NO. 55019-9-II; NO. 55029-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ANDREW LARRY SIMMONS and MICHAEL MYRON SIMMONS,
Petitioners (Appellants/Defendants),

v.

STATE OF WASHINGTON
Respondent (Plaintiff).

APPELLANTS' REPLY BRIEF

Ben Cushman
Deschutes Law Group, PLLC
1202 State Ave NE
Olympia, WA 98506
360-464-1055

Attorney for Appellants

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1. RESTATEMENT OF FACTS

The Defendants/Appellants, Andrew and Michael Simmons, enrolled members of the Cowlitz Indian Tribes, were cited for unlicensed harvesting of shellfish under state law after they were found with more than the daily harvest limit of clams. The Simmons defendants proved their membership in the Cowlitz Tribe at the time of the citation. (RP 5/31/19 p. 29 l. 13 – p.30, l. 4.)

The Cowlitz Tribe has no treaty with the United States. (RP 5/31/19 p. 20 ll 14-17; p.26, l.1 - p.27, l.19.) There is also no Act of Congress that divests the Cowlitz People of hunting and fishing rights in their traditional hunting and fishing grounds. There are two Executive Orders that purport to recognize or abrogate Indian rights in the area where the Cowlitz People lived, but these Orders were not ratified or authorized by Congress. (RP 5/31/19 p. 27 l. 22 - p.28, l.16.) There is also a Proclamation of sale of land in the ancestral territory of the Cowlitz (see Attachment A) and a subsequent Indian Court of Claims Award granting the Cowlitz one million five hundred thousand dollars for that loss of the right to occupy their ancestral lands ("Final Award, Cowlitz v. U.S. Indian Claims Commission, Washington DC". Docket 218).

The Cowlitz people are "fish-eating Indians of the Pacific Northwest" and therefore have a hunting and gathering culture, subsisting on game, fish and shellfish. (RP 5/31/19 p. 25, ll 9-18.) They fished and gathered shellfish places that included shared fishing and shellfish gathering locations outside their ancestral, controlled territory, including the location where the Simmons

defendants were cited for gathering clams, which was a shared shellfish ground on established coastal trade routes extensively used by the Cowlitz people. (RP 5/31/19 p. 23, l. 11 – 24, l.25.)

2. STATEMENT OF THE CASE BELOW

The District Court convicted the Defendants of unlawful shellfish harvesting, relying on the 1865 Executive Order and a misinterpretation of the case *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (1996). The Superior Court affirmed the conviction, ruling that that *Confederated Tribes* was dispositive and had the effect of divesting the Cowlitz people of their historic shellfishing rights.

3. SUMMARY OF ARGUMENT

The *Confederated Tribes* case is inapplicable here. It was based on a unique circumstance where tribal interests opposed each other in court. As a result, the general Canons of Indian Law did not apply, as they do in this case.

Further, the Superior Court uncritically applied *Confederated Tribes* without regard to the Constitutional limitations on the executive power under the Indian Commerce Clause. The State's position below rested on the effectiveness of an Executive Order without any applicable treaty or Act of Congress. The Supreme Court has recently clarified that such executive action is *ultra vires. McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (July 9, 2020).

Rather, as separate sovereigns that share legal and geographic space with the states, Indian Tribes have sovereignty over their members with regard to the exercise of tribal rights, including hunting and fishing rights. It is well established that hunting and fishing activities is an area where state criminal law does not apply to members of Indian tribes, who are instead subject to regulation by their tribe. *United States v. Jackson,* 600 F.2d 1283 at 1286-1288 (9th Cir. 1979; *United States v. Wheeler,* 435 U.S. 313, 323-326 fn. 20-23, 98 S.Ct. 1079, 1086-1087 fn. 20-23, 55 L.Ed.2d 303 (1978).

Finally, the Simmons and the Cowlitz Tribe have rights protected by Washington State civil rights law in addition to any Federal rights addressed in *Confederated Tribes*. (*Confederated Tribes* did not address any issues of State civil rights.) The courts below did not address this argument and the State continues to ignore state law as a separate basis for the Simmons' defense here.

4. HISTORY OF COWLITZ HUNTING AND FISHING RIGHTS

Attached hereto as Attachment B is a monograph on the history of Cowlitz hunting and fishing in Southwest Washington by Prof. Stephen Beckham of Lewis and Clark College, one of the pre-eminent historians of the history of the fish-eating Indians of the Pacific Northwest. In that work, Prof. Beckham details the uninterrupted traditional fishing and hunting by the Cowlitz people from pre-Columbian times to the present. Over the last two hundred years, that history has involved the intersection, or collision, with white settlement and state government, which Prof. Beckham also discusses.

While the entire history of hunting and fishing by the Cowlitz Tribe is relevant here, certain historical evidence presented by Prof. Beckham has particular relevance. First, as a background to all treaty-making by Governor Stevens during the treaty period, the Federal government recognized both the existence of and the need to preserve tribal hunting and fishing rights as essential to both subsistence and what we would now call "traditional life ways," and the divestment of those rights were not on the table, even as an initial government demand, at treaty-making meetings. (Beckham, Steven, "Cowlitz Tribe: A History of Its Fishing and Hunting Rights in Southwestern Washington pp 12-13 (2019).) Further, these hunting and fishing grounds were identified as a commons, shared among tribes in the Washington Territory, rather than being exclusively used as part of tribal ancestral lands. (Beckham at p 16, citing Gibbs, "Tribes of Western Washington and Northwestern Oregon," (1877:187).) This recognition of (1) the importance and (2) the sharing of hunting, gathering, and fishing grounds was at the core of the reserved rights protected by Stevens treaties in exchange for the Indians peacefully opening parts of their ancestral lands to white settlement.

However, the Cowlitz treaty negotiations broke down, despite Governor Stevens' recognition of Cowlitz hunting and fishing rights, because Governor Stevens demanded that the Cowlitz give up all their ancestral lands and relocate from Southwest Washington to a reservation on the northwest Washington coast. (Beckham, pp 19-24.) The Cowlitz "territory remained

'Indian Country' as a matter of federal law. It was unceded land protected [by specific Federal statutes]." (Beckham at 26.) Despite that, surveying of the land for settlement continued and, without resort to war or conquest, the land was eventually opened up to white settlement (through the Lincoln Proclamation attached hereto as Attachment A).

Cowlitz fishing and hunting is historically documented on hunting and fishing grounds throughout Southwest Washington from the moment of contact to the present. Notable evidence includes: recognition of the Cowlitz as "fish eating Indians of the Pacific Coast" by the U.S. Supreme Court in *Halbert v. United States,* 283 U.S. 793 (1931) (Beckham p 37); Cowlitz tribal fisherman who opposed Initiative No. 77 (prohibiting fish traps) (Beckham, pp 37-38); Cowlitz fishermen who opposed dam building by the City of Tacoma in 1955 (Beckham, pp 41-42); and, perhaps most important for the current case, participation of Cowlitz Indians in the "Washington Blue Card Program" through which the State of Washington both recognized and attempted to regulate Indian hunting and fishing rights in the 1950s and 1960s (Beckham, pp 53-57).

The Cowlitz Tribe has never ceded its hunting, gathering, or fishing rights, but has rather continuously exercised those rights since time immemorial. The recent addition of attempts by state law enforcement to impair the exercise of those rights has not caused the Cowlitz to abandon those rights, which are and remain guaranteed by Federal and state law.

5. ARGUMENT

5.1 Initial Condition of Tribal Right to Hunt, Gather, and Fish.

Rights to hunt, fish, and gather have been held by the original peoples from time immemorial. These rights have been exercised by the descendants of the original peoples to the present without interruption. Shellfishing, the activity which is the subject of this case, has been engaged in by these peoples throughout this time. Shellfishing remains an important aspect of the lifeways of fish-eating Indians of the Pacific Northwest, providing food, service to the community, and an ingredient of cultural identity. *United States v. Washington*, 520 F. 2d 676 (9th Cir. 1975), cert. den., 423 U.S. 1086 (1976), reh. den., 424 U.S. 978 (1976): Fishing and shellfish gathering remain an important aspect of Indian tribal life, providing food, employment, and an ingredient of cultural identity. *Id.* 520 F.2d at 683.

Contrary to the position taken by the State, this right was not created or granted by treaty. Rather, it pre-existed any applicable treaties and was reserved despite the granting away of other rights in treaties. Treaties did not represent a grant of privilege from the English; rather, the Indians reserved a privilege they had previously exercised. As the United States Supreme Court later put it, such treaties are not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted. *United States v. Winans*, 198 U.S. 371 at 381, 25 S. Ct. 662; 49 L. Ed. 1089 (1905).

Indian hunting and fishing rights reflect "a hybrid mixture of Indian jurisdictional and proprietary interests." *Ute Indian Tribe v. State of Utah,* 521 F. Supp. 1072, 1145 (D.Utah 1981). Tribes have both a proprietary right to permit or refuse entry by outsiders to hunt, fish or gather upon tribal lands, see *Montana v. United States,* 450 U.S. 544, 557-567, 101 S.Ct. 1245, 1254-1258, 67 L.Ed.2d 493 (1981), and a right to take fish and game thereon, see *United States v. Minnesota,* 466 F. Supp. 1382, 1385 (D.Minn. 1979), *affirmed Red Lake Band of Chippewa Indians v. State of Minnesota,* 614 F.2d 1161 (8th Cir. 1980) (per curiam), *cert. denied,* 449 U.S. 905, 101 S.Ct. 279, 66 L.Ed.2d 136.

The rights and powers in question are *tribal* rights and powers; in fact, the basic unit of the Federal-Indian relationship is the tribe. *United States v. Washington, supra,* 520 F.2d at 691. An individual Indian's hunting or fishing right is measured wholly in relation to the nature and extent of the tribe's right. F. Cohen, *Handbook of Federal Indian Law* 185 (1942 ed.). Tribal rights in property are owned by the tribal entity, and not as a tenancy in common of the individual members, see *e.g., Fleming v. McCurtain,* 215 U.S. 56, 30 S.Ct. 16, 54 L.Ed. 88 (1909); F. Cohen, *Handbook of Federal Indian Law* 288 (1942 ed.), including hunting and fishing rights. *United States v. Washington, supra,* 520 F.2d at 688, 691; *Whitefoot v. United States,* 293 F.2d 658, 661-663 fn. 8-9 (1961), *cert. denied,* 369 U.S. 818, 82 S.Ct. 829, 7 L.Ed.2d 782 (1962).

> The distinctive characteristic of [tribal] communal property is that every member of the community is an owner of it as such. He does not take it as heir, or purchases, or grantee; if he dies his right of property does not descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing he can convey; and yet he has a right of property in the lands as perfect as that of any other person; and his children after him will enjoy all that he has enjoyed, not as heirs but as communal owners.

Journeycake v. Cherokee Nation, 28 Ct.Cl. 281, 302 (1893) *affirmed,* 155 U.S. 196, 15 S.Ct. 55, 39 L.Ed. 120 (1894).

Though individuals possess no interest in tribal lands or hunting and fishing grounds as legal title holders, "[i]n all these cases, the individual enjoys a right of user derived from the legal or equitable property right of the tribe in which he is a member." F. Cohen, *Handbook of Federal Indian Law* 185 (1942 ed.). The right to ancestral lands belongs to the Tribe but is exercised by the members of the Tribe and every member of the tribe, by virtue of that tribal membership, participates in and is protected by the rights of the Tribe. *Shulthis v. McDougal,* 170 F. 529, 533 (8th Cir. 1909), *affirmed,* 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912); see *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 307, 23 S.Ct. 115, 119, 47 L.Ed. 183 (1902). Similarly, hunting and fishing rights are tribal rights held for the common benefit of all tribal members. (See *Handbook of Federal Indian Law* at 183-194, 285-286, 288-289.)

Further, hunting and fishing rights are separate from and more geographically expansive than occupancy rights to ancestral ground. A tribe can occupy only those lands on which it could show historic exclusive use.

However, hunting and fishing grounds were often shared by multiple tribes and the recognized hunting and fishing rights recognize that by allowing hunting on "open and unclaimed lands" and fishing at "usual and accustomed places" rather than limiting those rights to the ancestral lands of the Tribe. Hunting and fishing in these locations is an individual right to a community common. *Mason v. Sams,* 5 F.2d 255, 258 (W.D.Wash. 1925). Further, these hunting and fishing rights survive the termination of a tribe and the loss of the tribe's occupancy right to ancestral grounds. See *Kimball v. Callahan (II),* 590 F.2d 768, 773 (9th Cir. 1979), applying the *Mason* case to a case where, as here, there was a loss of occupancy right to ancestral grounds:

> From *Mason* it is clear that an individual Indian enjoys a right of user in tribal property derived from the legal or equitable property right of the Tribe of which he is a member. See also F. Cohen, *Handbook of Federal Indian Law* 185 (1945). . . . Prior to the Termination Act, the Klamath Tribe held treaty hunting, fishing, and trapping rights within its reservation in which the individual members of the Tribe held rights of user. The Termination Act did not affect those rights. That an individual member withdrew from the Tribe for purposes of the Termination Act did not change his relationship with the Tribe as to matters unaffected by the Act, e.g., treaty hunting, fishing and trapping rights. . . . [footnote omitted].

For Indian people to lose a right, they must be divested of it by Constitutional means. The only Constitutional means for such divesture are (1) Treaty or (2) Act of Congress. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980); *McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (July 9, 2020). It is undisputed here that there is no applicable Treaty or Act of Congress divesting the Cowlitz of their

ancestral hunting, gathering, and fishing rights. Therefore, the Cowlitz People maintain those rights and the prosecution of the Defendants here, who were just exercising those rights, was unsound.

Further, as the Cowlitz Tribe retains a hunting and fishing right, exercised by its members, the Cowlitz Tribe, as a separate sovereign, retains exclusive jurisdiction to regulate the hunting and fishing activities of its members. The State lacks jurisdiction to regulate, through the criminal law applicable to the non-Indian citizens of the state, the hunting and fishing activities of tribal members exercising tribal rights. *United States v. Jackson,* 600 F.2d 1283 (9th Cir. 1979). Tribal jurisdiction over such minor offenses remains exclusive. *Id.,* at 1286-1288; *United States v. Wheeler,* 435 U.S. 313, 323-326 nn. 20-23, 98 S.Ct. 1079, 1086-1087 nn. 20-23, 55 L.Ed.2d 303 (1978).

5.2 State's Argument for Divesture

Admitting that there is no applicable treaty or Act of Congress divesting the Cowlitz of their hunting, gathering, and fishing rights, the State looks for divesture elsewhere, primarily in the exercise of Executive power. As argued at length in the Opening brief, the "Indian Commerce Clause" (Art. 1, Sec. 8, Clause 3) of the U.S. Constitution makes attempted divesture of Indian Rights by the President or any Executive Agency acting independently of a clear divesture statute of Congress *ultra vires*. This was the core holding of the

recent Supreme Court case *McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (July 9, 2020). All the State's argument founder on the holding of *McGirt*.

In the case below, both the State and the courts rested their claim that Cowlitz rights were divested on executive orders, which was also the basis for the holding in *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (1996) (the case that the State still rests its argument on as a keystone). The *McGirt* decision expressly addressed such executive orders and ruled that they cannot be the basis of a divesture of tribal rights. That puts paid to the arguments and reasoning below.

In their Response, the State changes their position and attempts to rest their argument on the Lincoln Proclamation (a printed and more legible version of which is attached hereto as Attachment A) and on the Indian Court of Claims decision based on that Proclamation. This is a distinction without a difference. Neither the Lincoln Proclamation nor the ICC decisions are treaties or Acts of Congress.

However, the new basis asserted for divesture on appeal also fails in its own right. Even if done through an Act of Congress, a divesture of Indian Rights is limited to those rights it specifically addresses and divests. Because the trust obligations of the Federal Government, which are supreme over state law, requires that "`[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon

its protection and good faith'," *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973), *quoting Carpenter v. Shaw,* 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 586, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977); *Ute Indian Tribe v. State of Utah,* 521 F. Supp. 1072, 1154 (D.Utah 1981, courts are "extremely reluctant" to find abrogation of vested Indian rights by Congress absent explicit language. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 690, 99 S.Ct. 3055, 3076, 61 L.Ed.2d 823 (1979).

Neither the Lincoln Proclamation nor the ICC decision (which is based on the Lincoln proclamation, finding it as the act that divested the Cowlitz of their occupancy right to ancestral lands and using the date of that Proclamation as the time at which divestment occurred) addresses hunting and fishing rights in a way that divests the Cowlitz of such rights. The Lincoln Proclamation does not mention or address hunting and fishing rights at all. Rather, it opens certain ancestral lands of the Cowlitz to white settlement (just as the executive action invalidated in *McGirt* opened some Creek land in Oklahoma to white settlement). At most, that Proclamation divested the Cowlitz of their ancestral right of occupancy to such lands. That could limit hunting, as any settled land would no longer be “open and unclaimed,” but it does not and could not limit fishing and shellfishing rights, especially rights to gather shellfish in shared

shellfishing grounds not included in the ancestral area opened to settlement by the Lincoln Proclamation.

The ICC took the Lincoln Proclamation as the date of divesture of occupancy right and compensated the Cowlitz for divesture of that right. However, the ICC lacks authority to divest tribal rights. The authority of the ICC is limited to determination and award of compensation to tribes based on previous forfeiture of rights. Even if the ICC had such authority, it did not attempt to divest the Cowlitz of hunting and fishing rights. The compensation award by the ICC was for the occupancy right to land divested by the Lincoln Proclamation. Hunting and Fishing rights, as they were not divested by that Proclamation, were not included in the compensation award by the ICC.

That limitation was inherent in the limits of the ICC's own understanding of its jurisdiction. As a predicate to compensation, the ICC required that a Tribe prove exclusive "use and occupancy" of the land for which the Tribe sought compensation. That standard is applicable only to the ancestral occupancy right of land and excludes rights, such as hunting and fishing rights, to traditional hunting and fishing grounds shared among tribes. The activity penalized in this case as shellfish harvesting at just such a traditionally shared shellfishing ground.

5.3 Reliance on of *Confederated Tribes of Chehalis*.

Despite the attempt to shift the basis for the alleged divesture of Cowlitz hunting and fishing right to from the Executive Orders analyzed in

Confederated Tribes of Chehalis v. Washington, 96 F.3d 334 (1996), the State's position, here and below, ultimately rests on the *Confederated Tribes* case. The state concludes the section of its brief on the Lincoln Proclamation and subsequent ICC award to the Cowlitz by citing back to the *Confederated Tribes* case. However, as argued at length in the opening brief, the *Confederated Tribes* case is an outlier, properly limited to the facts and procedural posture of the case, because the Court expressly declined to apply the generally applicable Canons of Federal Indian Law because there were tribal interests on both side of the case. That unique procedural posture is not present here.

> The rules of construction, however, are of no help to the Tribes in their claim to Quinault fishing rights because of the countervailing interests of the Quinaults. The government owes the same trust duty to all tribes, including the Quinault. See *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.) (government has same fiduciary relationship with the Northern Cheyenne Tribe as it does with the Crow Tribe), cert. denied, *Crow Tribe of Indians v. EPA*, 454 U.S. 1081 (1981). We cannot apply the canons of construction for the benefit of the Tribes if such application would adversely affect Quinault interests. See *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) ("No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians.").

Confederated Tribes, supra, at 340.

Here, there is no competing tribal interest. There is the interest of the Cowlitz Tribe, and its members, to hunt and fish and regulate that hunting and fishing under the tribe's exclusive sovereign power over the traditional activities of its members on one side and the State interest in regulating hunting

and fishing on the other. Therefore, the Canons of Federal Indian Law apply and those Canons require reversal of the decisions below. This is the clear application of *Mason v. Sams,* 5 F.2d 255, 258 (W.D.Wash. 1925) and its progeny.

Further, even *Confederated Tribes* expressly re-affirmed the limitation on executive orders as applied to indigenous rights.

> *Tribal powers are not implicitly divested by virtue of the Tribes' dependent status.* This Court has found such a divestiture in cases where the exercise of tribal sovereignty *would be inconsistent with the overriding interests of the National Government …*

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) (emphasis added).

Confederated Tribes further reaffirmed the rule of construal of rules through the trust obligation lens, but ruled that it could not apply a favorable lens to the interests of the Chehalis Tribe without disfavoring the Quinault Tribe on the opposing side.

> Courts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996). Any ambiguities in construction must be resolved in favor of the Indians. *Parravano*, 70 F.3d at 544. These rules of construction "are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985).

Confederated Tribes at 340.

Unlike the *Confederated Tribe* case, the recent Supreme Court case of *McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (July 9, 2020) does apply the general Canons of Indian Law to an issue of attempted divesture of tribal rights by executive action. *McGirt, supra,* holds that, under the Indian Commerce Clause of the U.S. Constitution, only Congress has the power to divest Indian rights without a treaty agreed to by the Tribe. Any attempted divesture of such rights by a state or by the Executive Branch of government without a clear statutory or treaty basis is *ultra vires.*

It is undisputed here that there is no Treaty or Act of Congress abrogating any rights of the Cowlitz Tribe. Therefore, the Defendants had the right to harvest shellfish in the Cowlitz's usual and accustomed place for such harvesting, subject only to the regulation by the Cowlitz Tribe and not to State criminal law otherwise applicable to such conduct.

Under the Canons of Federal Indian Law, the court must interpret the 1865 and 1873 Executive orders, and the Lincoln Proclamation and ICC rulings, through the Federal trust obligations to the Cowlitz people. This requires liberal construal in favor of the Defendants here and, as a corollary, precludes criminal regulation of the Tribal rights by the State.

5.4 State Civil Rights Law Also Protects the Simmons here.

Separate from, but parallel to, guaranteed Federal rights and sovereign jurisdiction over tribal hunting reserved by the Cowlitz Tribe, Washington law recognizes hunting and fishing rights of Indian people within its borders. This

was recently and vehemently reaffirmed by the Supreme Court in its Order vacating the decision *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916), (a decision which upheld the conviction of a Yakama tribal member for fishing with a gaff hook in a usual and accustomed fishing location of the Yakama People). (Order 13083-3.) In making this ruling, the Supreme Court extended a long tradition of Washington State recognizing the limits of its jurisdiction over hunting and fishing by Indians, which historically included the Blue Card program (in which Cowlitz people participated) and *State v. Stritmatter*, 102, Wn. 2d 516, 688 P.2d 499 (1984). In its Response, the State lumps the *Towessnute* decision with the *McGirt* decision and asserts, without detailed or case-specific argument, that those cases are distinguishable and don't apply, urging application of the inapposite reasoning in *Confederate Tribes* instead.

