, 183 (2000) (explaining that "the canons stand for the proposition that [t]reaties are to be construed as they were understood by the tribal representatives who participated in their negotiation and should be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians," and further noting that "[t]he canons of construction were originally limited to treaty construction but were subsequently expanded to statutory construction as well") (citations and internal quotation marks omitted).

[7]Treaty of Point Elliot, U.S.-Dwamish, Suquamish, etc., Mar. 8, 1859, 12 Stat. 927.

[8]*See, Pioneer Packing Co. v. Winslow*, 294 Pac. 557 (1930); *State v. Moses*, 442 P.3d 775 (1987)). Many times, the U.S. Supreme Court was called on to limit state of Washington's interference with the treaty right to fish. In *United States v Winans*, 198 U.S. 371 (1905) the Court held tribes could not be denied access to their fishing sites and an entire run of fish could not be intercepted when the effect would be to deprive the tribes of an opportunity to fish. In *Tulee v. Washington*, 315 U.S. 381 (1942), the Court held that Washington could not impose a fishing license requirement on treaty fishers. In *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973), the Court held the state could not discriminate against treaty fishing by denying the Puyallup tribe the ability to harvest steelhead with nets.

[9]*See generally*, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974); *aff'd.* 520 F.2d 676 (9th Cir. 1975); *Washington v. Washington Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (substantially affirming *United States v. Washington*). Two of the more significant subsequent rulings within *United States v. Washington* were the court's affirmation that tribes could harvest hatchery fish, 759 F.2d 1353 (1985), and its determination that, included within the treaty right to take fish, was the right to take shellfish,157 F.3d 630 (1998).

[10]*See, e.g., Nevada v. United States*, 463 U.S. 110 (1983) (elucidating the conflicts of interest that the United States may have when it supports tribes in litigation).

[11]On review, the Supreme Court modified this allocation slightly in holding that tribes had a right to take so many fish as was necessary to earn a moderate living up to a maximum of 50 percent of the available harvestable fish. 443 U.S. 687.

[12]*Supra* n.6 at 328.

[13]*See supra* n.6.

[14]*Winters v. United States*, 207 U.S. 564 (1908).

[15]*United States v. Winans,* 198 U.S. 371 (1905).

[16]*United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980); 694 F.2d 1374 (9th Cir. 1983) (aff'd in part, rev'd in part); 759 F.2d 1353 (9th Cir. 1985) (en banc) (aff'd in part, vacated in part).

[17]*United States v. Washington*, No. CV 9213RSM, 2007 WL 2437166, at *2 (unpublished, filed Aug. 22, 2007).

[18]*United States v. Washington*, 20 F. Supp. 3d 986, 1000 (W.D. Wash. 2013).

[19]*Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979) (quoting *Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct. for the W.D. of Wash.,* 573 F.2d 1123, 1126 (1978)).