There is no sound basis to distinguish the rights recognized and protected in the *Towessnute* Order from those asserted by Defendants here. Both cases involve the exercise of historic fishing rights by fish-eating Indians of the Pacific Northwest at a usual and accustomed place for such fishing. Under the *Towessnute* Order, such fishing, even if at odds with the application of some otherwise applicable criminal law, is lawful. A conviction for such fishing is, itself, a violation of law, both Federal law and State law, and should be vacated.

The State continues to fail to recognize or apply the state right of Indian people to fish as a distinct right parallel to but different from any Federal right.

Further, as the *Confederated Tribes* case did not involve or address any such state right, it lacks any illumination on the subject. The State's argument, resting entirely on the *Confederated Tribes* case, fails to address, let alone rebut, the Defendant's right to fish under state law.

6. CONCLUSION

Indian tribes have reserved rights associated with their ancestral use and occupancy of land in the United States. These rights are not established by or dependent on treaties. They are what the tribes brought to the table during treaty making. Treaties resulted in tribes giving up some rights in exchange for the guarantee of others, benefitting the tribe by having some control over the outcome, which would not be the case if Congress had acted independent of a treaty.

If, as with the Cowlitz, a tribe has not expressly reserved a right by treaty, they nonetheless have those rights, subject only to the plenary power of Congress under the Indian Commerce Clause. The rights of Indian Tribes, including the hunting and fishing rights, can be divested only by treaty or Act of Congress. More, unless implementing the terms of a treaty or statute or fulfilling trust obligations to Indians, Presidential Proclamations or Executive Orders, or the rulings of executive agencies or tribunals, are ultra vires in Indian Country.

These tribal rights are exercised by individual tribal members. When tribal members exercise such rights, they are subject to regulation by the tribe, but not by the State. That rule of law is well-established with regard to hunting and fishing rights. The State and the various tribes within the state have alternative and exclusive jurisdiction, with tribes having the exclusive right to regulate the hunting and fishing of their members and the State having jurisdiction over everyone else.

There is no applicable treaty or Act of Congress divesting the Cowlitz people of their hunting and fishing rights. Therefore, those rights remain as undivested rights of the Cowlitz Tribe subject to the exclusive regulatory jurisdiction of the Cowlitz Tribe. This case involves the invasion, by the State, into the exclusive jurisdiction of the Cowlitz Tribe and the punishment of Cowlitz tribal members under inapplicable and pre-empted state law. Therefore, the conviction of the Simmons defendants for gathering clams was unsound and should be vacated by this court.

SUBMITTED this 26th day of July, 2021

DESCHUTES LAW GROUP, PLLC

Ben Cushman, WSBA #26358
Attorney for Appellants Simmons

CERTIFICATE OF SERVICE

I certify that on the date signed below, I e-filed the foregoing document with this Court, and served it upon Respondent's attorneys via e-service.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 26th day of July 2021 in Olympia, Washington.

Doreen Milward
Doreen Milward

Attorneys for Respondents
State of Washington

William A. Leraas, WSBA #15489
Deputy Prosecuting Attorney
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, WA 98563
wleraas@co.grays-harbor.wa.us

ATTACHMENT A

National Republican.

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VOL. III. WASHINGTON, D. C., SATU

BY THE PRESIDENT OF THE UNITED STATES.

[No. 693.]

In pursuance of law, I, ABRAHAM LINCOLN, President of the United States of America, do hereby declare and make known that public sales will be held at the under-mentioned Land Offices in the Territory of WASHINGTON and the States of MICHIGAN and KANSAS, at the period hereinafter designated, to wit:

IN THE TERRITORY OF WASHINGTON.

At the Land Office at VANCOUVER, commencing on Monday, the third (3d) day of August next, for the disposal of the public lands heretofore unoffered, situated in the following townships and parts of townships, viz:

North of the base line and east of the Willamette meridian.

Fractional township 2, north of Columbia river, including all of Vancouver island, except the western extremity; townships 3, 4, and 5, of range 1.

Fractional township 1, north of Columbia river; townships 2, 3, and 4; sections 13, 14, and 15, and sections 17 to 35, inclusive, of township 5, of range 2.

Fractional township 1, north of Columbia river; township 2; sections 4 to 9, inclusive; sections 17 to 21, inclusive, and sections 28 to 33, inclusive, of township 3; sections 1 to 7, inclusive; the north half of section 8; the north half of section 9; the north half of section 10; sections 11 and 12; the south half of section 17; sections 18 to 20, inclusive, and sections 29 to 33, inclusive, of township 4; sections 1 and 2; the south half of section 7; the south half of section 8; the south half of section 9; the south half of section 10; sections 11 to 15, inclusive; and sections 17 to 35, inclusive, of township 5, of range 3.

Fractional township 1, north of Columbia river; sections 13, 14, and 15, and sections 17 to 35, inclusive, of township 2, of range 4.

Fractional township 1, north of Columbia river; sections 17 to 21, inclusive, and sections 25 to 35, inclusive, of township 2, of range 5.

Fractional township 1, north of Columbia river; sections 22, 25, 26, 27, 34, and 35, of township 2, of range 6.

Sections 1, 2, 11, 12, 14, 15, 20, 21, 22, 29, 30, and lot 1, of section 31, of township 2, of range 7.

Fractional township 2, north of Columbia river, of range 12.

Fractional township 2, north and east of Columbia river; and township 3, of range 13.

Fractional township 2, north of Columbia river, including Rabbit island; and township 3, of range 14.

Fractional township 2, north of Columbia river; and townships 3 and 4, of range 15.

Fractional townships 2 and 3, north of Columbia river; and township 4, of range 16.

Township 5, of range 22.

Township 5, of range 23.

Township 7, of range 31.

Township 7, of range 32.

Townships 7 and 8, of range 33.

Townships 7, 8, and 9, of range 34.

All of townships 7 and 8, except Fort Walla-Walla military reservations; townships 9, 10, and 11, of range 35.

All of township 7, except military reservations on Mill creek; townships 8, 9 and 10, of range 36.

Sections 1 to 15, inclusive; sections 17 to 24, inclusive, and sections 27 to 34, inclusive, of township 7; townships 8, 9 and 10, of range 37.

Sections 1 to 8, inclusive, sections 17 to 20, inclusive, and sections 29 to 32, inclusive, of township 9, of range 38.

North of the base line and west of the Willamette meridian.

Fractional townships 2, 3, 4, 5 and 6, east of Columbia river; sections 6, 7, 18, 19, 30, 31 and 32, of township 7; townships 9 and 10 of range 1.

Fractional township 6, east of Columbia river; fractional township 7, north and east of Columbia river; township 8; sections 1 to 15, inclusive; sections 17 and 18; sections 21 to 28, inclusive; sections 33, 34 and 35, of township 9; sections 1 to 4, inclusive; sections 9 to 15, inclusive; sections 21 to 28, inclusive; sections 33, 34 and 35, of township 10, of range 2.

Sections 1, 2, 6, 7, 8, 11, 12, 13, 14, and 15; sections 17 and 18; sections 20 to 27, inclusive; and fractional sections 34 and 35, of township 8, of range 3.

Fractional township 8, north of Columbia river, of range 4.

Fractional sections 18, 19, and 30, of township 8, of range 5.

Fractional township 8, north of Columbia river, of range 6.

Fractional township 9, north of Columbia river, and township 10, of range 10.

Fractional township 9; township 10; and fractional townships 11 and 12, of range 11.

At the Land Office at OLYMPIA, commencing on Monday, the thirteenth (13th) day of July next, for the disposal of the public lands heretofore unoffered, situated in the following townships and parts of townships, viz:

North of the base line and east of the Willamette meridian.

The surveyed portion of township 12; township 16; fractional township 17, south and west of the Nisqually river; fractional township 18, west of the Nisqually river; all of township 19, except that portion east of Puget Sound and the Nisqually river; fractional townships 20, 21, and 22; township 23; fractional townships 24, 25, 26, 27, 28, 29, 30 and 31; fractional township 32, except so much of township as is covered by Penn's Cove military reservation; fractional township 33; fractional township 34, south of Deception Passage; sections 1 to 15, inclusive; sections 17 to 24, inclusive; sections 27, 28, 29, 32, 33, and 34, of township 39, of range 1.

Part of township south and west of the Nisqually river; north half of northeast quarter, the southeast quarter of northwest quarter, the northeast quarter of northwest quarter, and lots 1, 2, 3 and 4, of section 35, of township 17; lots 1 and 2, of section 6, and fractional sections 7 and 18, of township 20; fractional townships 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, and 33; fractional sections 30 and 31, and lots 1, 2, 3, 4 and 5, of sections 32, of township 34; fractional sections 1, 2, 11, 12, 13, 24, 25, 26, and 32, of township 37; sections 1 to 5, inclusive; sections 8 to 14, inclusive, and fractional sections 17, 23, 24, and 25, of township 38, of range 2.

Fractional sections 5 and 6, of township 21; fractional townships 22 and 23; fractional township 24, east of Admiralty inlet; fractional townships 25, 26, 27, 28, and 30; fractional township 31, west of Port Susan bay; sections 17 to 22, inclusive; lots 1, 2, and 3, of section 26, sections 27 to 32, inclusive, of township 32; sections 4 to 9, inclusive; sections 17 to 21, inclusive, and sections 28 to 33, inclusive, of township 38, of range 3.

Township 23; fractional townships 24, 25, 26, 27, 28, 29, and 30, of range 4.

North of the base line and west of the Willamette meridian.

Fractional sections 1, 2, and 3, south of Cowlitz river; lots 1 and 2, of section 4; lots 1 and 2, the southwest quarter of northeast quarter, the northwest quarter, and the south half, of section 5; sections 6, 7, and 8; fractional sections 9 and 10, south of Cowlitz river; sections 11 to 15, inclusive, and sections 17 to 35, inclusive, of township 11; sections 1 to 15, inclusive; sections 17 to 24, inclusive; sections 28, 29, 30, and 31; fractional section 32, north and west of Mission claim, of township 12; townships 13, 16, 17, and 18; fractional townships 19, 20, 21, 22, 25, 26, and 27; all of township 30, except Port Townsend military reservation; fractional townships 31, 32, 39, and 40, of range 1.

Townships 11, 12, and 13; sections 2 to 11, inclusive; sections 13, 14, and 15, and sections 17 to 35, inclusive, of township 14; sections 1 to 15, inclusive; sections 17 to 21, inclusive; sections 28 to 33, inclusive, of township 15; townships 16, 17, and 18; fractional townships 19, 20, 21, and 22; sections 25, 26, 27, 34, and 35, of township 25; fractional townships 30 and 31, of range 2.

Townships 13 and 14; sections 1, to 15, inclusive; sections 17 and 18; sections 22 to 27, inclusive; sections 34 and 35, of township 15; sections 1 to 4, inclusive; sections 9 to 15, inclusive; sections 17 to 35, inclusive, of township 16; township 17, sections 1, 12, 13, 24, and 25, of township 18; fractional townships 19, 20, 21, 22, and 30: sections 30, 31, 32, of township 31, of range 3.

Township 13; sections 1 to 4, inclusive; sections 5 and 6, north of Chehalis river; sections 9 to 15, inclusive; section 17; sections 19 to 35, inclusive, of township 15; sections 18, 19, and 25; sections 30 to 35, inclusive, of township 16; township 19; sections 1 to 15, inclusive; section 17; the north half of section 18; sections 20 to 26, inclusive, and section 35 of township 20; sections 7 to 15, inclusive; sections 17 to 35, inclusive, of township 21; fractional township 30; fractional sections 22 and 23; lots 1, 2, 3, and 4; the southwest quarter of southeast quarter and south half of southwest quarter of section 25; sections 26, 27, 28, 32, 33, 34, and 35, of township 31, of range 4.

Sections 1, 2, 11, 12, 13, 14, 23, 24, 25, 26, and 35, of township 13; sections 1, 2, 3, 4; sections 9 to 15, inclusive; sections 22 to 27, inclusive; sections 34 and 35, of township 16, and fractional township 30, of range 5.

Sections 1 to 13, inclusive, of township 17; sections 1, 12, 13, and 14; sections 22 to 35, inclusive, of township 18, of range 6.

Sections 1 to 15, inclusive; sections 17 to 18, of township 17; sections 1, 2, 11, 12, 13, and 14; sections 22 to 27, inclusive; sections 34 and 35, of township 18, of range 7.

Sections 1 to 15, inclusive; sections 17 to 24, inclusive, of township 17, of range 8.

Sections 1 to 15, inclusive; sections 17 to 24, inclusive, of township 17; township 18, of range 9.

Fractional township 13; fractional sections 1, 3, 4, 5, 6, 13, 22, and 23, sections 24 and 27; fractional sections 28, 33, and 34, of township 14; fractional township 15; sections 3 to 10, inclusive; section 15; sections 17 to 22, inclusive, and sections 27 to 35, inclusive, of township 16; fractional township 17; sections 1, 2, and 3; sections 10 to 15, inclusive; sections 22 to 27, inclusive; sections 34 and 35, of township 18, of range 10.

Fractional township 13; fractional sections 1, 2, 3, 4; the east half of the northwest quarter, and the east half of section 5; fractional sections 11, 12, and 13, of township 14; fractional sections 6, 7, 18, and 19; sections 25, 30, 31, and 32, of township 15; fractional townships 16, 17, and 18; townships 19 and 20, of range 11.

Fractional townships 16, 17, and 18, of range 12.

Lands claimed under the donation laws will be excluded from the sales.

No "mineral lands," or tracts containing mineral deposits, are to be offered at the public sales, such mineral lands being hereby expressly excepted and excluded from sale or other disposal pursuant to the requirements of the act of Congress approved February 14, 1853, entitled "An act to amend an act entitled An act to create the office of surveyor general of the public lands in Oregon, and to provide for the survey, and to make donations to the settlers of the said public lands, approved September 27, 1850."

IN THE STATE OF MICHIGAN.

At the Land Office at IONIA, commencing on Monday, the thirteenth (13th) day of July next, for the disposal of the vacant lands in the *even numbered sections and parts of sections*, within the undermentioned townships, which remain to the United States, within six miles on each side of the railroad "from Grand Haven and Pere Marquette to Flint, and thence to Port Huron," subject, as required by law, to a minimum of two dollars and fifty cents per acre, viz:

North of the base line and west of the principal meridian.

The north half of southwest quarter and southwest quarter of southwest quarter of section 2; the northeast quarter and south half of section 4; section 6; the north half, the north half of southeast quarter, and the north half of southwest quarter, of section 8; the east half, the east half of northwest quarter, the southwest quarter of northwest quarter, and the southwest quarter, of section 10; sections 12, 14, and 18; the northeast quarter, the east half of northwest quarter, and northwest quarter of northwest quarter, of section 20; sections 22 and 24; the northeast quarter of northeast quarter, the southeast quarter, and the south half of southwest quarter, of section 26; the northeast quarter of northeast quarter and south half of section 28; the southeast quarter of southeast quarter of section 30; the north half of section 32, the northwest quarter of northeast quarter, the south half of northeast quarter, the northwest quarter, the north half of southeast quarter, and the north half of southwest quarter, of section 34; the northeast quarter of northeast quarter, south half of northeast quarter, north half of northwest quarter, southeast quarter, east half of southwest quarter, and southwest quarter of southwest quarter, of section 36, of township 16, of range 4.

The northeast quarter and the south half of section 2; the northeast quarter of northeast quarter, the northwest quarter of northeast quarter, the southeast quarter of northeast quarter, the northwest quarter of southwest quarter, and south half of southwest quarter, of section 4; the west half of section 6; the northeast quarter of section 8; the east half of northeast quarter, the east half of southeast quarter, and northwest quarter of southwest quarter of section 10; section 12; the northwest quarter of northwest quarter, the south half of southeast quarter, and the southeast quarter of southwest quarter, of section 14; the west half of northwest quarter, of section 18; the southwest quarter of northeast quarter, of section 20; the south half of northeast quarter, the east half of northwest quarter, the southwest quarter of northwest quarter, and the south half of section 22; the north half, the northwest quarter of southeast quarter, and the southwest quarter, of section 24; the north half of northeast quarter, the southeast quarter of northeast quarter, the southwest quarter of northwest quarter, and the southwest quarter, of section 26; the southeast quarter of northwest quarter, the west half of northwest quarter, and the south half of southwest quarter, of section 28; the northeast quarter of northeast quarter, of section 32; the north half of northeast quarter, of section 34; and the east half of northeast quarter, of section 36, of township 16, of range 5.

The northeast quarter, the notheast quarter of northwest quarter, and southwest quarter of northwest quarter, of section 4; the north half, the northwest quarter of southeast quarter, and the southwest quarter, of section 6, of township 15; sections 2, 4, and 6; the northeast quarter, northeast quarter of northwest quarter, southwest quarter of northwest quarter, northwest quarter of southwest quarter, and south half of southwest quarter, of section 8; sections 10, 12, 14, and 18; the north half, the southeast quarter, and the north half of southwest quarter, of section 20; sections 22 and 24; the north half and the north half of southeast quarter, of section 26; the southeast quarter, the east half of southwest quarter, and the southwest quarter of southwest quarter, of section 28; the north half of northwest quarter and southwest quarter of northwest quarter, of section 30; the north half of northeast quarter, northwest quarter of northwest quarter, and south half of southeast quarter, and south half of southwest quarter, of section 32; the northwest quarter of northeast quarter, the south half of northeast quarter, the northeast quarter of northwest quarter, the south half of northeast quarter, the northeast quarter of northwest quarter, the south half of northeast quarter and the southwest quarter of northwest quarter, of section 36, of township 16, of range 6.

At the Land Office at EAST SAGINAW, commencing on MONDAY, the third (3d) day of August next, for the disposal of the vacant lands in the *even numbered sections and parts of sections*, within the undermentioned townships, which remains to the United States, within six miles on each side of the railroads "from Amboy, by Hillsdale and Lansing, and from Grand Rapids to some point on or near Traverse Bay," and "from Grand Haven and Pere Marquette to Flint, and thence to Port Huron," subject, as required by law, to a minimum of two dollars and fifty cents per acre, viz:

North of the base line and east of the principal meridian.

The east half of northeast quarter, southwest quarter of northeast quarter, west half of northwest quarter, southeast quarter of northwest quarter, lots 5 and 6, and east half of southeast quarter, of section 4; fractional section 10; lots 5 and 6 of section 24, of township 13; the southeast quarter of southwest quarter of section 20; the northeast quarter, lots 2 and 4, the northwest quarter of southeast quarter, and east half of southwest half, of section 30; the south half of northeast quarter, southeast quarter of northwest quarter, lot 1, southeast quarter, and southeast quarter of southwest quarter, of section 32; the north half of northwest quarter, and southwest quarter of southwest quarter of section 34, of township 14, of range 2.

The northeast quarter and southeast quarter of northwest quarter of section 10; the southwest quarter of northeast quarter of section 20; the southeast quarter of southeast quarter of section 22; the south half of northeast quarter, east half of southeast quarter, and northwest quarter of southeast quarter, of section 34, of township 9; fractional section 4, of township 12; the west half of southeast quarter and southwest quarter of section 18; the northwest quarter and west half of southwest quarter of section 20; the west half of southwest quarter and southeast quarter of southwest quarter of section 28; fractional sections 30 and 32, of township 13, of range 3.

Fractional section 4; the northwest quarter of northeast quarter, west half of northwest quarter, northeast quarter of northwest quarter, and southeast quarter of southeast quarter of section 10; the east half of northeast quarter, the southeast quarter, the east half of southwest quarter, and southwest quarter of southwest quarter, of section 12; the west half of northeast quarter, southeast quarter of northeast quarter, west half of southeast quarter, northeast quarter of southeast quarter, and east half of southwest quarter of section 14; the northeast quarter, east half of northwest quarter, northwest quarter of northwest quarter, and lot No. 4, of section 24, of township 13; the southeast quarter of northeast quarter, lots 4, 5, and 6, and south half of southeast quarter, of section 10; the northeast quarter, west half of southeast quarter, northeast quarter of southeast quarter, and west half, of section 12; section 14; lots 3 and 4, and south fractional half of section 18; sections 20 and 22; the north half of northeast quarter, northwest quarter, south half of southeast quarter, and east half of southwest quarter of section 24; sections 26 and 28; fractional sections 30 and 32, the north half, the north half of southeast quarter, the west half of southwest quarter, and northeast quarter of southwest quarter, of section 34; the west half of northeast quarter and north half of northwest quarter of section 36, of township 14; the east half of northeast quarter, east half of southeast quarter and southwest quarter of southeast quarter, of section 26; the north half of section 36, of township 15, of range 4.

Lot 1 of section 8; fractional section 10, of township 9; the east half of northeast quarter, lots 1, 2, and 3, and the northeast quarter of southeast quarter, of section 20; the south half of southeast quarter of section 28; the east half of northeast quarter, lots 2, 3, and 4, and east half of southeast quarter, of section 32, of township 10; the southwest quarter of southwest quarter of section 4; the west fractional half of northeast quarter, the west half of southeast quarter, and northeast quarter of southeast quarter, of section 6; lots 2, 3, 4, 5, 6, 8, and 9, and southwest quarter of southeast quarter, of section 8; section 18 and fractional section 20, of township 13; section 4; north half of northeast quarter and lot 1 of section 6; the northeast quarter, northeast quarter of northwest quarter, north half of southeast quarter, west half of southwest quarter, and southeast quarter of southwest quarter, of section 8; the west half of northeast quarter, southeast quarter of northeast quarter, southeast quarter, and west half, of section 10; fractional section 12; the northwest quarter of northeast quarter, the west half of southeast quarter, and the west fractional half of section 18; the north fractional half of northwest quarter of section 30, of township 14; lot No. 2, south half of southeast quarter, and southwest fractional quarter, of section 30; the east fractional part east of Kawkawling river, the north half of southeast quarter, and the west fractional half, of section 32, of township 15, of range 5.

IN THE STATE OF KANSAS.

At the Land Office at TOPEKA, commencing on MONDAY, the third (3d) day of August next, for the disposal of the public lands heretofore unoffered, situated in the following townships and parts of townships, viz:

South of the base line and east of the sixth principal meridian.

The parts of townships 12, 13, 14, and 15, inside of the Shawnee reservation, of range 20.

The parts of township 12 inside of Shawnee reservation; townships 13 and 14, and the parts of township 15 inside of Shawnee reservation, of range 21.

The parts of township 12 inside of Shawnee reservation; townhips 13 and 14; and the part of township 15 inside of the Shawnee reservation; and the parts of townships, 18, 19, and 20 inside of the Miami reservation, of range 22.

The parts of townships 11 and 12 inside of the Shawnee reservation; townships 13 and 14; and the parts of township 15 inside of the Shawnee reservation; and the parts of township 18 inside of the Miami reservation; townships 19, 20, 21, and 22, of range 23.

The parts of township 11 inside of Shawnee reservation; townships 12, 13, and 14; the parts of township 15 inside the Shawnee reservation; the parts of township 18 inside of the Miami reservation; townships 19, 20, 21, and 22, of range 24.

The parts of township 11 inside of the Shawnee reservation; townships 12, 13, and 14; the part of township 15 inside of the Shawnee reservation; the parts of township 18 inside of the Miami reservation; townships 19, 20, 21, and 22, of range 25.

At the Land Office at HUMBOLDT, commencing on MONDAY, the thirteenth (13th) day of July next, for the disposal of the public lands heretofore unoffered, situated in the following townships and parts of townships, viz:

South of the base line and east of the sixth principal meridian.

The parts of township 23 inside of the Miami reservation, of range 22.

The parts of township 23 inside of the Miami reservation, of range 23.

The parts of township 23 inside of the Miami reservation, of range 24.

The parts of township 23 inside of the Miami reservation, of range 25.

Lands appropriated by law for the use of schools, military and other purposes, or lands on which applications have been filed under the provisions of the homestead law, will be excluded from the sales.

The offering of the above lands will be commenced on the days appointed, and will proceed in the order in which they are advertised, until the whole shall have been offered, and the sales thus closed; *but no sale shall be kept open longer than two weeks*, and no private entry of any of the lands will be admitted until after the expiration of the two weeks.

Given under my hand, at the city of Washington, this twentieth day of March, anno Domini one thousand eight hundred and sixty-three.

ABRAHAM LINCOLN.

By the President:
J. M. EDMUNDS,
Commissioner of the General Land Office.

NOTICE TO PRE-EMPTION CLAIMANTS.

Every person entitled to the right of pre-emption to any of the lands within the townships and parts of townships above enumerated, is required to establish the same to the satisfaction of the Register and Receiver of the proper Land Office, and make payment therefor as soon as practicable after seeing this notice, and before the day appointed for the commencement of the public sale of the lands embracing the tract claimed; otherwise such claims will be forfeited.

J. M. EDMUNDS,
Commissioner of the General Land Office.

NOTE.—Under the regulations of the Department, as heretofore and now existing, no payment can be made for advertising proclamations except to such publishers as are *specially authorized* to publish by the Commissioner of the General Land Office.

mar 31—w13w

Cowlitz Tribe:

A History of Its Fishing and Hunting Rights

in Southwestern Washington

Submitted to
Cowlitz Tribe
7700 NE 26th Ave
Vancouver, WA 98665

Stephen Dow Beckham
1389 SW Hood View Lane
Lake Oswego, OR. 97034-1505

December, 2019

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Introduction

The Cowlitz Tribe entered into formal relations with the United States in March, 1855, as a participant in the Chehalis River Treaty Council at Cosmopolis, Washington Territory. It sustained decades of federal dealings wherein its members obtained Indian Homesteads (Homestead Act of 1860, amended 1876), Public Domain Allotments (4th Section, General Allotment Act of 1887), and allotments on the Quinault Reservation (General Allotment Act of 1887). The federal government served as the trustee of these non-taxed lands, administered the disposition of resources from these lands, established Indian Money Market Accounts for the Cowlitz land-owners, and probated the estates of these Indians. In spite of these and other measures of a "government-to-government" relationship, the Bureau of Indian Affairs withdrew in the mid-1950s from dealing with the tribal council and members of the Cowlitz Tribe. The Department of Interior effectively invoked an ad hoc "administration termination" of the Cowiltz Tribe.

Staring in 1973 the Cowlitz tribal council began an ambitious mission to document and argue its historical and legal relationship with the United States. It carried out these efforts through the guidelines of the Federal Acknowledgment Program administered by the Office of Acknowledgment and Research, subsequently the Branch of Acknowledgment and Research, and today the Office of Federal Acknowledgment in the Bureau of Indian Affairs. Paradoxically, the tribe had to petition the agency that had with no explanation administratively "terminated" it. The petition process proved exceedingly complicated and prolonged. It took twenty-nine years or the lives of more than a generation of the tribe. The matter was resolved on January 4, 2002, when the Cowlitz were given formal federal acknowledgment, an action published in the *Federal Register*.

The acknowledgment process necessitated extensive genealogical research and proofs of descent. It required probing the records of the National Archives, Washington, D.C., and Seattle, to document federal dealings with the Cowlitz Tribe. These included Indian Census records, BIA enrollments, decennial census compilations, land records, BIA administrative records, minutes of treaty councils, allotment records, probates, fishing and hunting issues, admittance of Cowlitz members to Indian schools and hospitals, and correspondence between agents, superintendents, and the Commissioner of Indian Affairs relating to the Cowlitz Tribe. The material also included records of the U.S. Army, U.S. Navy, U.S. Topographical Engineers, General Land Office, and other agencies dealing with the Cowlitz.

When the revised petition was submitted in 1998, it was challenged by the Quinault Business Committee which feared that as a land-owing tribe on the Quinault Reservation, the Cowlitz, if restored to a federal relationship, would seek to participate in the governance of the reservation along with the several other western Washington tribes allotted lands at Quinault. The Quinault opposition delayed the petition process nearly two years, but finally in May, 2000, Kevin Gover, Assistant Secretary of Interior for Indian Affairs, announced the favorable recommendation of the Office of Federal Acknowledgment. Two more years passed before publication of the tribe's recognition.

Federal acknowledgment was a major accomplishment, but the restoration of status on par with other tribes of the United States was incomplete. Several matters were unresolved. These included the undistributed Judgment Fund in Docket 217, Indian Claims Commission, and unextinguished tribal fishing and hunting rights. When western Oregon tribes were "restored" to federal status between 1977 and 1989, their enabling restoration acts addressed fishing and hunting. The Federal Acknowledgment Program made no such determinations. Thus the Cowlitz have sought to clarify the situation of their fishing and hunting rights. This research report is part of the process of discovery bearing on Cowlitz fishing and hunting within their aboriginal lands in southwestern Washington. The report identifies the chronology of events and several turning points that affect tribal rights.

Stephen Dow Beckham
Lake Oswego, Oregon

Beckham, Pamplin Professor of History, Emeritus, Lewis & Clark College, was engaged by the Cowlitz Tribe in 1979 as its witness in *Cowlitz Tribe of Indians, et al., v. Bateman, et al.*, [See parallel case, *Wahkiakum Band of Chinook Indians, et al. v. Bateman, et al.*, 655 F. 2d 176, 177-80 (9th Cir. 1981)]. The Cowlitz Tribe retained Beckham as witness in 1995-97 *State of Washington v. Whitner, et al.* PA94-CR 2598/2045/2597/2043/2044, District Court of Washington for Cowlitz County. Beckham served as witness for a Cowlitz tribal member, *Dan Van Mechelen v. State of Washington Department of Revenue*, Board of Tax, No. 08-011, Olympia, WA. From 1979 to 2000 Prof. Beckham worked as an ethnohistorical researcher and primary author of its Petition for Federal Acknowledgment. During those years he testified for the Cowlitz Tribe before Congress and in Cowlitz matters before the Indian Board of Indian Appeals.

Contents

"Finally, based on my work and training and experience as an anthropologist, I have reached the professional opinion that the Cowlitz Indian Tribe which is now before this committee is the political continuation of, and successor in interest to, the aboriginal Cowlitz Tribe."

Dr. Verne Frederick Ray, Testimony on S. 2931, Senate Select Committee on Indian Affairs, December 7, 1982

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1. Cowlitz Tribe and Western Washington Treaties

Historical Context

The history of treaty-making in Washington Territory was a product of evolving relations between the United States and Indian tribes. The formal process commenced in 1778 with the Delaware Treaty. Notably the Delaware agreement not only sought to establish peace and friendship between the tribe and the thirteen colonies in rebellion against Great Britain, it provided the Delaware might seek statehood. That promise was never fulfilled nor were many of the promises in the history of federal-tribal treaty relations that continued until 1872 when the treaty process was abandoned.

By the 1850s Euro-American settlement had surged across North America to the shores of the North Pacific Ocean. Settlers poured in via the Oregon Trail as well as by sea. Others moved north from the gold fields of California or south from fur trade posts in Canada. Their presence compelled Congress to pass the Organic Act of August 14, 1848 (9 Stat. 323), creating Oregon Territory. The law put aside former governance by the Hudson's Bay Company and of the Oregon Provisional Government with its capital in Oregon City. The statute created a territorial government in the Pacific Northwest with appointed officials, a delegate who could speak but not vote in Congress, and the extension of federal services to the region. The law set in place construction and staffing military posts, lighthouses, federal courts, post offices, customs houses, wagon roads, the public land survey system, granting and selling public lands, charting shorelines and harbors, and the administration of Indian affairs.

The Oregon Organic Act referred in Section 1 specifically to the tribes of the region:

> **Provided, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed** (U.S. Congress, *Statutes at Large, 1848*, Chap. CLXXVII; 9 Stat. 323). [Emphasis supplied.]

The fourteenth section of the Organic Act extended the Northwest Ordinance of 1787 to Oregon Territory (1 Stat. 52, note a).

> *And be it further enacted,* That the inhabitants of said territory shall be entitled to enjoy all and singular, the rights, privileges, and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio, by the articles of compact contained in the ordinance for the government of said territory . . . , ¶14, 9 Stat. 323.

The critical element of the Northwest Ordinance was its third article which affirmed, once again, the nation's policy toward Indians:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them, Art. III, 1.

The Ordinance of 1787 and its reiteration in the Oregon Organic Act of 1848 established a legal foundation and philosophy for dealing with the tribes of Washington Territory. In spite of these assurances, however, Congress compromised these principles and fostered disillusionment, distrust, and eventually disgust among the tribes. The noble promises rang false in light of the events that soon overtook the tribes.

Samuel Thurston (1816-1851), delegate to Congress from Oregon Territory, expressed early in 1850 dissatisfaction with the appointment of agents and appropriation of funds for functions of the Oregon Superintendency of Indian Affairs. Thurston wrote:

> The Committee on Indian Affairs in the Senate have the subject of extinguishing the Indian title to lands in Oregon before them, and have promised me **to report a bill soon for the extinguishment of their title to all of that part of Oregon lying west of the Cascade Mountains, and for the removal of the Indians east of those mountains.** I am in hopes that it will pass Congress in the course of next summer, and all the country at present and for some time to come, needed for settlement, will be thrown open to the immigrant and thus the first pre-requisite step will have been taken preparatory to the final disposition of the soil

(Coan 1921:54). [Emphasis supplied.]

On June 5, 1850, Congress passed "An Act Authorizing the Negotiation of Treaties with the Indian tribes in the Territory of Oregon, for the Extinguishment of their Claims to Lands Lying West of the Cascade Mountains, and for other Purposes." The law provided:

> that the President may appoint one or more Commissioners **to negotiate treaties with the several Indian tribes in the Territory of Oregon, for the extinguishment of their claims to lands lying west of the Cascade Mountains; and, if found expedient and practicable, for their removal east of said mountains; also, for obtaining their assent and submission to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories of the United States, so far as they may be applicable to the tribes in the said Territory of Oregon**; the compensation to such commissioner or commissioners not to exceed the rate heretofore allowed for similar services. [Emphasis supplied.]

This statute also authorized the position of the Oregon Superintendent of Indian Affairs, appointment of up to three Indian agents, appropriation of $25,000 for operations with the tribes, and extended the Indian Trade and Intercourse Act (1834, as amended) to the Pacific Northwest. The law further defined "Indian Country" as those lands claimed or belonging to the United States not ceded by ratified treaty of the tribes to the United States (U.S. Congress 1850a). (*Statutes-at-Large, 1834,* 23 Congress, 1st Session, pp. 729-735; 4 Stat. 729).

The extension of the doctrine of "Indian Country" to the Pacific Northwest on June 5, 1850, meant that in all unceded Indian lands, tribal law and custom prevailed, at least in theory. Tribal law and custom governed internal tribal affairs, since "Indians not taxed" were not deemed citizens of the United States. These matters suggested increasing ambiguities about the status of tribes and their members in Washington and Oregon territories. In order to try to define further tribal roles and federal responsibility, the federal government established in 1850 the Oregon Superintendency of Indian Affairs and in 1853 the Washington Superintendency of Indian Affairs. The Secretary of Interior named superintendents who appointed agents. The President and Superintendents created treaty commissions and started to implement its policies.

Settlers continued to emigrate to the Pacific Northwest. Prior to

negotiation of any treaties, Congress passed on September 27, 1850, "An Act to Create the Office of Surveyor-General of the Public Lands in Oregon, and to Provide for the Survey, and to Make Donations to Settlers of the Said Public Lands." Familiarly known as the Donation Land Act, the law granted 320 acres to each adult male and married female who settled in the Territory prior to December 1, 1850, including half-breed Indians. The law set the stage for dispossession of the tribes of the Pacific Northwest. Settlers promptly began to appropriate sites of tribal villages, fisheries, gathering areas, cemeteries, and portages. Congress, in spite of the promises of the "Organic Act," had not protected tribal landed interests or rights (U.S. Congress 1850b) (*Statutes-at-Large*, Chap. LXXVI, 497-500; 9 Stat. 496, amended by 10 Stat. 1853).

The Oregon Donation Land Act had immense impact on land tenure in western Washington and Oregon. Nearly 2.8 million acres passed from federal "ownership" (not yet obtained by ratified treaties) to individual tracts filed on by claimants at the General Land Office. A total of 7,437 claims were entered in Oregon and another 1,018 in the region north of the Columbia River that, in 1853, became Washington Territory. The law set up a system that, once the land was surveyed, title would pass from the federal government to the land claimant (Johansen and Gates 1967:234).

Numerous settlers filed for Donation Land Claims in Cowlitz tribal lands. The claims lined the north bank of the Columbia River from Vancouver downstream to Lewis River, to the Kalama River, and to the mouth of the Cowlitz. Settlers also filed for claims along the lower reaches of these rivers as well as up the Cowlitz for dozens of miles and into the watersheds of the Skookum Chuck and Chehalis rivers. The claims eventually embraced the farms of the Puget Sound Agricultural Company on Cowlitz Prairie where there was a scramble for the improvements such as houses, barns, granaries, and fences. The spread of settlement and dispossession of the Indians in the 1840s and early 1850s was the predicate to conflicts that erupted between the tribes and settlers in the fall of 1855 (Strong 1930:111-12, 119-21).

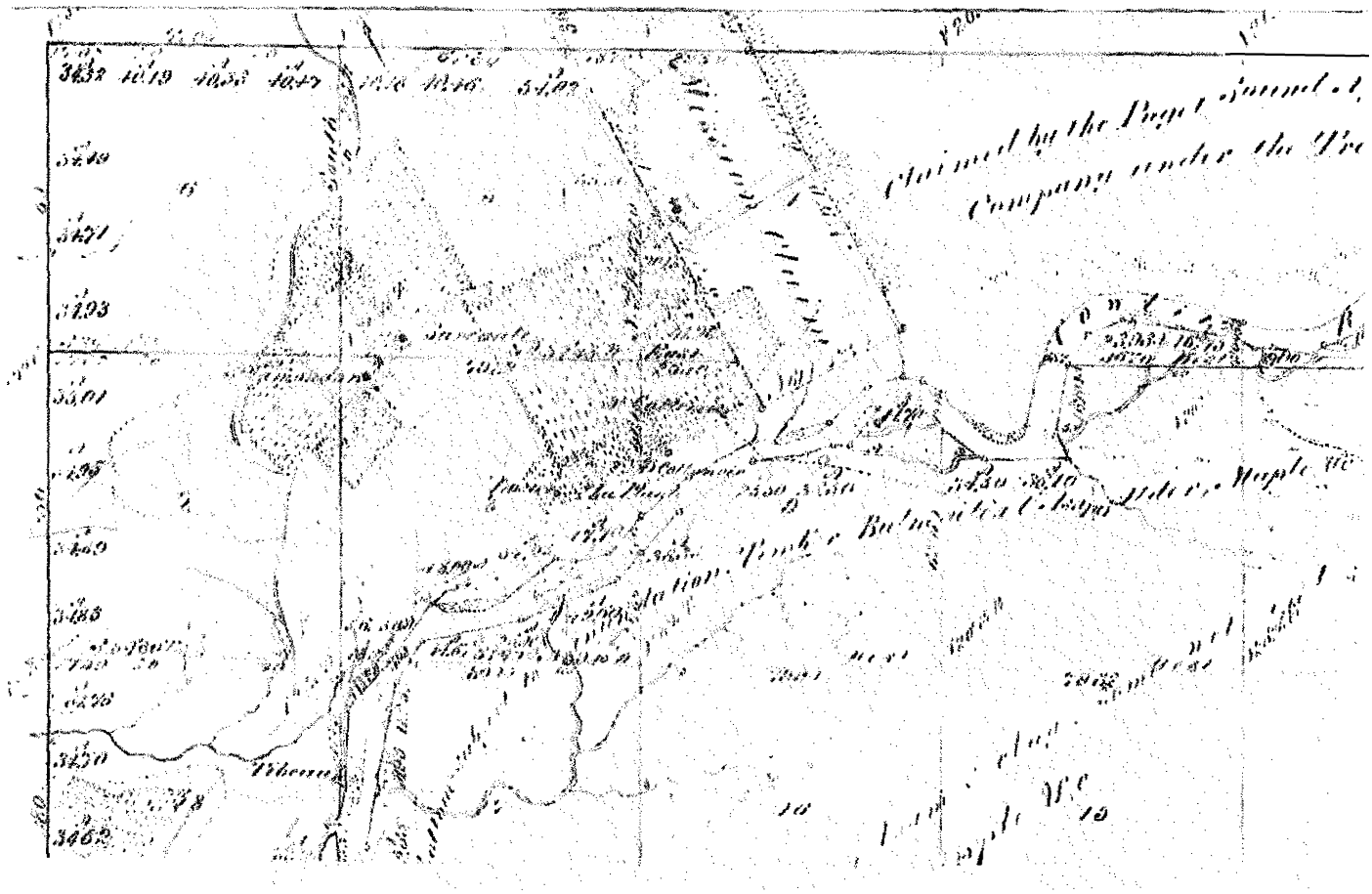

Fig. 1. Farms of settlers on Cowlitz Prairie, 1853: Edward Warbass [unnamed], Tibeau, Simon Plamondon, E. Laussier, Sareault, Peter Leplante, David Cottonoire, Michael Cottonoire, St. Francis Xavier Mission (Ives and Hunt 1853a).

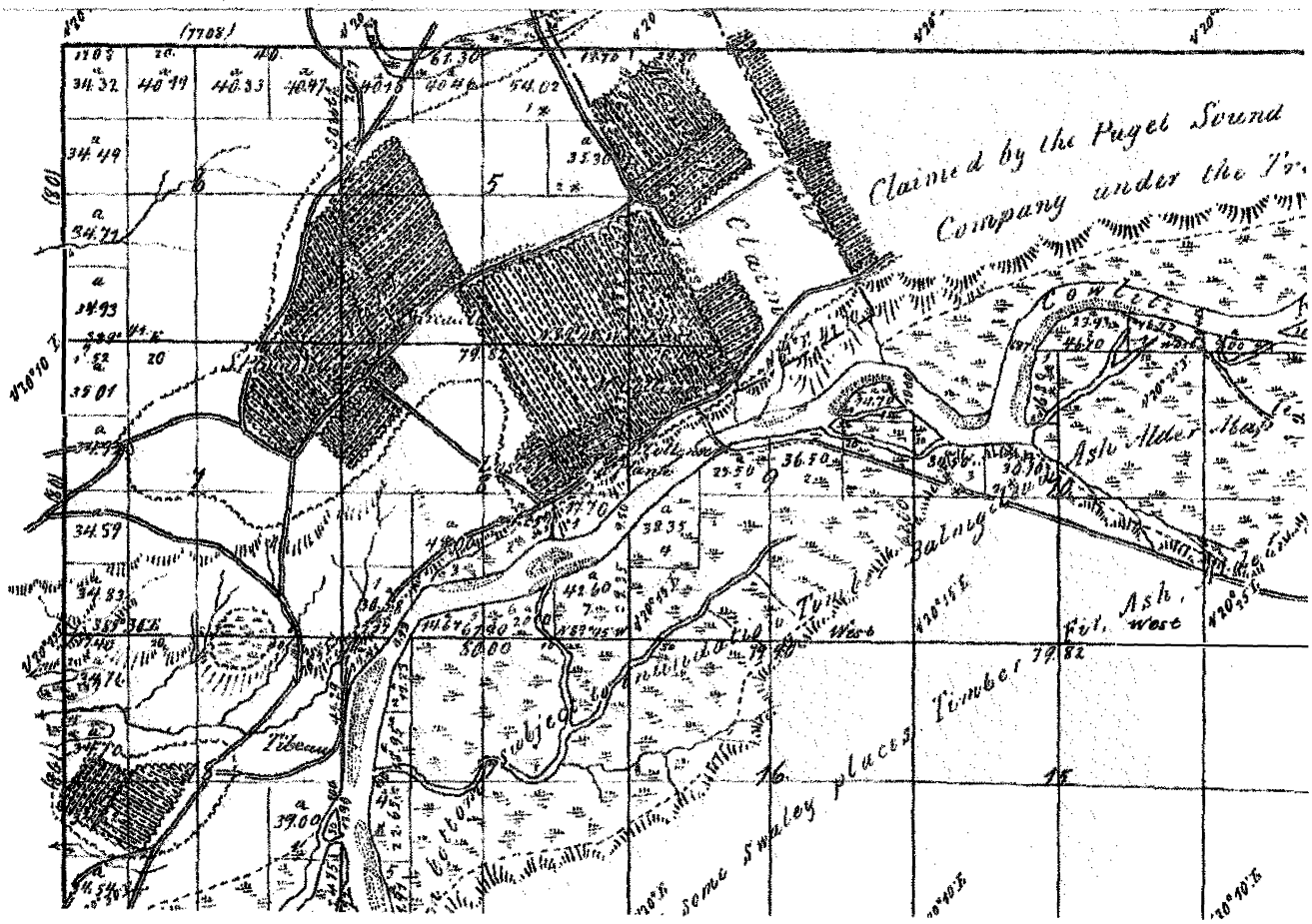

Fig. 2. Configuration of fields and fences in 1853 on Cowlitz Prairie, (Ives and Hunt 1853b).

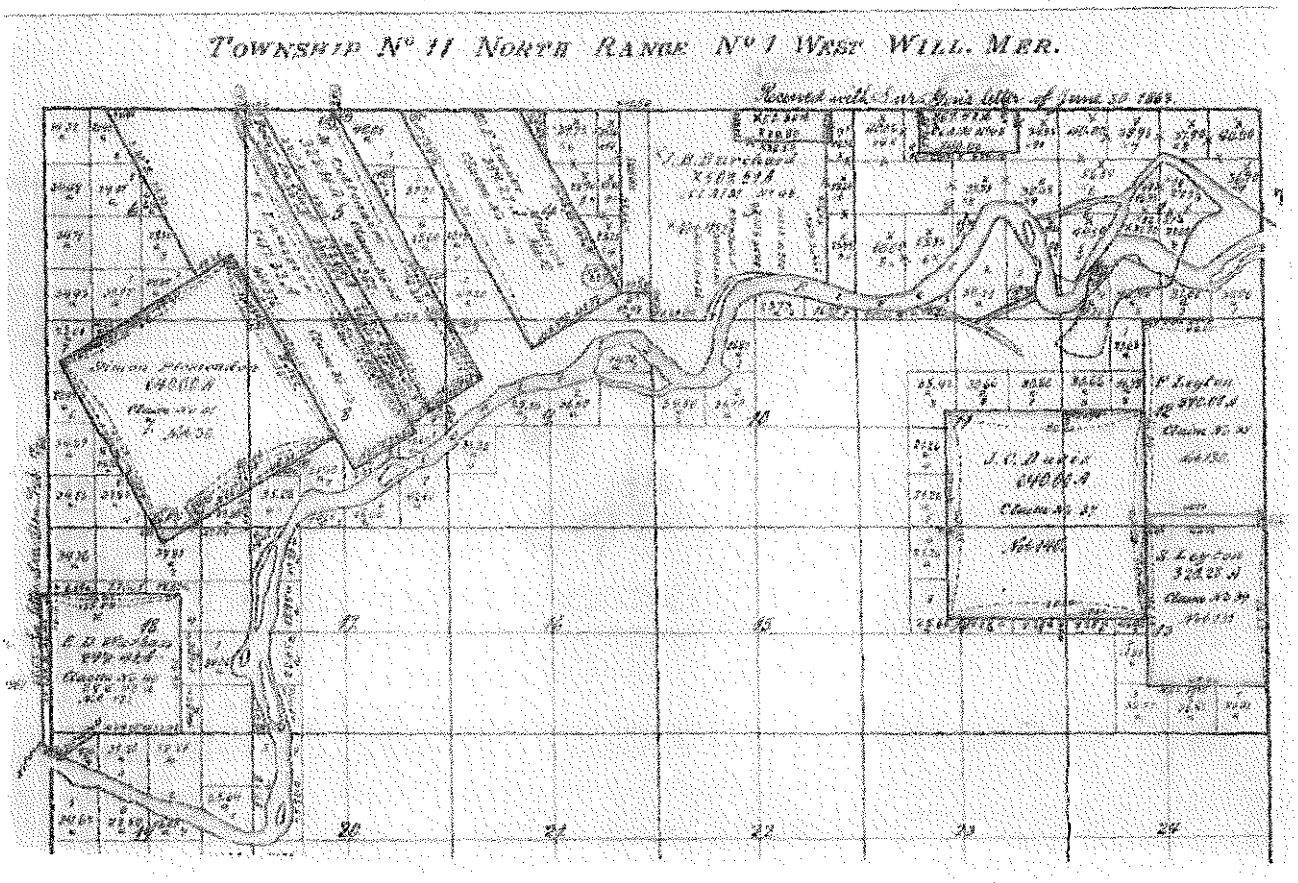

Fig. 3. Land Status Plat documenting Donation Land Claims on Cowlitz Prairie (Henry 1868).

The Act of June 5, 1850, proposed the removal of the tribes west of the Cascade Mountains to the Columbia Plateau. This statute ignored the significant cultural and linguistic differences between these peoples or their conflicts and differences that were a product of their origins and millennia of residency in the region. Inherent in the statute's advice was the philosophy of "Removal" that had persisted as a foundation of federal Indian policy since the late eighteenth century. Formal adoption of "Removal and Relocation" commenced in 1828 with the administration of President Andrew Jackson and passage on May 28, 1830 of the Indian Removal Act (4 Stat. 411). This law built on the programmatic removals of the Jefferson, Madison, and Monroe

administrations to designate Indian Territory west of the Mississippi River (later Kansas, Nebraska, and Oklahoma) as a permanent home for the tribes of the eastern third of the United States. The government plan was to remove all tribes to Indian Territory, isolate them from Euro-Americans, and transform them into "civilized" agrarians speaking English, adopting Christianity, and assuming the basic elements of Euro-American culture (Gibson 1980:281-82).

The "Removal and Relocation" program compelled tribes either by treaty or act of Congress to give up their aboriginal lands, move to a designated reservation, and submit to the civilization efforts implemented by the Office of Indian Affairs. The programs were often led by missionaries engaged by the government to assume management of the reservations. Federal insistence on segregating Indians from non-Indians persisted through the 1830s, 1840s, and into the 1850s and became a primary goal in the treaty program in the Pacific Northwest.

By 1850 or the decade of regular relations between the Cowlitz Tribe and the United States, the Office of Indian Affairs operated in the Pacific Northwest with the following goals:

(1) Reduction of the Indian land base or "Indian Country" by treaty councils and ratification of agreements by the U.S. Senate, approval of the President, and proclamation of the treaties.

(2) Removal or relocation of Indians onto reservations, lands reserved as "Indian Country" and held in trust by the United States for the benefit of the peoples who resided on those reservations.

(3) Civilization of Indians premised upon their adoption of an agricultural economy, use of the English language, embrace of "civilized" clothing and lifeways, manners, and customs eventually leading to citizenship in the United States.

(4) Peace between Indians and Euro-Americans.

These policies shaped the relationships of the Cowlitz and the federal government and, in the long term, affected the exercise of tribal fishing, hunting, and gathering within their aboriginal lands in southwest Washington.

In August, 1851, Anson Dart, Superintendent of Indian Affairs for Oregon Territory, held a treaty council at Tansy Point on the south side of the mouth

of the Columbia River near present Warrenton, Oregon. He entered into treaties with the Waukiakum Band of Chinook (August 8), Konnaac Band of Chinook (August 8), Lower Band of Chinook (August 9), and the Wheelappa and Quillequequas Band of Chinook (August 18) from southwestern Washington. The treaties proposed small reservations within the tribes' homelands and enumerated several reserved rights such as hunting, cutting timber for fuel, harvesting of cranberries, cultivation of the soil, and "fishing upon the Columbia river" and other streams. None of the Dart treaties was ratified (Beckham 1984:135-137).

On March 2, 1853, Congress divided Oregon Territory into two parts. The present state of Oregon became Oregon Territory. All of the remaining area north of the Columbia River to Canada and east to the Rockies became Washington Territory. Section 1 of this act (10 Stat. 172) affirmed relations with the tribes:

> That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said territory, their lands, property, or other rights by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed.

The enabling act for Washington Territory was the predicate for the President to name Isaac I. Stevens to serve as governor and superintendent of Indian affairs.

Washington Treaty Commission 1854-55

Isaac Ingalls Stevens, a graduate of West Point in 1839 at the top of his class, was a veteran of the Mexican War. In 1853 he gained a complex assignment in the American West. He was named first governor of Washington Territory, created on March 2, 1853, by Congress. He was also named Superintendent of Indian Affairs for the territory extending from the crest of the Rockies to the Pacific and lying between Oregon Territory and Canada. A trained engineer, he was further appointed head of the Northern Division of the Pacific Railroad Surveys. That assignment made by Jefferson Davis, Secretary of War, put Stevens in charge of finding a route for a transcontinental railroad from Minnesota to the Pacific Ocean. A driven, competitive man, Stevens was determined to succeed in all three assignments.

Stevens' approach to his complex missions was to delegate important tasks to subordinates. Charles H. Mason, the territorial Secretary of State, assumed several responsibilities for establishing the new territorial government in Olympia. Stevens assigned Lt.-Colonel George B. McClellan to examine the eastern flank of the Cascade Range between the Columbia River and Canada to find, determine elevations, and survey the most suitable passes for the railroad. Stevens traveled overland from Minnesota with a large company of surveyors, naturalists, engineers, and support staff to cross the northern Great Plains, Rockies, Columbia Plateau, and ultimately the Cascade Mountains to layout the most efficient and practicable railroad route (Stevens 1888).

Stevens likewise turned to subordinates to assist him implementing federal Indian policy and treaties. Michael Simmons (1814-1867), an overland traveler of 1844, became his primary Indian agent. Simmons settled in 1845 on Budd Inlet where he constructed a water-powered sawmill and grist mill. He eventually moved to nearby Olympia. Simmons was given charge of the Indians from the Skookum Chuck on the south, to the Canadian boundary on the north, to the Pacific Ocean on the west (Bancroft 1890[31]:1-3, 94, 176; Stevens 1854a).

Benjamin "Frank" Shaw (1829-1908) served as Stevens' interpreter because of his knowledge of the Chinook Jargon. Shaw had traveled overland to Oregon in 1844 and became a partner with Michael Simmons in milling on Puget Sound. Shaw was named "Interpreter" for the Western Washington Treaty Commission (Bancroft 1890[31]:272; Haines 1999:12-13). Hugh A. Goldsborough (1818-1890), another member of the Commission, served as commissary. Goldsborough came to Puget Sound in 1850 when his brother, Louis M. Goldsborough, commander of the U.S. Navy frigate *Massachusetts*, mounted a reconnaissance seeking locations for forts, lighthouses, and customs houses (Bancroft 1890[31]:48).

Stevens also tapped other settlers for service to the Washington Superintendency of Indian Affairs. In the Whidbey Island-San Juans district, Stevens hired Captain Robert C. Fay (1820-1872), a farmer and exporter of Indian-caught, salted salmon. In trading with the tribes of northern Puget Sound, Fay had acquired good knowledge of their leaders, numbers, and primary villages. In southwestern Washington Stevens turned to Sidney Ford (1801-1866), Sr., a settler and legislator, he charged with dealing with the Cowlitz, Chehalis, and Shoalwater tribes. He was also aware of John Gilchrest Swan (1818-1900), resident since 1853 of Willapa Bay and author of *The Northwest Coast: Three Years Residence in Washington Territory* (1857).

Stevens engaged William H. Tappan (1821-1907), an overland emigrant of 1849, to serve as Indian agent to the Lower Cowlitz and the tribes along the northern bank of the river from the Columbia Gorge to the ocean (Bancroft 1890[31]:35, 48, 94, 121, 177).

George Gibbs (1815-1873) proved singular among the men helping Stevens implement Indian policy. Gibbs was a graduate of the Dane Law College, Harvard University, a lawyer and historian from New York City who arrived overland in 1849 as a civilian traveling with the U.S. Army Mounted Riflemen. Gibbs, a skilled linguist, cartographer, and self-trained ethnographer, served in 1851 as secretary to the Willamette Valley Treaty Commission and as secretary and cartographer to the Northwestern California Treaty Commission. In 1853 he settled on a Donation Land Claim near Steilacoom and was compiling ethnographic data and Indian vocabularies, later published in a series of dictionaries on the Chinook, Chinook Jargon, Nisqually, Lummi, and other languages. George McCellan in 1853 hired Gibbs to join his expedition as a linguist and naturalist during the examination of Cascade passes for a railroad route (Beckham 1969; Gibbs 1853).

Between January 14 and February 6, 1854, Stevens engaged Gibbs to travel with him to make a reconnaissance on the *Sarah Stone* of Puget Sound. While Stevens was seeking potential harbors as a terminus for a transcontinental railroad, he was also exploring for coal veins to provide fuel for steam locomotives and steamships. Gibbs was compiling data for a map of western Washington illustrating tribal distribution. Basing his cartography on the Charles Wilkes map of western Washington published in 1845, Gibbs interviewed dozens of Indians to secure information on locations of bands and villages, names of tribal headmen, populations, and differences in the languages and dialects of the territory (Gibbs 1853-54, 1854-55).

Governor Stevens' staff assisting in Indian affairs spent most of 1854 collecting information on the tribes, villages, and their populations. Gibbs assembled the data for Stevens' first annual report to the Commissioner of Indian Affairs. Stevens signed the document on September 16, 1854. Gibbs articulated a specific philosophy for dealing with the tribes of Washington Territory:

(1) Removals of Indians to distant locations was "impracticable." Gibbs wrote:

> To throw the fishing tribes of the coast back upon the interior,

even were the measure possible, would destroy them; nor is there any suitable region east of the Cascades where all of the tribes now living there could be concentrated and find food. They must, therefore, remain as they are, adopting such a plan only as will remedy, so far as may be, the inconvenience of the contact.

(2) Reservations should be small because the territory was essentially not a game country. Gibbs argued that areas of "exclusive use" reserved for Indians did not need to be of great size:

> They require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found, and of grazing their horses and cattle at large; but they do not need the exclusive use of any considerable districts.

(3) Continued use of Indian subsistence areas should be preserved. Gibbs wrote:

> A drove of hogs belonging to one white man will consume the winter provisions of a tribe of Indians. In like manner, the use of their customary fisheries and free pasturage for their stock on unenclosed lands, should be secured.

(4) Indian access to their fisheries must be guaranteed. Gibbs wrote:

> The subject of the right of fishery, in its present position, is believed to be one concerning which difficulties may arise. It is certain that the intention of Congress never was that the Indian should be excluded from them; but as no condition to this effect was inserted in the donation act, the question has been started whether persons taking claims, including such fisheries, do not possess the right of monopolizing them. It is, therefore, proper that this also should be set at rest by law.
>
> The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that the Indians could be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing

> them. It is therefore desirable that this question should be set at rest by law.

(5) Public lands not explicitly reserved to Indians and not claimed by Euro-Americans should be open to both. Gibbs wrote:

> As regards treaties for the purchase of their lands and other purposes, it would be most advantageous simply to acquire the right of settlement at pleasure in their territory, except upon the tracts reserved for their own use, leaving the remainder as lands common to both.
> (U.S. Senate 1854)

Finally in December Stevens was ready and engaged Gibbs, a member of the bar in Oregon and Washington territories, to draft a template treaty to use in the several councils he planned in Washington Territory. Stevens wanted to move quickly, indeed decisively, in settling Indian matters. His goals were to secure maximum cession of lands to facilitate continuing Euro-American settlement and set aside only small reservations for tribes and bands who were expected to leave their old homelands and settle on the new reservations under the watch of Indian agents and U.S. Army personnel stationed at nearby forts.

The "Proceedings" of the Washington Treaty Commission, recorded before it began its work with the tribes, noted:

> It is however proposed, if practicable to remove all the Indians on the East side of the Sound as far as the Snohomish; as also the S'Kallams to Hood's Canal, and **generally to admit as few Reservations as possible, with a view of finally concentrating them in one** (Washington Treaty Commission 1854-55). [Emphasis supplied.]

The "Proceedings" confirmed that the initial reservations were viewed as temporary, an expedient to the creation of one, large reservation for all the Indians west of the Cascade Range. The concept of temporary reservations leading to one large holding area was explained in subsequent councils with the treaty language "reserved for the present use and occupation" (Kappler 1904b[2]:662, 670, 674, 682).

Stevens employed Gibbs in December, 1854, to work a surveyor for the Washington Indian Commission. Gibbs's first assignment, however, was to

draft the Commission's template treaty. He was familiar with the treaties of the Willamette Valley Treaty Commission having served in April and May, 1851, as its secretary and cartographer (Mackey 1974). He was familiar with the treaties negotiated in the fall of 1851 by Commissioner Redick McKee in northwestern California, having served as cartographer and interpreter in those councils (Gibbs 1853). On March 3, 1854, he submitted the "Report of Mr. George Gibbs to Captain Mc'Clellan, on the Indian Tribes of the Territory of Washington." The account was a detailed overview of the Indians from the Columbia Plateau of the Pacific Ocean based on his travels, correspondence with other observers, and interviews with tribal informants (Washington Treaty Commission 1854-55; Gibbs 1855a).

By the spring of 1854 Gibbs was concerned about the status of wild game and salmon. The Klickitats and other tribes faced fierce competition from settlers in killing elk, deer, bear, sheep, and mountain goats. He observed:

> Of game, there is but little left. The deer and elk are almost exterminated through the country, the deep snows of winter driving them to the valleys, where the Indians with their usual improvidence, have slaughtered them without mercy. The mountain goat, and the big-horn, or sheep, are both said to have formerly existed here, but, since the introduction of fire-arms, have retired far into the recesses of the Cascades. The black bear alone is still found, though but rarely. The salmon furnishes to these, as to most other tribes of the Pacific, the greatest staple of food (Gibbs 1855a:404).

Gibbs articulated several observations about the situation of the tribes in Washington Territory:

> To remove the Indians altogether into any one district is impracticable, for the western verge has been reached. To throw the fishing tribes of the coast back upon the interior, even were the measure possible, would destroy them; nor is there any suitable region east of the Cascades where all of the tribes now living there could be concentrated and find food. They must, therefore, remain as they are, adopting such a plan as will remedy, so far as may be, the inconvenience of contact.
>
> The primary evil in Oregon and the western part of this Territory is the donation act, in which, contrary to established usage, and to natural right, the United States assumed to grant, absolutely, the land of the Indians without previous purchase from them. It followed, as a

> necessary consequence, that as settlers poured in, the Indians were unceremoniously thrust from their homes and driven forth to shift for themselves. No provision was made to support them after their former means were taken away; and finally the treaties negotiated by authorized agents of the government, in which some small patches of their own territories were secured to them, were either rejected or passed over in silence (Gibbs 1855a:422).

Because diminution of game resources was acute by 1854, Gibbs focused on helping the tribes retain access to other foodstuffs:

> They require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found, and of grazing their horses and cattle at large; but they do not need the exclusive use of any considerable districts. A large portion of their territory will, in all human probability, never be occupied by white men; and so far nature has provided reserves. That is necessary for them, and just in itself, is, that small tracts of good land should be set apart as permanent abodes, where they may raise their vegetables and bury their dead, secure that they will not be driven off at the pleasure of the first comer (Gibbs 1855a:423).

Gibbs identified the Lower Cowlitz and the Taidnapam, Upper Cowlitz, in his overview of the western Washington tribes:

> The Cowlitz, likewise a once numerous and powerful tribe, are now insignificant and fast disappearing. The few bands remaining are intermingled with those of the Upper Chehalis. According to the best estimates obtained, the two united are not over one hundred and sixty-five in number, and are scattered in seven parties between the mouth of the Cowlitz and the Satsop.
>
> The Taitinapam, a band of Klickitats already mentioned, living near the head of the Cowlitz, are probably about seventy-five in number. They are called by their eastern brethren wild or wood Indians. Until very lately they have not ventured into the settlements, and have even avoided all intercourse with their own race (Gibbs 185ta:428).

Gibbs's template treaty contained assurance to the tribes: "The right of taking fish, at all 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, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands." The only variation in this language was that some of the treaties employed the words "in common with all the citizens of the United States." Extensive research into the two phrases confirmed, however, that the treaties did not intend to create separate classes of non-Indian users and that the change in language was inadvertent (Beckham 1984:96-97).

In his essay, "Tribes of Western Washington and Northwestern Oregon," Gibbs identified the Indian fisheries and hunting grounds:

> As regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seigniorage for the right of taking. In fact, such a claim would be inconvenient to all parties, as the Indians move about, on the sound particularly, from one to another locality, according to the season. Nor do they have disputes as to their hunting grounds. Land and sea appear to be open to all with whom they are not at war. Their local attachments are very strong, as might be inferred with regard to a race having fixed abodes, and they part from their favorite grounds and burial-places with the utmost reluctance (Gibbs 1877:187).

Gibbs identified the principal foods of the Indians of western Washington: fish, roots, berries, and game. "Elk and deer are hunted to a certain extent, chiefly by the bands nearest the mountains . . . ." He described the harvest of shellfish, camas, fern roots, acorns, and berries of numerous kinds. Fish, however, were the dietary staple:

> But the great staple of food through a vast portion of the country west of the Rocky Mountains northward, as well as the interior as on the coast, is the salmon, which frequents in extraordinary quantities almost every river from the Sacramento northward, and pursues his way to the very base of the Rocky Mountains. Of this there are several kinds, not less than six, it is supposed, entering the Columbia alone at the different periods of the year, and others being found in other localities. The salmon, which enter that river n the spring and are the only ones prized as food by the whites, do not seek either the small rivers of the coast or the lower tributaries near its mouth for the purpose of spawning, but push directly up the principal branches such as the Willamette, the Snake, &c., to the colder waters of the mountains (Gibbs 1877:193-194).

The Washington Treaty Commission adopted Gibbs's template treaty and employed it in late December, 1854, in the initial council at Medicine Creek with the tribes at the southern end of Puget Sound. Stevens drove a brisk agenda. He sent out agents to round up the tribes and bring them to council campsites. He and his party traveled by a chartered steamer to the respective meetings. He personally presided at councils that led to four ratified treaties in western Washington:

1. Treaty of Medicine Creek, December 24, 1854: Nisqually, Puyallup, Steilacoom, and others

   The treaty reserved the following:

   (1) "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory"
   (2) "erecting temporary houses for the purpose of curing"
   (3) "privilege of hunting"
   (4) "of gathering roots and berries"
   (5) "pasturing their horses on open and unclaimed lands"
   (Kappler 1904[2]:661-665)

2. Treaty of Point Elliott, January 22, 1855: Duwamish, Suquamish, Skagit, Suquamish, and others

   The treaty reserved the following:

   (1) "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory"
   (2) "erecting temporary houses for the purpose of curing"
   (3) "privilege of hunting"
   (4) "gathering roots and berries"
   (Kappler 1904[2]:669-673]

3. Treaty of Point No Point, January 26, 1855: Klallam, Skokomish, and others

   The Treaty reserved the following:

   (1) "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the United States"
   (2) "erecting temporary houses for the purpose of curing"

(3) "privilege of hunting"
(4) "gathering roots and berries on open and unclaimed lands"
(Kappler 1904[2]:674-676)

4. Treaty of Neah Bay, January 31, 1855: Makah

The treaty reserved the following:

(1) "right of taking fish and of whaling or sealing at usual and accustomed grounds and stations . . . in common with all citizens of the United States"
(2) "erecting temporary houses for the purpose of curing"
(3) "privilege of hunting"
(4) "gathering roots and berries on open and unclaimed lands"
(Kappler 1904[2]:682-685)

These four treaty councils were not negotiations. They were settings for Stevens to explain federal policies as he interpreted them. The "Proceedings" of the councils document his rhetoric invoking the "Great Father" and "Children" wherein he dictated the treaties. The councils attracted tribal participants through the guise of free food and gifts, an accommodation to the native "potlatch" hospitality. The council give-and-take arose over the demands of cession of virtually all Indian lands and compulsory removals of the tribes to small, "temporary" reservations within the ceded areas. Numerous tribal leaders used the councils to jockey for position within their respective communities as well as with the Washington Superintendency. Several of the tribal speakers addressed the dishonesty of the government, the potential jeopardy of the reserved lands, and the value of compensation for ceded lands (Friday 2008:157-161).

The cadastral land surveys had only reached the vicinity of Olympia in late 1854 with establishing the Willamette Meridian and Baseline. Even though Stevens had engaged George Gibbs initially as surveyor for the Treaty Commission, Gibbs had no reference points to mount accurate surveys of any of the proposed reservations except for the Medicine Creek treaty. Stevens' pace of councils was so brisk that Gibbs and his assistants had but three days to make a partial survey of the proposed reservation for the Nisqually and Puyallup tribes (Washington Treaty Commission 1854-55). Because of the lack of surveys the treaties contained only verbal descriptions of the reservations. The legal boundaries were not established until completion of the surveys and the executive orders of President Ulysses S. Grant in the 1870s and those of

subsequent presidents (Kappler 1904a[1]:917-920, 923-926).

In thirty-three days Stevens in December, 1854, and January, 1855, Stevens secured four treaties, each ultimately ratified, for the cessions of all of the lands around Puget Sound. His fast-track treaty program continued. Between February 24 and March 2, 1855, he and his associates held the Chehalis River Treaty Council at Cosmopolis near the confluence of the Chehalis River with Grays Harbor. The Washington Treaty Commission met with the tribes of the central and southwestern coast of Washington: Lower Chinook (112), Upper Chehalis (216), Lower Chehalis (217), Cowlitz (140), and Quinault and Kwehtsa (158). A total of 370 Indians were present at the council out of an estimated population of 843 people (Washington Treaty Commission 1854-55).

Stevens presented the treaty template with the following "reserved rights:"

1. "right of taking fish at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory"
2. "erecting temporary houses for the purposes of curing"
3. "privilege of hunting"
4. "gathering roots and berries"
5. "pasturing their horses on all open and unclaimed lands"

(Washington Treaty Commission 1854-55).

The governor was unrelenting in his insistence on the terms of the treaty. The tribes were to cede all of southwestern Washington and remove to an undetermined site of undetermined size on the Washington coast between Grays Harbor and Cape Flattery. This demand proved unacceptable except to the Quinaults who lived in that area. The other tribes refused to give up their traditional villages, fisheries, and cemeteries and were adamant in their refusal to live among the Quinaults who had often made war on them or raided their villages to kidnap people into slavery (Washington Treaty Commission 1854-55).

The patronizing rhetoric of Stevens was evident in the minutes recorded by George Gibbs:

> My Children. I have seen many Indians in the last two months, none better clothed nor apparently more happy than you. You have seen the Whites for years. You have heard of the Great Father, yours, and the

father of the Whites. The Great Father has many White children and they are coming here: the Great Father wishes that his white and red children should be friends, and you are friends now. What is your state now though?

Do you now own all your old burying grounds and potato patches - have you not been told by the Whites "Let us have these places, and the Great Father will pay you for them?" The Whites now have these lands, but you have not got your pay. And now the Great Father has sent me here and know what he should pay you for them.

He also thinks you should have homes where no white man would go without your wish. You want homes where you can live happy all your days and gather roots, berries and fish, and you shall have them. You have many children. We want those children to have trades, to farm &c. Sometimes you are sick and need a physician. You also want ploughs and tools to raise crops. And you want also an Elder brother, an Agent who shall be your brother and take care of you. This is the heart of your Great Father, it is my heart, that of your elder brothers, Mr Simmons, Mr Tappan and Mr Shaw (Washington Treaty Commission 1854-55).

Two Cowlitz chiefs addressed the council. Kish-kok, head chief, stated:

The French, Hudson's Bay People first came among them against their will and did not use them well. When Mr. Shaw came he told them a straight story and they hurried to come along. Mr. Shaw had told them that they would have an Agent to look out for them and a Doctor. When the Bostons (the Americans) came they were glad to see them and wanted them to settle in their country. Wanted now to know where they themselves were to have a piece of land. He described the bounds of his country as in the report. They wanted a strip of country crossing the Cowlitz and taking in a small part of the Puget's Sound Farm. That where the Kammas ground was.

Ow-hye, another Cowlitz, then spoke:

Formerly the King Georges (English) came. They only paid them a shirt to go from Cowlitz to Vancouver. The Indians were very much ashamed at their treatment. They just now find out what the land was worth by seeing the French sell to the Whites. Several hundred dollars for a small

> piece with a house on it. It was not their land, but the Indians after all. They were willing to put up with a very small piece of land but they want it at that place. When the Americans came, they first saw money and knew its value. They have been paid well for everything they had done - women as well as men. When they went back they could show their commissions as Chiefs, and they wanted one to show where their grounds were so that the French would know. As soon as they got back to the Cowlitz, they would gather their people up and make them live in one place.
>
> They were now scattered every-[missing word]. He wanted the same ground with Kish-kok because there was a fishery on it, where they could go in winter, and to go on the prairie to live for their houses. He wanted Davis, an American settler, to live near him as he worked for him. Davis treated him like a brother and gave him flour and he gave Davis salmon. He wants to stay there till he dies. All his children have died there but one (Washington Treaty Commission 1854-55).

Stevens responded that it might be some time before the treaty was ratified. In the meantime the tribes could continue living where they wished, so long as a settler had not filed a claim to the property. This was poor assurance to the Cowlitz leaders that they had been heard. Similarly the spokesmen for the Chinook and Chehalis raised their concerns and got little satisfaction. Stevens kept offering promises:

> You understand that to find the place a survey will be made and the ground known. And that your place will be picked out for you by your Great Father, and that I shall send to him everything you have said. You know that he is your Great Father and your good Father, and that he will take good care of you. You understand all this and I have no more to say. I am ready to sign the paper if you think it is good.

The tribal leaders were not ready to sign. Tu-leh-uk and Annan-nata, Chehalis speakers, were insistent on retaining some of their own lands as their homes and identified specific areas by name. When he had no success, Stevens had the treaty read another time to the assembled Indians. "If your hearts are with it," he said, "you will sign it. If not, I cannot buy your lands." The governor's patience was wearing thin in face of the refusal of the tribes to agree to his dictates.

Tu-leh-uk, the Chehalis chief then said:

> We are very proud all of us. We have made you our father. We give up all our lands to you but a small piece. The Kwinaiutl speak a different language. All those on this river from Wanoolchie down are willing to go together. I want but a small piece of ground where my horses can eat. We are pleased to raise potatoes. We want to raise them on a small piece of our own ground. This land on the river now belongs to the Americans. We only want to fish here (Washington Treaty Commission 1854-55).

In addition to recording the council "Proceedings" George Gibbs kept a private journal of the events. They are further documentation of the events, of which the following are extracts:

> Feb. 26 Monday. Mr. Shaw arrived with the delegation of the Chinook & Cowlitz Indians. The Kwillehyute tribe not being represented, it was found necessary to omit them from the treaty . . . . The Secretary was then ordered to engross the treaty. Present Stevens, Simmons, Shaw, Gibbs, Tappan. The Kwillehyute country to be omitted in describing the ceded lands the chiefs to be sent for to Olympia to conclude a separate one. Gov. Stevens to proceed by way of Shoalwater Bay & see such of the Chinooks as had not been able to come in.
>
> Feb. 27 Tuesday. Commissions issued to Kehmalts or Kish-hok, head chief of Cowlitz and to Wallech, Owhye or Wahowa and Oh-hoe as Sub Chiefs. General Council held both morning and afternoon, but no decision arrived at, & the subject postponed to the next day. Rain commenced during the night.
>
> Feb. 28 Wednesday. Indians in Council again. Nothing accomplished.
>
> Mar. 1 Thursday. Do Do no treaty made
>
> Mar. 2 Friday. Indians called together and after a speech from Gov. S. Council dissolved (Gibbs 1854-55).

On March 2, Stevens broke up the treaty council. Repeated reading of the treaty, badgering of tribal leaders to give in to his incomplete reservation plan, demanding cession and removal from their lands, except for the Quinault, had led to an impasse. The minutes vividly captured the dynamics of his frustration. Stevens confronted Tu-leh-uk, the Chehalis chief, who had remained steadfast in resisting the treaty with no defined reservation. Stevens

articulated his threat of forced removal without a treaty:

> We have now been here a week. I have heard you all. Only one band the Kwinaiutl have hearts like mine, but the paper is nothing without all sign. The Kwinai-utl alone leave it to the Great Father. **There can therefore be no Treaty and I shall not call upon you again to treat, but next summer I shall send Col. Simmons through that country to examine it and when a good place is found I shall say to the Great Father put these people upon it.**
>
> **There will then be no treaty, no promises, but you will be in the hands of the Great Father to do as we please.** We shall recollect however the willingness of the Kwinaiutl and the good behavior of the Cowlitz, Chinook and Upper Chihalis.
>
> In regard to the Lower Chihalis I have a word to say to their Chief Tu-leh-uk. "Tu-leh-uk come here! Bring your paper!" (Takes his commission and reads it.) A man who cannot control his people is no chief. You have not prevented your people from drinking. You brought some rum here and your father was drunk here. I reproved you for it at the time, and passed it over, but last night you behaved disrespectfully. You let your people defy me. (They had fired their guns during the night.) You are no longer a chief. (Tears the paper.) I have only one word. There has been no treaty. I therefore give you no presents but the Kwinaiutl will hereafter receive presents when Mr. Simmons comes to their country. You will all have your potatoes and return home (Washington Treaty Commission 1854-55). [Emphasis supplied.]

This jarring event ended the council on the Chehalis River. The Cowlitz had agreed to cede their lands and amalgamate with the Chehalis. None of these agreements, however, had any meaning. Stevens rode away from the council grounds, resolved to secure a treaty with the Quinault. Ultimately on July 1, 1855, he signed the Treaty of Olympia with the Quinault and the Quileute. That treaty did not include any of the other tribes who had participated in the Chehalis River council. It, however, reserved the following:

(1) "right of taking fish at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory"
(2) "erecting temporary houses for the purpose of curing the same"
(3) "privilege of hunting"
(4) "gathering roots and berries"

(5) "pasturing their horses on all open and unclaimed lands" (Kappler 1904b[2]:719-722).

Treaty-making thus remained unfinished in western Washington Territory. The Treaty of Medicine Creek was promptly ratified on March 3, 1855, by the Senate (Kappler 1904b[2]:661). The treaties of Point Elliott, Point-No-Point, Neah Bay, and Olympia were ratified in 1859 (Kappler 1904b[2]:719, 660, 674, 682, 719). The situation of lands in southwestern Washington, the extensive homeland of approximately 1,716,000 acres of the Cowlitz tribe lying in the Willapa Hills and the watersheds of the Cowlitz, Kalama, and Lewis rivers, and along the north bank of the Columbia remained unresolved in light of federal policy and practice.

Fort Vancouver Council, May, 1855

Tensions between Pacific Northwest Indian tribes and Euro-Americans continued to mount. The western Washington tribes had been dispossessed of significant parts of their lands and, in spite of treaty promises, the federal government had moved slowly in ratifying treaties and distributing the presents, annuities, and assistance promised at the councils. By March, only the Medicine Creek Treaty had gained ratification. Another four years passed before the other western Washington treaties were ratified. In May, while traveling to the Walla Treaty Council of May 29-June 11, Stevens met with Klickitat Indians at Fort Vancouver to discuss their removal to a reservation. His account of this council identified them as "Klickatat."

Yacatowit and Spencer, chiefs, were the primary spokesmen for the Klickitat at Vancouver. Yacatowit, identified by George Gibbs as "Ya'hotowit," became an important cultural and linguistic informant for Gibbs. Illustrative of his information were notes Gibbs recorded in December, 1855, at Fort Vancouver: "Umtuts, or 'Untuts,' father was Moke-qua'h. Umtuts was Taitnapam. His proper country was not Wiltqu [Lewis River village], but in the mountains at the foot of St. Helens, or the head of the Cowlitz. His people were always quarreling and he left them (Gibbs 1855b).

Stevens said to Yactowit and Spencer: "I want you to understand that I am your father and will take care of you as a father would his children. I have as yet made no treaty with you-I have not bought your lands. You still own them but I will advise you to go to the Yakima Country. Go to the Simcoe Valley: there does your friend, your father, advise you to go" (Stevens 1856).

The discussion confirmed the Klickitat were conquerors who had moved west of the Cascades and taken over the lands of other tribes at the south end of Puget Sound and in the vicinity of Fort Vancouver. Stevens acknowledged their presence: "You have conquered this land and it is your own. We treat with you as its conquerors. You have the possession, and the possessors are the ones with whom we treat" (Stevens 1856). This position was completely at odds with that of Joel Palmer, Oregon Superintendent of Indian Affairs, who in 1855 compelled those Klickitats who had invaded and settled in the Umpqua and Willamette valleys to remove from western Oregon. He declined to meet with the Klickitat in Oregon. They attended no treaty councils with him nor met with other officials of the Oregon Superintendency. By early 1856 most of the Klickitats had removed to places north of the Columbia River.[1]

Yacatowit and Spencer expressed reluctance to move to the Simcoe Valley. They feared the power of Yakima chief Kamiakin. Stevens, however, offered the assurance that Colonel George Wright and the U.S. Army at Fort Simcoe would protect the Klickitat if they would return to territory east of the Cascades. "Where can you go into the mountains and hunt your game and gather your berries," asked Stevens. "Therefore I say go to the Simcoe Valley. Now I am done talking" (Stevens 1856).

Yocatowit countered with the proposal that he and his people move to the Columbia Gorge to settle on the north bank of the river between White Salmon River on the west and the Yakima on the east. "It is also our own country," said the chief, "and here we wish to go and live." Yacatowit, in fact, offered to take any Klickitat who remained in western Oregon with him. Stevens liked the plan and gave his provisional approval. "Try it for one year," he said, "I want all the Cascade Indians to go with you-none to stop at this place." In sum, Stevens wanted all of the Cascade band then residing within the vicinity of Fort Vancouver also to move east with the Klickitat. He urged Yacotowit and Spencer to try this plan for a year. Stevens concluded: "Until then nothing will be done in reference to purchasing your lands."

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[1] The exceptions were Klickitat women who had married Indians resident in western Oregon. The Klickitat families of Dick Johnson and Old Mummy attempted to remain at Yoncalla in the Umpqua Valley where they had forged friendship with the Charles and Jesse Applegate families. Local settlers in 1858 murdered Johnson and Mummy and drove Johnson's wife and children from his land claim.

Subsequent to this meeting in May, 1855, Stevens on October 22, 1856, wrote a summary of it. "On my return from the Walla Council," he noted, "I determined in consequence of the unsettled condition of the interior, not to move the Indians parties to the above Council to the Simcoe, but to keep them on the White Salmon and its vicinity, and I directed Agent [J.] Cain to collect the Indians of the Yakima, reported by Col. Wright to be friendly in the same general vicinity." The governor concluded not to compel the Klickitat of the bands headed by Yacatowit and Spencer to remove to the Yakima Reservation (Stevens 1856).

In 1857 agents J. Cain and A. Townsend confirmed what Stevens had reported in October, 1856. On June 30, 1857, Townsend, local agent "in charge of Indians at White Salmon reservation" in the Columbia Gorge, reported: "Indians consisted of the Vancouver and Lewis river tribe of Klikatats and the Cascade Indians, who had remained friendly during the war, numbering three hundred and forty persons; also, branch of the Klikatat tribe, who were among the hostiles, and with whom Colonel Wright effected a peace treaty . . . the number to about eight hundred persons" (Townsend 1857:348). J. Cain, agent for the district from the mouth of the Columbia along its north bank to The Dalles, reported on July 15, 1857, about the Indians on the White Salmon Reservation: "The Indians number about eight hundred, made up of the Vancouver Indians and Cascade Indians, and the remainder, mostly Klikatats, that were scattered along the river, and roaming over the country at large" (Cain 1857:345-346).

In spite of the Vancouver council in May, 1855, Stevens presented no treaty subsequent to that of the Chehalis River Council to the Indians of southwestern Washington. Their territory remained "Indian Country" as a matter of federal law. It was unceded land protected by the Organic Act (1848), the extension of the Northwest Ordinance's "Good Faith Clause" to Oregon Territory (1848), and the extension of the Indian Trade and Intercourse Act's "Indian Country" definition to Oregon Territory (1850). The ownership of the lands and resources of the Cowlitz tribe and their neighbors between the Skookum Chuck River and the Columbia and between the summit of the Cascade Range and the Pacific Ocean remained. The reality, however, was the General Land Office was proceeding with surveys, confirming land grants, and selling the tribal territory to settlers and speculators.

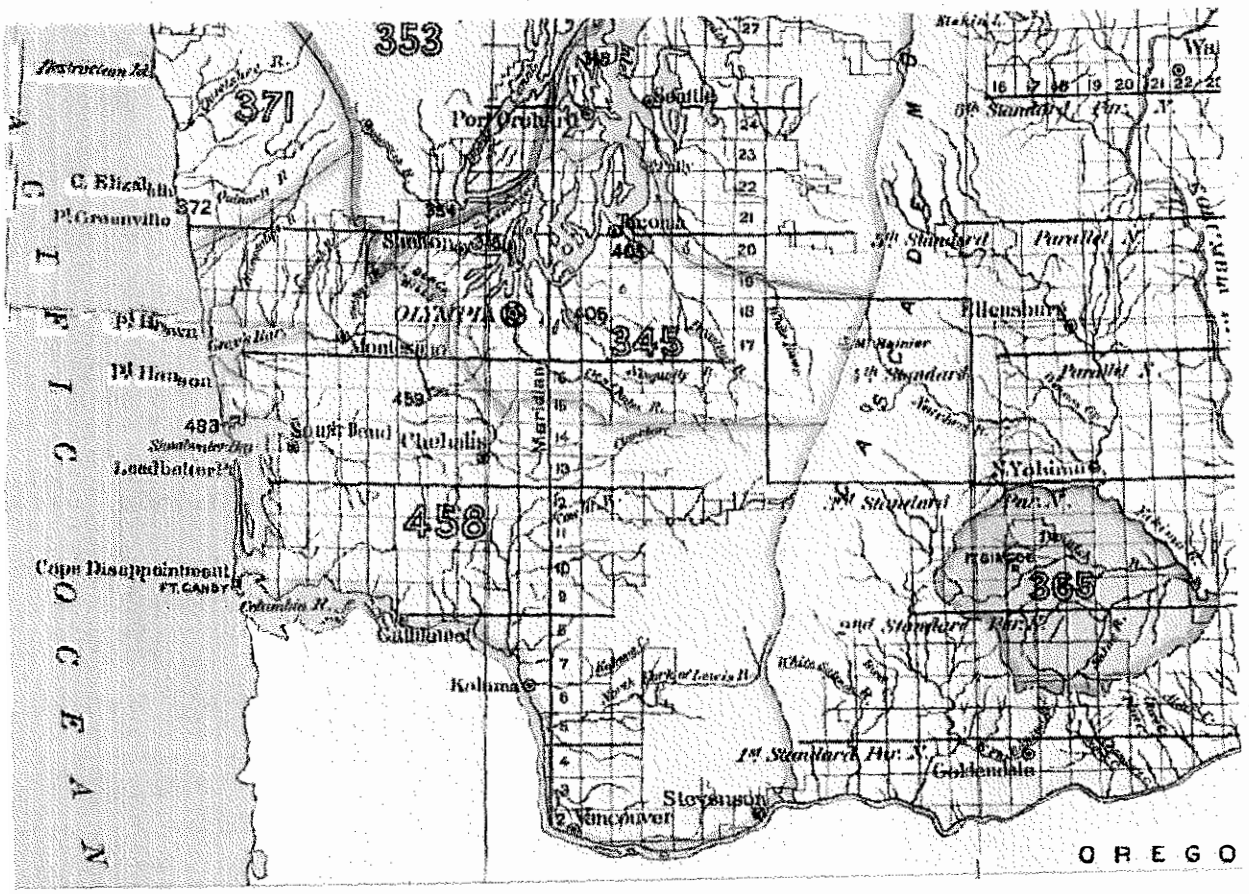

Fig. 4. Area 458, Indian land cessions by treaty and appropriation in southwestern Washington by the federal government (Royce 1899: Map Washington 1).

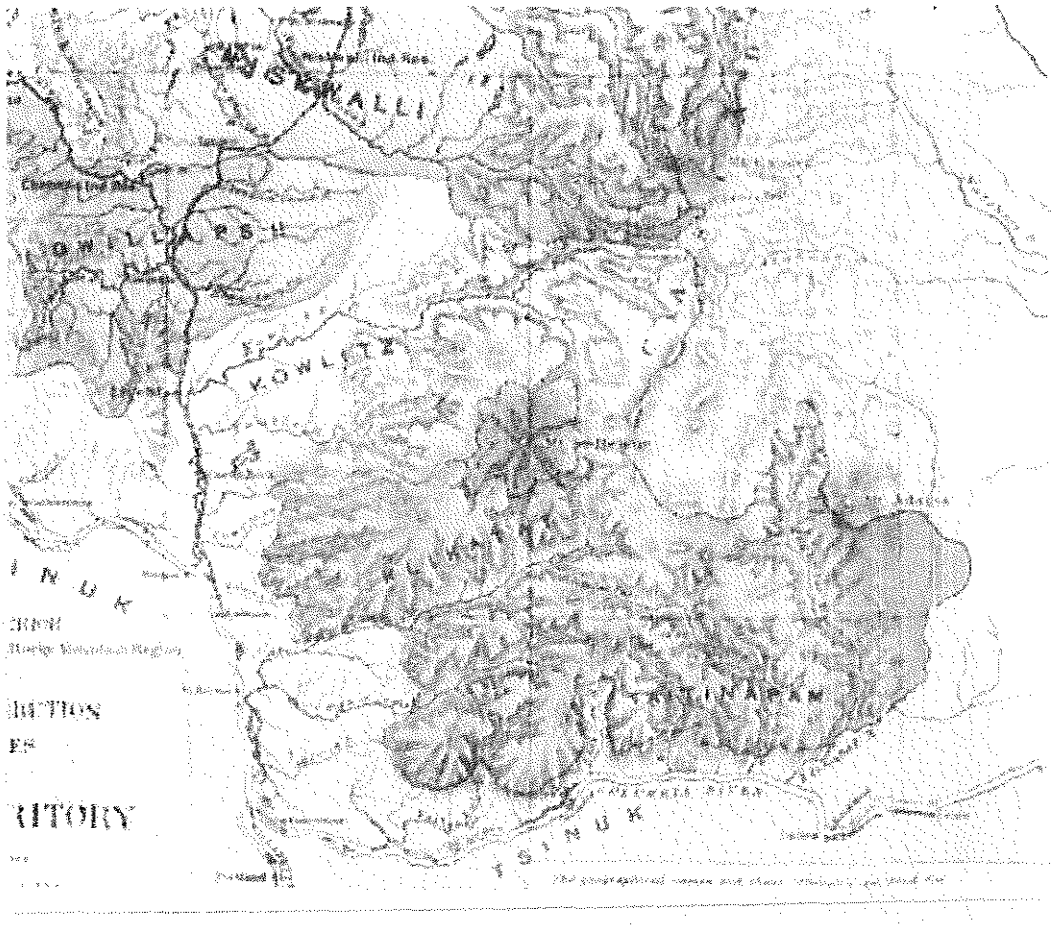

Fig. 5. Location of the "Kowlitz," "Klickatat," "Taitinapam," "Tsinuk" and other tribes of western Washington (Gibbs 1876).

Findings of Fact

1. The Oregon Organic Act (1848) provided a guarantee not "to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."

2. The Oregon Organic Act (1848) in Article 14 extended the "utmost good faith" clause of the Ordinance of 1787 to the Indians of the Pacific Northwest. The Ordinance stated:

   "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

3. Congress on June 5, 1850, authorized treaties in Oregon Territory to obtain Indian land cessions, established the Oregon Superintendency of Indian Affairs, and extended the legal construction of "Indian Country" of the Indian Trade and Intercourse Act (1834, as amended) to the region. In "Indian Country" (areas of unceded lands) tribal law and custom prevailed.

4. Congress on September 24, 1850, passed what was popularly known as the Oregon Donation Land Act. The law led to settlers claiming 2.8 million acres of Indian lands, including 1,018 claims north of the Columbia River prior to the ratification of treaties with the tribes.

5. Starting in 1851 the Office of Indian Affairs assumed administration of federal Indian policy in Oregon Territory. The policy was premised on peace and friendship, cession of Indian lands, removal of Indians to small reservations, and conversion of the tribes into sedentary agrarians speaking English and practicing Christianity. The treaty program of Superintendent Anson Dart in 1851 failed to secure any ratified treaties.

6. Congress on March 2, 1853, created Washington Territory with the same guarantees to Indian tribes as in the Oregon Organic Act (1848). The President appointed Isaac I. Stevens to govern the territory and administer Indian affairs.

7. In December, 1854, the Washington Treaty Commission commenced councils with tribes in western Washington using a treaty drafted by George Gibbs. The Commission ultimately secured five ratified treaties west of the Cascades providing for land cessions, small reservations, and reserved rights, including fishing, hunting, and gathering.

8. In February-March, 1855, the Cowlitz and other tribes of southwestern Washington participated in the Chehalis River Treaty Council. After days of debate the tribes refused to give up all of their lands and remove to an undefined, unexplored reservation among the Quinaults on the central Washington coast. In anger Governor Stevens stormed out of the council. None of the tribes who participated, except the Quinault, entered into further discussions about another treaty.

9. In May, 1855, Governor Stevens met in council with the Klickitat and other Indians residing in the vicinity of Fort Vancouver. Stevens neither presented nor discussed a treaty. He tried to persuade the Indians to move east to the Columbia Gorge and reside in the White Salmon Indian Agency.

2. Cowlitz Fishing, Hunting, and Gathering

Traditional Resource Use

The Cowlitz homeland contains abundant natural resources. The land sustained the Cowlitz for millennia with fish, game, and plant foods. Cowlitz territory abutted the north bank of the Columbia River and included shared use areas with the Upper Chinookans who occupied part of the same region. Cowlitz territory extended throughout the watersheds of the Cowlitz, Kalama, and Lewis rivers. It embraced a vast region from the crest of the Coast Range east to the crest of the Cascades and lands lying south of the divide with the Skookum Chuck, a tributary of the Chehalis. The Cowlitz watershed includes 2,586 square miles with several tributary streams: Coweeman, Toutle, Tilton, and Cispus. The Kalama River drains forty-five miles into the Western Cascades and flows through 205 square miles of land into the Columbia River. The Lewis River and its East Fork drain 1,046 square miles. The stream flows west from Mount St. Helens and Mt. Adams for ninety-five miles into the Columbia River.

The tidal reaches of the Columbia River had abundant resources to sustain a large population. The lakes and marshes along the lower ninety miles of the estuary were filled with nutritious Wapato (*Saggitaria*), sometimes referred to as the "Indian Potato." Meadows contained Camas (*Camassia*), a bulb baked in rock-lined ovens, and tarweed seeds (*Madia*), harvested with seed beaters and roasted prior to eating. The setting was habitat for ducks, geese, swans, band-tail pigeons, and other birds whose populations numbered in the tens of thousands. The rivers filled with salmon, sturgeon, smelt, seals and sea lions. The nearby forests and meadows were home to deer, elk, bear, beaver, rabbits, and other mammals. Excellent hunting in the area led the Lewis & Clark party to camp for a week at the mouth of the Washougal River in April, 1806, to build up their supply of elk and deer meat for their return journey east via the Columbia River (Moulton 1991[7]:26-76).

The Cowlitz hunted game and birds, and gathered eggs. John Kirk Townsend, an American naturalist living in 1834-35 on Sauvie Island below the mouth of the Willamette and opposite the mouth of Lewis River, noted: ". . . the Indians have adopted a mode of killing them which is very successful; that of drifting upon the flocks at night, in a canoe, in the bow of which a large fire of pitch pine has been kindled. The swans are dazzled, and apparently stupefied by the bright light, and fall easy victims to the craft of the sportsman" (Townsend 1839:235).

Cowlitz country also included acres of huckleberry patches in the High Cascades of the upper Cowlitz and Lewis River watersheds. These areas they shared with the Klickitat and Yakima from east of the mountains. Fall berry-picking coincided with hunting for deer and elk. As part of the seasonal round Cowlitz families moved to higher elevations to camp, pick and dry berries, hunt, smoke meat, and cure hides. Their seasonal round took them through all parts of their homeland (Anonymous 1927d).

The rivers of the Cowlitz country were among the most prolific sources of anadromous fish in the Pacific Northwest. The runs included sturgeon, steelhead, salmon, smelt, and lamprey. Lt. Charles Wilkes, U.S. Navy, led an overland expedition in May, 1841, from the southern end of Puget Sound to Fort Vancouver via the Cowlitz. His party found a large Indian fishery with weir on the Chehalis River. Wilkes wrote about the native foods:

> We stopped here for two hours, to rest our horses. Hanging around their lodges were hundreds of lamprey eels, from a foot to eighteen inches long, and about an inch diameter. We were told that these fish are caught in great quantities, and dried for food; they are also used for candles or torches; for, being very full of oil, they burn brightly.

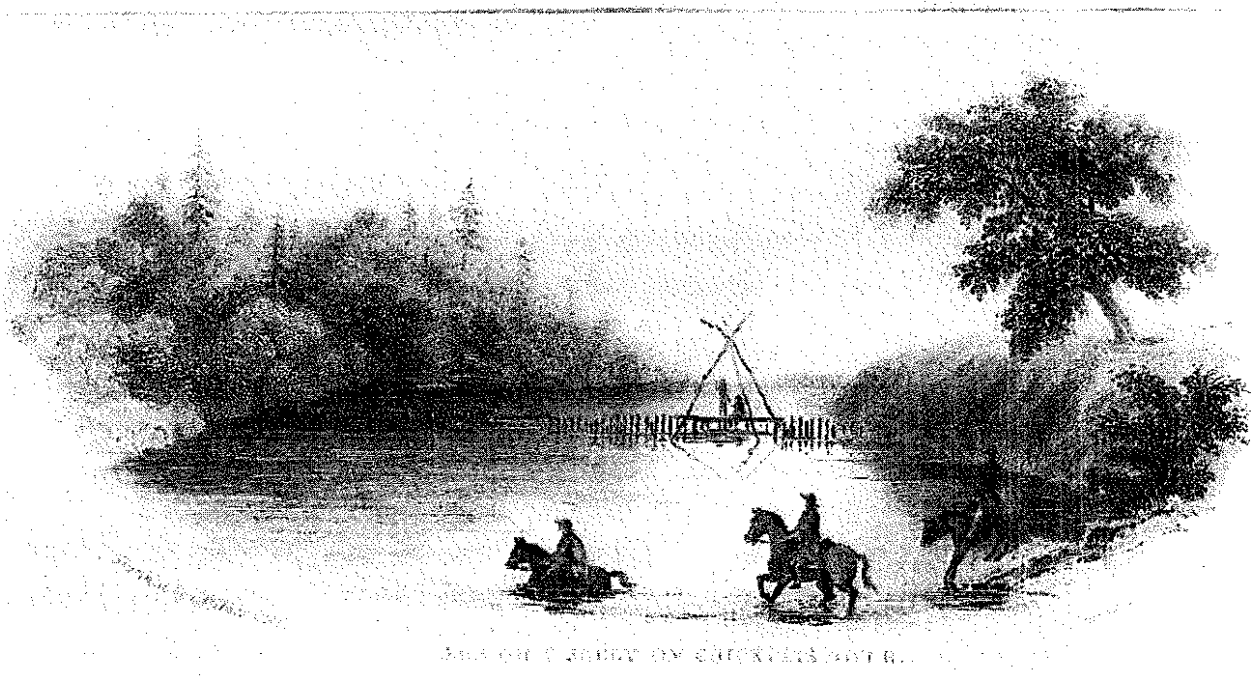

Fig. 6. Indian fish weir on the Chehalis River, 1841, a common technique for catching salmon (Wilkes 1845[4]:313).

> The Indians had a quantity of the cammass-root, which they had stored in baskets. It is a kind of sweet squills, and about the size of a small onion. It is extremely abundant on the open prairies, and particularly on those which are overflowed by the small streams (Wilkes 1845[4]:311-314).

This U.S. Navy detachment next camped on the Cowlitz River. Wilkes reported: "The Indians supplied us with some fresh salmon, which they had already begun to take in the rivers that were in sight from our encampment. They report that the river was navigable for canoes, though seasonal obstructions were met with from fallen timber." The travelers passed through forests and prairies where the men found abundant strawberries. "After passing the cammass plains," noted Wilkes, "we arrived at the [Puget Sound Agricultural] Company's farm on the Cowlitz, which occupies an extensive prairie on the banks of that river (Wilkes 1845[4]:315).

Wilkes encountered Indians at Cowlitz Prairie. He identified them as the "Klackatat tribe, though they have obtained the general name of the Cowlitz Indians." He discovered they had endured significant decline in population because of the introduction of new diseases and fevers. "The mortality that has attacked them of late has made sad ravages; for only a few years since they numbered upwards of a hundred, while they are now said to be less than thirty." The Navy detachment hired Simon Plamondon, a French-Canadian fur trapper married to a Cowlitz woman, and several Indians to assist their travel down the Cowlitz in canoes. Wilkes continued:

> About a mile from the farm-house, we descended a steep bank, two hundred feet high, to the river, where we found our canoes waiting for us. The Cowlitz was here about two hundred yards wide, and very rapid. Our company, or rather crew, consisted of nine young Indians. We were soon seated and gliding down the stream, while each boatman exerted his fullest strength to send us onwards (Wilkes 1845[4]:316).

Wilkes and his party reached the Columbia the following day. "On our way," he concluded, "we met with many canoes passing up, loaded with salmon and trout, which had been taken at the Willamette Falls, and which they were then carrying to trade with the Indians for the cammass-root. We obtained some of the fish as a supply for our Indians." Wilkes's observation confirmed the extensive commerce of trade and exchange, especially of valued foods, that existed from prehistoric times (Wilkes 1845[4]:319).

Although the Hudson's Bay Company established seasonal fisheries at the Cascades, Willamette Falls, and Pillar Rock on the lower Columbia, the primary fishers in the first half of the nineteenth century were the Native Americans. Lt. Neil Howison, U.S. Navy, visited the Columbia and wrote in 1846: "Strange to say, up to this day none but Indians have ever taken a salmon from the waters of the Columbia; it seems to have been conceded to them as an inherent right, which no white man has yet encroached upon" (Howison 1913:47).

James G. Swan, a former resident of Boston who located in 1853 on Willapa Bay near the mouth of the Columbia River, wrote vividly about the net fishing of the Chinook, Chehalis, and Cowlitz:

> The Chinook salmon commences to enter the [Columbia] river the last of May, and is the most plentiful about the 20th of June. It is, without doubt, the finest salmon in the world, and, being taken so near the ocean, has its fine flavor in perfection. The salmon, when entering a river, to spawn, do not at once proceed to the head-waters, but linger round the mouth for several weeks before they are prepared to go farther up. It has been supposed that they can not go immediately from the ocean to the cold fresh water, but remain for a time where the water is brackish before they venture on so great change . . . .
>
> The Chenook fishery is carried on by means of nets. These are made by the whites of the twine prepared for the purpose, and sold as salmon-twine, and rigged with floats and sinkers in the usual style. The nets of the Indians are made of a twine spun by themselves from the fibres of spruce roots prepared for the purpose, or from a species of grass brought from the north by the Indians. It is very strong, and answers the purpose admirably. Peculiar-shaped sticks of dry cedar are used for floats, and the weights at the bottom are round beach pebbles, about a pound each, notched to keep them from slipping from their fastenings, and securely held by withes of cedar firmly twisted and woven into the foot-rope of the net.
>
> The nets vary in size from a hundred feet long to a hundred fathoms, or six hundred feet, and from seven to sixteen feet deep.
>
> Three persons are required to work a net, except the very large ones, which require more help to land them. The time the fishing is commenced is at the top of high-water, just as the tide begins to ebb.

> A short distance from shore the current is very swift, and with its aid these nets are hauled. Two persons get into the canoe, on the stern of which is coiled the net on a frame made fir the purpose, resting on the canoe's gunwales. She is then paddled up the stream, close in to the beach, where the current is not so strong. A tow-line, with a wooden float attached to it, is then drown to the third person, who remains on the beach, and immediately the two in the canoe paddle her into the rapid stream as quickly as they can, throwing out the net all the time (Swan 1857:104-107).

In addition to net-fishing in the Columbia and lower Cowlitz, the Cowlitz employed weirs, hook and line, spears, and fish traps. Their fisheries extended far up the rivers and sustained villages deep into the Cascade Range, especially along the upper Cowlitz at Cispus, Tilton, and other confluences.

State of Washington Regulations and Controversies

In the 1920s and 1930s the State of Washington tightened its regulations over Indian hunting and fishing. In 1925 the State designated steelhead a "game fish." The identification, effective in 1926, meant catching steelhead with a net or selling steelhead was a crime. The action was a major blow to tribal subsistence fishers as well as to those who eked out an existence by selling part of their catch. The State refused to acknowledge the special rights and needs of the tribes. Its goals were to "preserve, protect, perpetuate, and enhance wildlife through regulations and sound, continuing programs to provide the maximum amount of wild-life oriented for the people of the State" (Anonymous 1926a, 1926b; U.S. Commission on Civil Rights 1981:65).

Contributing to the change in position of the State of Washington was passage on June 1, 1924, of the Indian Citizenship Act (43 Stat. 253). The law finally extended citizenship to all Indians in the United States. Previously Indians had gained citizenship by severing tribal relations, serving in the military, or passing through a period of "non-competency" as holders of land held in trust by the Department of Interior. In 1924 the Washington Fish Commissioner ruled that Indians could take fish for their own use "at any time they need them" but were not permitted to sell fish except "during the seasons established by the state" (Sams 1924).

These measures fell on members of the Cowlitz Tribe. The failure of the Chehalis River Treaty Council to result in a ratified treaty was a major factor.

Unlike the Puget Sound tribes or the Quinault and Quilheute of the central coast, the tribes of southwestern Washington had no treaty-guaranteed rights. They could point to the words in the reserved rights in the draft treaty, but that language had no legal standing. They also argued the United States had violated its "good faith" and taken their lands without compensation. The Cowlitz position, however, was given scant consideration by either state or federal officials.

The tightening noose of regulations began to be felt. On April 12, 1926, Otto Beusch, Lewis County game warden, seized the "webb [fishing net] and clothing of John Skahan, a Cowlitz Indian" (Sams 1926). Skahan and Howard Logan, a Quinault, were net-fishing the spring salmon run in the Cowlitz River. The warden entered Skahan's home and took the nets, clothing, and personal papers of the two men. W. B. Sams, superintendent of the Taholah Agency which had jurisdiction over the Indians of southwestern Washington, wrote about this action:

> Both of these Indians asserted that they were taking fish for their own use and were away from their webbs [nets] and were preparing a building to smoke the fish that they caught. They further asserted that they have not sold any fish and the receipts that were taken from them from the Fish Company on the Columbia River at Rainier, Oregon, were referring to fish caught in the Columbia River last fall.

Sams clearly understood both reservation and off-reservation fishing from his long duty at the Quinault Reservation. He concluded: "The Courts of our country have uniformly held that all the Indians have a right to take fish at their usual and accustomed places for their own use and for smoking and drying" (Sams 1926a).

Skahan and Logan pleaded guilty to net-fishing in the Cowlitz River. The judge fined each $50 with a sentence of thirty days in jail. The county attorney, however, recommended clemency. The sentences were remitted on payment of the fines (Anonymous 1926a). As a consequence of this prosecution and increasing State activity, on October 31, 1927, the Cowlitz Tribe met at Chehalis "for the purpose of protesting against the new game law, that requires them to have a license for hunting and fishing." Cowlitz Chief John Ike said to the press: "Capt [Isaac I.] Stevens said we could have free hunting and fishing rights. We are asking for that!" Among the tribal leaders attending the meeting were Lewis Castama, Sam Eyley, Peter Thomas, Jim Yoke, Alec Yoke, Sam Eyley, May Eyley, and John Ike (Anonymous 1927a, 1927b).

Also in the fall of 1927 Washington officials arrested Frank Klatush, an Indian resident of Ethel east of Cowlitz Prairie, for subsistence fishing. In his trial Judge P. C. Beaufort ruled that Klatush was "within his rights under treaty rights when he caught fish for his own use recently in the Cowlitz River." Klatush, however, sold some of the fish. Beaufort thus fined him $100 and gave him a suspended jail sentence. W. B. Sams, Indian agent at Taholah on the Quinault Reservation, and J. H. Stetson of Seattle represented the Bureau of Indian Affairs during the trial (Anonymous 1927c).

In March, 1928, the Washington Attorney-General ruled the Cowlitz Indians could fish only "except at the times and in the same manner as the white people fish." The ruling, according to Sams, permitted Cowlitz to fish "with hook and line for your own use or the use of your family, and only during such times as it is lawful to take trout therein." He continued: "In other words, when the trout season is open, you can fish with hook and line for salmon for food purposes, but not for market." The ruling contravened existing traditional Cowlitz rights in their unceded lands throughout southwestern Washington, an area of approximately 1,716,000 acres. Superintendent Sams communicated the ruling to John Ike and wrote: "It would look as though the State intends to enforce the law against the Cowlitz Indians for the reason that they have no treaty with the Government and no reservation" (Sams 1928b, 1928c).

In this observation Sams was soon proven incorrect. The U.S. Supreme Court ruled in *Halbert v. United States* (1931) that the Cowlitz were a tribe of "fish eating Indians of the Pacific Coast" as designated in the executive order of November 4, 1873, of Ulysses S. Grant. By that order the Cowlitz were entitled to allotments as one of the tribes of the Quinault Reservation (Kappler 1904a[1]:923-924).

Indian Agent Sams was well-aware of the importance of traditional subsistence in sustaining Cowlitz families. On October 27, 1928, he wrote to Charles R. Pollock, secretary of the Washington State Fisheries Board, to seek written guarantees "to allow the old [Cowlitz] Indians to fish for the use of themselves and their families." "There have been several arrests of Indians for fishing in the Cowlitz River," he observed, "but up to this date the Justice-of-the-Peace before whom they were tried, has found them 'not guilty' and let them go" (Sams 1928d).

On November 6, 1934, the State of Washington dramatically increased its control over fisheries with passage of Initiative No. 77. The law read:

> An Act relating to fishing; prohibiting the use of fish traps or other fixed appliances for catching salmon and certain other fish within the waters of the State of Washington; prohibiting the taking or fishing for salmon and certain other fish within a certain area therein defined and created by any means except by trolling, regulating trolling in such area, and permitting the operation of gill nets therein under certain conditions; providing for open and closed seasons, prohibiting drag seines and limiting the length of gill nets in the Columbia River; prescribing penalties; and repealing all laws in conflict therewith (Washington Secretary of State 1934).

Proponents argued the measure was critical to preserving the salmon industry, the third most important economic enterprise in the state. One writer noted: "To bring the issue nearer home, Gray's Harbor, the mouth of our own Chehalis river, had 62 traps and 90 set nets licensed to operate this year, yet you or I could not go down to the river and get a salmon. The Columbia river had 350 traps, 250 set nets, 39 drag seines, and 30 fish wheels licensed . . . . Even Willapa Harbor had 57 traps licensed in 1933" (Anonymous 1934a).

The Cowlitz Tribe monitored Washington Initiative 77. John B. Sareault, president of the Tribal Council, drafted a petition on behalf of the tribe seeking federal intervention and protection from state harassment:

> We, the undersigned, members of the Upper Cowlitz and the Lower Cowlitz Indian Tribes, hereby Petition the Law-making bodies of the State of Washington, and of the United States, in Washington, D.C., that it be made lawful, and provided by an Act of said Law-making bodies, for any Indian, of any Tribe, to take fish from any stream or body of water, in the State of Washington, which were originally Indian fishing grounds, at and in usual manner, for food for themselves and family, either in or out of season, without being stopped or arrested. Provided, however, that any Indian wishing to secure fishing rights, must first file application for and be issued his Fishing Permit from the State without cost or charge.

Noteworthy were the signatures of forty-two Cowlitz fishers who endorsed the petition. Many gave their places of residence; these included Kelso, Silver Creek, Nesika, Rochester, Cinnabar, Winlock, Packwood, Randall, Morton, Mayfield, and Alpha, Washington. The residence data confirmed the presence of the Cowlitz at locations of their traditional fisheries (Wannassay 1934a).

Frank Wannassay wrote on August 30, 1934, to B. M. Brennan, Washington Director of Fisheries:

> I am a Cowlitz Indian, being born where I now reside, on the west side of the Cowlitz River, at Kelso.
>
> I am now past 68 years of age, and am not able to do any kind of work; I am requesting permission to take fish for my own use; I would like to have a letter to the effect that I have the right to take fish for my own use, as Mr. McDonald, the Deputy here, has advised me to not go fishing until I had a letter from the Fisheries Department stating that I could do so.
>
> I have an old letter from Governor Hartley stating that I had the right to take fish for my own use at any time (Wannassay 1934b).

On August 31, 1934, Director Brennan denied permission for Wannassay to fish for subsistence in the Cowlitz (Brennan 1934a). Wannassay next sought the intercession of Nels O. Nicholson, superintendent of the Taholah Agency having oversight of the tribes of southwestern Washington. Nicholson reminded Brennan that "in previous years the State had permitted many of the Indians to take fish from various streams for their own use. Does your Department now permit this?" he asked (Nicholson 1934a). Brennan again denied permission. He insisted that Indians in the State of Washington possessed only on-reservation rights. "Indians," he wrote, "are permitted to take fish for personal use or family use only in rivers flowing through or bordering on reservations within five miles of the boundaries thereof" (Brennan 1934b). Brennan's opinion was in violation of the ratified treaties that made no such restriction nor any mention of a five-mile boundary!

Brennan's ignorance of the Cowlitz situation was evident to the tribe. Cowlitz Indians in 1934 had at least twenty Indian homesteads (Indian Homestead Act, 1876) or public domain allotments (Section 4, General Allotment Act, 1887) held in trust by the United States. These were all off-reservation trust lands. Further Brennan displayed no awareness of the finding in 1931 of the U.S. Supreme Court in *Halbert v. United States* that the Cowlitz were a tribe of the Quinault Reservation, were eligible for lands on that reservation, and by 1934 had secured numerous on-reservation allotments.

On March 20, 1936, Thomas Jordan of Castle Rock inquired of the Department of Fisheries: "Kindly advise me whether or not Indians who are

members of the Cowlitz Tribe can fish without a State License on the Cowlitz River, and if so, if they can fish with set nets (Jordan 1936). B. M. Brennan, Director of Fisheries, responded on March 21: ". . . pleased be advised that Indians of the Cowlitz tribe have no fishing rights on the Cowlitz River. Any fishing done by them would be governed by the fishery laws of the State of Washington. The operation of set nets is illegal within any of the waters of this state (Brennan 1936).

Initially Initiative No. 77 applied only to non-Indian "fixed appliances" for fishing. The law elicited numerous legal challenges but was upheld by the Washington Supreme Court in 1935 (Anonymous 1935b). In 1949 the State extended the restriction to Indian fishing, significantly limiting the exercise of traditional tribal rights throughout Washington (Barsh 1977:8).

In spite of Initiative No. 77 and actions by the Washington Department of Fisheries, the Cowlitz persisted in fishing and hunting in their traditional use areas. Frank Wannassay, son of Jack and "Patch-Eye" Wannassay, was one who continued usual ways. Wannassay lived all his life on the lower Cowlitz River. He died there in December, 1935, of tuberculosis in a houseboat moored to the shore. His obituary noted: "He followed in the footsteps of his parents by taking most of his living from the Cowlitz. Yearly he fished for smelt and salmon." Wannassay's parents had resided at the later site of the Crescent Shingle Company. His father, Jack, drowned in the Columbia River. Frank Wannassay was survived by his wife, his sons Charles and Johnny, and three daughters, including Maude Snyder of Kelso (Anonymous 1935a).

In 1937 O. D. Bouchard, a Cowlitz, was prosecuted under Initiative No. 77 for using a set net in the Cowlitz River. Even though the Initiative had not addressed Indian fishing (not instituted until 1949 by the Washington Department of Fisheries), Brennan had proceeded with his prosecution (Brennan 1937; Bouchard 1937a). Bouchard was arrested, tried, and fined. He wrote a stinging letter in January to B. M. Brennan, Director of Fisheries:

> Just a few lines in regards to fishing on the Cowlitz river with nets. I am a Cowlitz Indian. I guess you remember I was picked up by some of your men a year ago last fall, was sentenced (and paid a fine). After that us Indians went into find out about our rights to fish for our own use, which we did, but haven't made much head way, as it is still a question, but never the less since I got picked up what Indians did have nets has got rid of every thing and quit entirely which means they want to obey the law.

> Now since I got arrested and all of us has quit, it seems as though the river is open to every body else. This last fall there was a net in every eddy that was fit to set in, the white men had commercial lisence and sold them by the hundreds when the Columbia river was closed. How come. And there wasn't even a arrest, nice work. If that would of seen me through or some of my people why we would of been on the spot about the second time we tried it. So I would like to see a little action this spring and next fall, and when your men do make an arrest, why fine them the same as they did me.
>
> There was a white man arrested just before they got me, he got a nice big fine $5.00 and cost. I got a nice little fine $100.00 and 30 days suspended (all but $35.00). I wish I had a chance to run the river in salmon season & bet I would make a cleaning if you ever need a man to run the river let me know, as there are some fellows that I sure would like to get arrested of course I wouldn't work for nothing I would need a salary & hope this don't cause any bad feelings but it is the truth (Bouchard 1937b).

John Ike, a Cowlitz defender of tribal rights, was arrested by Washington State Police in the spring of 1939, and charged with illegal fishing. The jury exonerated him and Judge J. E. McCoy ordered Ike's attorney return his client's $10.00 fee so that Ike could use the money to purchase food for his family (Anonymous 1939a).

The persistence of the Cowlitz aboriginal fishery through the first half of the twentieth century was documented in the case of *The Cowlitz Tribe of Indians v. The City of Tacoma, a Municipal Corporation* (1955) (253 F.2d 625 9th Cir. 1958). The lawsuit was the opposition of the Cowlitz Tribe to construction of Mayfield and Mossyrock dams and blocking of fish passage and access to ages-old Cowlitz fishing stations, villages, and cemeteries.

John Eyle, a Cowlitz and resident of Nesika, testified on December 9, 1955, in this case. Eyle resided on off-reservation trust land located in the E ½ of NE 1/4 of the SE 1/4 of Section 2, Township 11 North, Range 4 East, Willamette Meridian. Eyle's trust land and that of his neighbor, Mary Kiona, were to be flooded by the proposed dams. Eyle stated:

> That the Cowlitz Indians have fished in the Cowlitz River from time immemorial and do so now. That prior to the coming of the white man, their entire living was obtained from fish from the river and game

> animals from the woods. That the fish taken from the river were silvers, chinook, calico fish (dog salmon), chubs, smelt, trout of all varieties, including steelhead, and suckers. Fishing on the said river was from its mouth near Kelso, Washington to as far up the watershed as the salmon would run, which was above the present down of Packwood on the Cowlitz River, and the Niggerhead, a tributary of the Cispus. Before the coming of the white man, fish taken were for the Indian's own use as food, and upon the coming of the white man, much was sold. The Indians to this day fish in said Cowlitz River for their own use (Eyle 1955).

Eyle also spoke to the large number of Cowlitz families engaged in the fishery in the 1940s and 1950s:

Table 1

Cowlitz Fishing Families, 1940s and 1950s

Family Name	Location
White	Near Kelso, Washington
Shokol	Near Kelso, Washington
Cheholtz	Castle Rock
Captain Peter	Olequa
Cottenoire	Olequa
Iyall	Above Olequa
Stokum	Near Toledo
Kimpus	Cowlitz Prairie
Kinswa	Near Mayfield
Castama	Near Mayfield
Sheungun	Near Mayfield
Tal-u-ya	Mossyrock
Yoke	Nesika and Kosmon
Myles	Nesika and Kosmon
Satanas	Cowlitz Falls, Randle
Kiona	Cowlitz Falls, Randle

He concluded: "That said Indians and all others in the watershed of the Cowlitz River fished said river from time immemorial and such Indians as remain now fish in said river" (Eyle 1955).

Sarah Castama, an aged Cowlitz living at Silver Creek, testified on December 8, 1955, in the Mayfield Dam litigation: "That the members of the Cowlitz Tribe of Indians have fished in the waters of the Cowlitz River and operated their canoes thereon from time immemorial and still fish in said river to a limited extent" (Castama 1955).

Frank Thomas, Cowlitz son of Tushwik, was born on the North Fork of the Neuwacum River and lived all his life in the Cowlitz country. He testified on December 9, 1955:

> That he and his family and his ancestors fished in the Cowlitz River, obtaining salmon particularly, said fishing being from time immemorial and since the coming of the white man the Indians obtained fish from said river for their own use, preserving the same by smoking and drying. That later many fish were sold, many Indians making their living by fishing. That in addition to the Indians living in the near vicinity of the Cowlitz River, many Cowlitz Indians came from distant parts of the tribal domain to fish in said river, some of the Indians being this affiant, his family, and his ancestors. That the fishing n said river was along its entire length, from its source to its mouth and the fish taken were all species of salmon and all species of trout (Thomas 1955).

Thomas further testified: "That the said Cowlitz Indians did hunt and obtain elk, bear, deer, and beaver on the lands soon to be inundated by the waters impounded by said proposed dams to be built by the City of Tacoma" (Thomas 1955).

Isaac Ike Kinswa, a Cowlitz living at Ethel and son of John Ike Kinswa, testified on December 6, 1955. He stated he was born at Vader and had lived his entire life in the Cowlitz Valley, most the time near Silver Creek. Kinswa identified a number of Indian cemeteries in the proposed reservoirs and added:

> That affiant has fished in the Cowlitz River to a limited extent and that his ancestors fished there prior to the coming of the white man and that any and all rights which the Cowlitz Indians had in the lands in the valley of the Cowlitz River and right which they had in the waters of the Cowlitz River have not been extinguished by treaty, transfer or otherwise and that the title to said lands still remains in the Cowlitz Tribe of Indians (Kinswa 1955).

The 1930s to the 1950s were a period of tightening fisheries and hunting

regulations by the State of Washington. Because of extensive construction of dams, logging, industrial and urban development, awareness grew that the fisheries of the state were in jeopardy. The legislature in 1949 passed the Washington Fish Sanctuary Act. The law exempted the North Fork of the Lewis River and the Big White Salmon, but included all other tributaries and specifically mentioned the Cowlitz River:

> SECTION 1. All streams and rivers tributary to the Columbia River downstream from McNary Dam are hereby reserved as an anadromous fish sanctuary Fish--against undue industrial encroachment for the preservation and development of the food and game fish resources of said river system and to that end there shall not be constructed thereon any dam of a height greater than twenty-five (25) feet that may be located within the migration range of any anadromous fish as jointly determined by the Director of Fisheries and the Director of Game, **nor shall waters of the Cowlitz River or its tributaries or of the other streams within the sanctuary area be diverted for any purpose other than fisheries in such quantities that will reduce the respective stream flows below the annual average low flow, as delineated in existing or future United States Geological Survey reports** (State of Washington 1949:38-39). [Emphasis supplied.]

The legislation was a preemptive move by the State to try to protect the remaining rivers productive of fish to sustain both commercial and sports fishing. The State did not acknowledge the existence of the Indian fisheries in its rationale for the law.

The situation for the Cowlitz Tribe grew more troubling and complex. Tacoma Light and Water Company, founded in 1884 as a private company, was purchased in 1893 by the city to become Tacoma Power, later Tacoma Utilities. The city bought land at Hood Canal on the west side of Puget Sound where it obtained control of the North Fork of the Skokomish River. The utility company constructed Cushman Dam No. 1 (1926) and Cushman Dam No. 2 (1930). The system effectively "dewatered" the entire Skokomish North Fork and diverted it through penstocks to the Cushman Power House. The hydro facility destroyed all fish runs on the Skokomish and was the predicate to the build-up of gravels in the Skokomish delta which subsequently flooded much of the Skokomish Indian Reservation (Canning, Randlette, Hashim 1987).

Tacoma Utilities next targeted the Cowlitz River and began an ambitious land acquisition program in its upper watershed. In 1946 the City of Tacoma

bought the preliminary dam permit issued by the State in 1933 to Bakus-Brooks Company. Two years later Tacoma notified the Federal Power Commission of its plans to construct dams on the Cowlitz. It announced preliminary specifications for Mayfield Dam to rise 185 feet and impound a reservoir for thirteen and one-half miles and Mossyrock Dam of 325 feet to back up the Cowlitz for twenty-one miles (Anonymous 1948a, 1957a; Secretary of Interior 1949).

The State responded with the Washington Fish Sanctuary Act. The Cowlitz Tribe, aware of the calamity about to befall its fishery and cultural sites throughout the upper Cowlitz watershed, began an examination of its responses to City of Tacoma and the projected expenditure of $148 million on the new hydro facilities. Public hearings in 1950 and 1951 led the Federal Power Commission on November 8, 1951, to issue a construction license. The Washington State Sportsmen's Council, the Washington Department of Fisheries, and the Washington Department of Game in January, 1952, requested a re-hearing on the license. On October 14, 1953, the Washington Supreme Court ruled the Fish Sanctuary Act was not a bar to the City of Tacoma for its Cowlitz project. It found that federal licensing authority preempted State efforts to thwart the dams (Anonymous 1957a).

In March, 1955, the utility company began road construction to the Mayfield dam site and in May authorized bond sales, subsequently suspended when the Departments of Fish and Game obtained a restraining order (Anonymous 1957a). In this setting over 100 tribal members gathered in June, to hear attorney and vice-chair James E. Sareault address the Cowlitz River issues. He reported the Yakima Tribe had authorized legal action to block the project and to seek damages. James Hovis, attorney for the Yakima, explained that the tribe and an "old and accustomed fishery" on the upper Cowlitz (Anonymous 1955a).

On July 20, 1955, the Cowlitz Tribe also sued the City of Tacoma for $80 million in federal court. The tribe engaged Malcom S. McLeod, Frederick Paul, and James E. Sareault as legal counsel. The Cowlitz complaint sought several reliefs: an injunction to block construction of the two dams and sale of bonds to fund such construction, $48 million in compensation for destruction of fishing sites, $18 million for water rights, $9.9 for flooding of land, and $5.2 million for 'sacrilegious interference" with the graves of its ancestors. The Cowlitz claimed their aboriginal title remained unextinguished and the sites of the projected dams and reservoirs was on their property. Additionally both the Chinook and Quinault tribes alleged they also had fishing rights on the Cowlitz

and Columbia rivers that would be negatively impacted by the dams (Anonymous 1955b).

The Cowlitz identified four cemeteries of particular concern:

- An old Indian cemetery on the Gene Flaming farm near Harmony. It has about 100 graves. Mayfield dam waters would flood it over.

- Riffe Cemetery located on a hill on the east side of Riffe, but not high enough to escape water backed up by the Mossyrock dam. There are about 200 dead buried there.

- A private Smith family cemetery on the Bill Irish place, a few miles east of Riffe. Thirteen persons rest there.

- An old Cowlitz Indian tribal burial grounds on the old Schoonover place at Nesika. The only estimate available list 400 buried there.

Chief John Eyle of Riffe opposed any grave removals. "They (the dead," he said, "were put there and they should stay there. That's the way I would like it to be if I were there." Sarah Kostomi [Castama] of Mossyrock said that should would like to have her family graves moved (Anonymous 1955c).

The dam controversies surged ahead with opposition to the City of Tacoma by the State Department of Fish, State Department of Game, sports fishing groups, and several tribes. The utility company engaged in numerous skirmishes with state agencies and litigation issues such as restrictions on river navigation and condemnation of state lands for the dam projects. The company also brought in mitigation projects for construction of hatcheries and a fish-skimmer system, ultimately approved by the U.S. Fish & Wildlife Service in May, 1957 (Anonymous 1957a).

On August 16, 1957, the Cowlitz Tribe, which had lost its case in federal court, also lost in the U.S. Circuit Court of Appeals. The Court observed the Cowlitz had no treaty and that the tribe's pending land claims case before the Indian Claims Commission was unresolved. The Court noted the federal government had not entered the case on behalf of the Cowlitz as the tribes guardian and protector. The District Court therefore claimed it had only limited jurisdiction over the matter. The Case Text noted: "Here the Tribe does not allege that the United States has ever recognized any title in these Indians, either collectively or individually, by congressional action or by

executive order. The primary question in a condemnation action is compensation for the title." The Court concluded: "The Cowlitz did not enter into any treaty with the government, so the construction of no such instrument is involved." The Court further observed the utility company was licensed for the project by the Federal Power Commission (U.S. Court of Appeals, Ninth Circuit 1958).

On October 7, 1957, the State Game Commission voted unanimously to reject the City of Tacoma's guarantee of covering fish losses by building other facilities (Anonymous 1957a). The long struggle over the Cowlitz River ultimately resulted in a costly victory for the City of Tacoma. The city expended over $200,000 in legal fees, encountered a doubling of interest rates on its bonds during the years of controversy, encountered cost overruns of up to $25 million, and ruptured relationships with stage agencies, legislators, sportsmens groups, and Indian tribes. An article, "Fight Over Dams Costly," concluded: "Tacomans hope to convince the skeptical sportsmen at long last their intentions toward fish are honorable" (Anonymous 1962a). The account gave made no prediction about the intentions toward the Indians of southwestern Washington.

In spite of years of opposition by the State, Cowlitz Tribe, and fishing organizations, the City of Tacoma prevailed and constructed the dams that dramatically changed the flows of the Cowlitz, its fish runs, and the cultural legacies of the Cowlitz people.

Findings of Fact

1. The Cowlitz Tribe possessed an extensive land area where it resided and engaged in subsistence, trade, and travel in southwestern Washington. The area included the entire watersheds of the Cowlitz, Kalama, and Lewis rivers and the Willapa Hills to the west. The Cowlitz engaged in fishing, hunting, and gathering and sustained themselves from time immemorial with the resources of their lands.

2. Numerous travelers, including fur trappers, explorers, and U.S. Navy personnel, encountered the Cowlitz in the first half of the nineteenth century. They identified places where they lived and described elements of their culture.

3. Congress passed the Indian Citizenship Act in 1924. Within a year the State

of Washington intensified its efforts to control Indian fisheries. In 1925 it declared steelhead a "game fish" and forbade catching them in traps or nets. State officials initiated arrests and convictions of Indian fishers, especially the Cowlitz who lacked a ratified treaty reserving fishing and hunting rights. Individual Cowlitz and the Cowlitz Tribe protested State regulations. In 1928 the Washington Attorney-General ruled that Cowlitz had to follow all regulations applying to non-Indians.

4. In 1934 Washington Initiative 77 banned the use of fish traps and set nets except for Indians with ratified treaty rights. The State prosecuted Frank Wannassay, O. B. Bouchard, John Ike (Kinswa) and other Cowlitz for engaging in subsistence fishing in Cowlitz homelands.

5. In 1955 the Cowlitz Tribe sued the City of Tacoma to stop construction of Mayfield and Mossyrock Dams on the Cowlitz River. The tribe charged the City's projects would block fish passage, flood traditional villages and cemeteries, and dislocate Cowlitz families. The State of Washington also fought the City, but both the tribe and State lost their efforts to thwart the hydro power projects on the Cowlitz.

3. Factors Affecting Cowlitz Fishing, Hunting, and Gathering

The fishing, hunting, and gathering rights of the Cowlitz Tribe remain ambiguous. They have been affected not only by the course of federal Indian policy and actions of the states of Washington and Oregon, but also by court findings and other factors.

Halbert v. United States (1931)

The Treaty of Olympia of January 6, 1856 (ratified March 8, 1859), created the Quinault Reservation for the Quinaelt and Quileute tribes of the central coast of Washington. On November 4, 1873, President Ulysses S. Grant by Executive Order enlarged the Quinault Reservation to 350 square miles (more than 200,000 acres) "for the use of the Quinaielt, Quillheute, Hoh, Quits and other tribes of fish-eating Indians of the Pacific Coast." In 1905, as a consequence of the General Allotment Act (1887), the Bureau of Indian Affairs commenced allotment of lands to individual Indians. The allotments were 80 acres for farming or 160 acres for grazing. The Bureau issued a total of 468 allotments in the first phase. The allotments embraced all potential agricultural lands on the heavily-forested reservation. With an evident shortage of arable lands controversies arose by 1910 about who was eligible for an allotment. Congress attempted to resolve the conflict. On March 4, 1911, it passed a law stating the "Hoh, Quileute, Ozette, or other tribes in Washington who are affiliated with the Quinault and Quileute tribes in the Treaty of July first, eighteen hundred fifty-five and January twenty-third eighteen hundred fifty-six . . ." can receive allotments on the Quinault Reservation. The Act (36 Stat. 1345) established that residency on the reservation was not required for being allotted (U.S. Congress 1911).

The Northwestern Federation of American Indians, founded in 1911, met and acted on behalf of numerous non-reservation Indians residing in western Washington. Led by Thomas G. Bishop (1859-1923), a Snohomish, the Federation promoted several causes: enrollment of all Indians off-reservation Indians west of the Cascades, securing land for Indians and their families, and obtaining equitable awards for the taking of tribal lands. The meetings of the Federation drew representatives from the Cowlitz and other tribes in southwestern Washington. The Federation's activities led the Bureau of Indian Affairs to send Dr. Charles E. Roblin to Washington State to mount between 1917 and 1919 an ambitious enrollment program. The Federation also quickened interest in dozens of indigent Indians to secure lands on the Quinault Reservation. Roblin observed:

> Mr. Bishop and his colleagues immediately took the position that all unalloted Indians living west of the Cascade Mountains in western Washington could be allotted on the Quinaelt Indian Reservation; and they spread this word broadcast. This, too, was the position taken by Mr. H. H. Johnson, Superintendent then in charge of the Quinaielt Indian Reservation; and it thus obtained backing which lent it impetus (Roblin 1919).

When allotments resumed at Quinault under the Act of 1911, the Bureau of Indian Affairs granted land only to Cowlitz, Chinook, Chehalis, and other Indians who went through a process of "adoption" into the Quinault Tribe. The Quinaults resisted further allotments and refused to engage in adoptions. Thus the potential allottees then filed the case of *Halbert v. United States* to clarify who was eligible for lands on the reservation. The matter was in the courts in the 1920s and was heard ultimately in 1931 by the U.S. Supreme Court. The Supreme Court found the following:

> 1. Indians of the Chehalis, Chinook and Cowlitz Tribes, not allotted elsewhere, are among those who, under the Act of March 4, 1911, are entitled to take allotments on the Quinaielt Reservation in the State of Washington. P. 283 U. S. 760.
>
> 2. Personal residence on the reservation is not essential to the right of allotment. P. 283 U. S. 762.
>
> 3. The rule is general that, in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends on tribal membership, and is terminated when the membership ends. P. 283 U. S. 762.
>
> 4. Under the operation of this rule, an Indian woman loses her tribal membership when she marries a white man, separates from the tribe, and lives with him among white people; but it is the separation from the tribe, rather than the marriage, which puts an end to the membership, the marriage usually serving to explain the separation and illustrate that it is intentional and permanent. P. 283 U. S. 763.
>
> 5. But where the Indian woman, after her marriage with a white, remains in the tribal environment and continues the tribal affiliation, the membership is not affected. P. 283 U. S. 763.

6. If the husband be a citizen of the United States, the woman, by marriage, becomes also a citizen; but there is no incompatability between tribal membership and United States citizenship. Id.

7. The children of a marriage between an Indian woman and a white man usually take the status of the father, but if the wife retains her tribal membership and the children are born in the tribal environment and there reared by her, with the husband failing to discharge his duties to them, they take the status of the mother. P. 283 U. S. 763.

8. Whether grandchildren of such a marriage have tribal membership depends on the status of the father or mother, as the case may be, and not on that of a grandparent. P. 283 U. S. 763.

9. As to marriages occurring before June 7, 1897 (as the marriages here did) between a white man and an Indian woman, who was Indian by blood, rather than by adoption, and who, on June 7, 1897, or at the time of her death, was recognized by the tribe, the children have the same right to share in the division or distribution of the property of the tribe of the mother as any other member of the tribe; but this is in virtue of the Act of June 7, 1897. Id.

10. The Court will decline to consider questions not raised by the assignment of errors and as to which there is no appropriate assurance that the record contains all the evidence material to their decision. P. 283 U. S. 764. (38 F.2d 795, 799, 805, 806).

As a consequence of the Halbert case several members of the Cowlitz Tribe obtained allotments on the Quinault Reservation prior to congressional termination of allotment by the Indian Reorganization Act (1934). These allotments were held in trust by the United States for Cowlitz Indians. The forested properties were mostly not habitable but contained valuable stands of timber. Allottees had hunting and fishing rights on the Quinault Reservation as owners of trust lands. Since most were not enrolled in the Quinault Tribe, the issue arose whether they retained these rights on the reservation where they were landowners.

Table 2

Allotments to Cowlitz Indians on the Quinault Reservation

Name	Tribe	Residence	Allotment No.
Amelia, Roy	Quinault-Cowlitz	Cathlamet, WA.	9-
Bobb, Vera	Chehalis-Cowlitz	Quinault Res.	164-
Brignone, Nora (Scarborough)	Chinook-Cowlitz	Cathlamet, WA.	166-
Brown, Laura May (Provoe)	Cowlitz	Little Rock, WA.	154-
Brown, Walter S.	Cowlitz	Little Rock, WA.	16-
Brown, Thomas J.	Cowlitz	Little Rock, WA.	16-
Carr, Mildred (Simmons)	Chinook-Cowlitz	Olympia, WA.	169-
Carr, Shirley Jean	Chinook-Cowlitz	Olympia, WA.	169-
Carr, Daniel B.	Chinook-Cowlitz	Olympia, WA.	169-
Hash, Beatrice E.	Chinook-Cowlitz	Olympia, WA.	184-
Cloquet, August	Cowlitz	Monroe City, WA.	1719
Fullerton, Christina (Clark)	Cowlitz	Tacoma, WA.	1802
Garrard, Rose R.	Cowlitz	Quinault Res.	1558
Gill, Dolores G.	Quinault-Cowlitz	Quinault Res.	1814
Gill, Geraldine	Quinault-Cowlitz	Quinault Res.	1815
Gill, Lee Roy	Quinault-Cowlitz	Quinault Res.	1816
Knowles, Mary	Cowlitz	Tacoma, WA.	1941
LeClaire, Louise (Scarborough)	Chinook-Cowlitz	Westport, WA.	1967
Lund, Emma G.	Chinook-Cowlitz	Olympia, WA.	1973
Lund, Henry	Chinook-Cowlitz	Olympia, WA.	1974
Lund, John Julius	Chinook-Cowlitz	Olympia, WA.	1975
Lund, James L.	Chinook-Cowlitz	Olympia WA.	1978
Miller, Mabel K. (Brignone)	Cowlitz	Portland, OR.	2023
Oliver, Sampson W.	Cowlitz	South Bend, WA.	204-
Oliver, Charles	Cowlitz	South Bend, WA.	2047
Oliver, Emmett	Quinault-Cowlitz	South Bend, WA.	2048
Oliver, Jennie	Quinault-Cowlitz	South Bend, WA.	2049
Oliver, Frances	Quinault-Cowlitz	South Bend, WA.	2050
Oliver, James	Quinault-Cowlitz	Tulalip, WA.	2051
Oliver, Marlene C.	Quinault-Cowlitz	Tulalip, WA.	2052
Pete, Frank	Chehalis [Cowlitz]	Quinault Res.	2080
Pete, Doris Hazel	Chehalis [Cowlitz]	Quinault Res.	2082
Pete, Ruth Ann	Chehalis [Cowlitz]	Quinault Res.	2083
Pete, Julia (Pe Ell)	Cowlitz	Quinault Res.	2078
Provoe, Mary	Cowlitz	Quinault Res.	1483

Provoe, Francis W.	Cowlitz	Quinault Res.	1586
Provoe, Raymond	Cowlitz	Quinault Res.	1585
Putnam, Louise S.	Chinook-Cowlitz	Olympia, WA.	2136
Scarborough, Charles F	Chinook-Cowlitz	Quinault Res.	2182
Sellers, Sarah (Provoe)	Cowlitz	Elma, WA.	139-
Simmons, Samuel	Cowlitz	Olympia, WA.	2204
Simmons, Samuel C.	Chinook-Cowlitz	Olympia, WA.	2205
Simmons, Lyle E.	Chinook-Cowlitz	Olympia, WA.	2206
Simmons, Walter C.	Chinook-Cowlitz	Olympia, WA.	2207
Simmons, Myron C.	Chinook-Cowlitz	Olympia, WA.	2208
Pete, Lawrence A.	Quinault-Cowlitz	Portland, OR.	2074
Pete, Jesse	Quinault-Cowlitz	Portland, OR.	2075
Torner, Mabel N. (Simmons)	Chinook-Cowlitz	Olympia, WA.	2074
Torner, Dorothy J.	Chinook-Cowlitz	Olympia, WA.	2245
Torner, Floyd P.	Chinook-Cowlitz	Olympia, WA.	2246
Torner, Peggy C.	Chinook-Cowlitz	Olympia, WA.	2247
Van Mechelen, Helen (Brown)	Cowlitz	Little Rock, WA.	2253
Van Mechelen, Juanita	Cowlitz	Little Rock, WA.	2254
Van Mechelen, Daniel	Cowlitz	Little Rock, WA.	2255
Young, Isabelle (Nicholson 1934b).	Cowlitz	Quinault Res.	1601

Twenty other Cowlitz Indians obtained in trust Indian Homesteads or Public Domain Allotments under the Indian Homestead Act (1875) and the 4th Section of the General Allotment Act (1887). Most of these lands were located in Township 12 North, Ranges 2 West, 2 East, 3 East, 4 East, and 6 East in lands bisected by the upper Cowlitz River. Cowlitz tribal members received these trust lands between 1888 and 1940. The land locations afforded tribal members the opportunity to fish at "usual and accustomed places" and to hunt in traditional locations used by the tribe from time immemorial. These Cowlitz families continued to exercise their subsistence rights on their trust lands through the twentieth century. Several of these Cowlitz properties were flooded by the reservoirs of Mayfield and Mossyrock dams.

Washington Blue Card Program

In 1957 the Washington State Fisheries Department identified eight primary threats to the fisheries: (1) over-fishing, (2) loss of natural spawning and rearing areas, (3) pollution, (4) "Unregulated Indian fishery on streams bordering reservations," (5) natural predators, (6) inception of salmon by other nations, (7) lack of enforcement of conservation laws, and (8) adverse weather

conditions (Moore 1957a:2-3). With his report, Director Moore filed Exhibit C, "The Indian Salmon Fisheries of Washington State." He reported there were twenty-one tribal fisheries and charged the tribes largely ignored all conservation practices. He contended that because of the Indian fisheries "every regulation imposed by the state on the commercial salmon fishery to allow spawning stocks to enter the stream is placed in jeopardy by the unregulated activities of these Indian fishermen." Moore warned: "Several hatcheries, located on streams where Indians fish, may be entirely without spawning stock this year" (Moore 1957b:1).

In the 1950s the State of Washington in cooperation with the Bureau of Indian Affair administered a "Blue Card" program. The cards were issued to identify Indians who were entitled to exercise their rights for fishing, hunting, and gathering. The issuance of "Blue Cards" commenced as early as 1951 and continued until 1964. Raymond Bitney, Superintendent of the Western Washington Agency of Indian Affairs, told recipients of the cards they did not have to purchase deer tags or pay license fees for commercial fishing in state waters (Bitney 1951).

The State identified four classes of Indians for the Blue Card Program:

- Persons of Indian ancestry who are members of Indian tribes and who possess a treaty with the U. S. government.

- Persons of Indian ancestry who belong to tribes who do not enjoy treaties but whose reservations were established by executive order or by other means.

- Persons of tribes in the state of Washington with no treaty nor any known reservations.

- Persons of Indian ancestry whose tribes are located in Canada or Mexico, but whose people reside both on and off reservations located in the state of Washington (Anonymous 1961).

These "Blue Card" categories were poorly fit with the members of the Cowlitz and other tribes. In the 1950s the Cowlitz had no ratified treaty but possessed unextinguished title to their unceded lands (nearly 1.7 million acres) in southwestern Washington. They possessed a post-treaty affiliation under the Treaty of Olympia by virtue of the Supreme Court finding in *Halbert v. United States* (1931). They did not fit neatly into categories one, two, or

three, and category four clearly did not apply. A Washington State official thus raised the question with the Department of the Interior: "Who are the people who retained and may enjoy these special privileges of hunting and fishing?" The question was difficult to answer because the Bureau of Indian Affairs did not maintain a Cowlitz roll. The most recent record it had secured was the Cowlitz Roll developed by Charles E. Roblin in 1917-18 (Anonymous 1961).

Numerous Cowlitz Indians secured "State of Washington-Dept. of Game Indian Identification Cards." The printed hunting card reported several types of information:

> Name _____
> Address _____
> Sex ___
> Weight ___
> Height ___
> Not applicable persons less than ___ percentage or part Indian Blood
> I, hereby certify, that I am a member of _____
> Tribe of Indian and that I, possess _____ part Indian Blood.
> Signature _____
> Recording Agent _____
> Title _____
> Date Issued. Mo ____ Day ____ Year ____
> MUST BE RENEWED ON OR BEFORE 12-31-59
> MAY BE REVOKED BY ORDER OF DIRECTOR OF GAME
> (Wilson 1958)

The Blue Card program was beset with inconsistencies. Mitchell Doumit of Wahkiacum County on April 17, 1957, raised issues about the cards regulating Indian fishing and hunting. He demanded the Washington Attorney-General to provide answers to two questions:

> By the regulation, the department has indicated that Indians of one-fourth or more Indian blood, registered by their tribe, possessing treaty rights, on the I.D. cards furnished by the department may and fish without a license off their reservation in common with other citizens.
>
> (1) What authority does the game commission have to adopt such a regulation in derogation of treaty rights possessed by the tribe?

(2) Where does the commission derive the authority to determine the degree of blood of a tribal Indian to be eligible for his tribal rights? (Doumit 1957).

The response of the Attorney-General to Doumit is unknown, but clearly the Blue Card program raised serious problems of State interference in the role of tribes determining their own membership.

The Blue Card program continued into the 1960s. On October 2, 1962, George Felshaw, Superintendent of the Western Washington Agency, sent a general letter to "All Tribal Governing Bodies." He explained the State of Washington had concluded that some tribes were "non-treaty." Felshaw told the tribal leaders: "We are listing them as follows: Chehalis, Chinook, Cowlitz, Muckleshoot, and Nooksack." He told the tribes the State would no longer recognize Blue Cards "formerly issued by the Bureau, as proof of tribal membership, but they do recognize membership cards issued by the tribes to members" (Felshaw 1962). Felshaw's letter was filled with inaccuracies. The Chehalis Tribe, for example, had a federally-recognized tribal government and resided on the Chehalis Reservation created by Executive Order on May 17, 1864, between Oakville and Rochester, Washington. The Muckleshoots were a federally-recognized tribe residing on the Muckleshoot Reservation created by executive order on April 9, 1874, at Auburn, Washington (Kappler 1904a1]:901-902, 918-919).

The interests of the State and the tribes were increasingly at odds. The economic returns for commercial fishing enterprises reeled under continuing decreases in fish runs as well as mounting sports fishing. Each year there were more potential users and more dollar values associated with the resource and almost annually the "catch" and the "returns" declined. The stage was set for a new round of litigation over Indian fishing rights in Washington and Oregon, especially because the states elected to favor the non-Indian fishers over the Indians. In 1958 the State Director of Fisheries announced that "concentrated Indian fisheries" had exterminated some stocks of salmon. He admitted, however, that the total tribal harvest statewide constituted only about one percent of the state's commercial landings (Barsh 1977:20).

In January, 1962, John A. Biggs, State Game Director, warned the steelhead fishery was in "danger of being destroyed unless the State Game Department wins its war against Indian net fishing." Biggs said there would be no enforcement against on-reservation fishing nor at documented "usual and accustomed grounds and stations" within treaty-ceded lands. Biggs predicted

however, that Indians would soon "place nets in every stream in the State." He blamed the Indians for failing to engage in conservation and put the problem of declining fish runs wholly on the continuation of the modest Indian fishery (Anonymous 1962b).

On July 5, 1965, John A. Carver, Jr., under Secretary of Interior, wrote to Governor Mark O. Hatfield of Oregon to report his department was proceeding with rule-making over the "Off-Reservation Treaty Fishing" in Oregon and Washington. Carver noted the regulations were to promote protection of the nation's fisheries, to protect the off-reservation rights of "certain Indian tribes under their treaties," to assist in the administration of Indian affairs, and to assist the states in enforcing their laws and regulations for the conservation of fish and wildlife. The program proposed in considerable detail a new "permit" or "card permit" program for treaty tribes. Only an Indian who was "a member of a recognized Indian tribe having off-reservation treaty fishing rights" was eligible to participate (Carver 1965).

The State of Oregon objected to eighteen elements of the new Indian "permit" or "card permit" program. Among these objections was the demand that Indian fishers had to "possess a State fishing license issued pursuant to State law" as a condition for gaining a "permit" or "card permit." The thrust of most of the objections was a determined effort by the State of Oregon to regulate the treaty-protected Indian fishery (Thornton 1965).

United States v. Washington (1974) *and Washington v. Washington Commercial Passenger Vessel Association* (1979)

Filed on September 18, 1970, the case of *United States v. Washington* (384 F. Supp. 312, aff'd, 520 F.2d 676, 9th Cir. 1975) addressed the long-simmering and contentious efforts of the State to control the treaty-protected fisheries of the tribes. The case was heard in the U.S. District Court, Western Washington District, Tacoma. The U.S. Department of Justice, at request of the Department of the Interior, acted as the trustee for several Indian tribes in the complaint. The initial plaintiffs were the Hoh, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, Skokomish, Lummi, Quinault, Sauk-Suiattle, Squaxin Island, Stillaguamish, Upper Skagit River and Yakima Nation. Between April, 1974, and October, 1975, the Court permitted thirteen additional tribes to intervene: Lower Elwa, Nooksack, Port Gamble, Suquamish, Swinomish Tribal Community, Tulalip, Duwamish, Jamestown Clallam, Samish, Snohomish, Snoqualmie, Steilacoom and Swinomish Tribe (aboriginal) (Bureau of Indian

Affairs 1976). In 1970 neither the Samish nor Steilacoom had clarified their federal relationship with the United States, but they were permitted to litigate. The case excluded the non-treaty tribes of southwestern Washington.

In 1974 Judge George H. Boldt recognized western Washington treaty tribes have a right to take fish "in common with" non-Indians from off-reservation waters. The U.S. Supreme Court later upheld Judge Boldt's major ruling that Indian tribes have a right to take as much as 50 percent of the harvestable fish in waters off the reservation. The Boldt decision also granted comparable responsibility to both the tribes and the state of Washington for conserving the resource and regulating the anadromous fisheries harvest (384 F. Supp. 312). Also in 1974 Judge Robert Belloni in a supplemental decision in *U.S. v. Oregon* held that Indian treaty tribes were entitled to take up to fifty percent of the harvest of spring Chinook destined to reach the tribes' "usual and accustomed fishing places on the Columbia River." In 1976 Belloni further ruled the treaty tribes had the opportunity to take up to fifty percent of the fall chinook salmon also destined to reach the tribes' "usual and accustomed fishing places on the Columbia River" (Bureau of Indian Affairs 1976:5-6).

In *Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979),* the Supreme Court held that, in general, tribal fishing rights under treaties reserving the tribes' "right of taking fish [off reservation] at all usual and accustomed grounds and stations" entitle tribes to "take a fair share of the available fish." According to the Court's interpretation of the applicable treaties protecting tribal fishing rights in western Washington, a "fair share" allows Indians to secure up to 50% of a fishing harvest, "but no more than is necessary to provide the Indians with a livelihood--that is to say, a moderate living." Therefore the case affirmed that the treaty right acknowledged an enforceable right to take fish throughout their fishing areas.

The findings in these landmark cases were highly significant for the treaty tribes but did not address the situation of the Cowlitz who had no ratified treaty.

Cowlitz Fishing Rights Case

The Wahkiakum Band of Chinook Indians, et al. v. Mrs. Allen Bateman, et al. Civil No. 79-39. [655 F.2d 176 (9th Cir. 1981)

The Cowlitz Tribe of Indians, Chinook Tribe, Inc., et al. v. Don Barth et al. Civil No. 80-391 [U.S. District Court for the District of Oregon]

The Cowlitz Tribe of Indians, Chinook Tribe, Inc., et al. v. Ralph Larson, et al. [Civil Action C80-166T. [U.S. District Court for the Western District of Washington, Tacoma]

In 1980 the Cowlitz Tribe, Wahkiakum Band of Chinook Tribe, and the Chinook Tribe, Inc., of southwestern Washington filed parallel lawsuits in federal court seeking protection of their fishing rights in the lower Columbia River and its tributary streams. Judge Robert Belloni initially heard this litigation but withdrew in light of his previous rulings. He stated he did not believe he could hear the case impartially. Judge Walter Craig then took over the litigation. During the proceedings Judge Craig issued a temporary restraining order barring Washington and Oregon from interfering with the on-going tribal fishery in the Columbia River. Craig did not consolidate the cases but proceeded with hearings in federal court in Portland in the parallel cases (655 F.2d 1976, 9th Cir. 1981).

The three cases were predicated by two Oregon court cases. The State had prosecuted Eugene S. Goodell and Lawrence E. Goodell, Chinooks, for fishing in the Columbia River claiming that the Chinook Tribe had unextinguished fishing rights in that stream and the fishery was protected by the Treaty of Olympia. Eugene S. Goodell was an original allottee on the Quinault Reservation (*State of Oregon v. Eugene S. Goodell*, 380 Or. App. 511, 590, F.2d 764 (1979); *State of Oregon v. Lawrence E. Goodell*, 380 Or. App. 419, 590 F.2d 769 (1979). The Oregon Supreme Court denied efforts of the defendants to appeal these decisions in 1979 in the Oregon Court of Appeals. Thus in 1980 the Goodells, other Chinooks, and Cowlitz began the next round of litigation.

Cowlitz plaintiffs were John R. Barnett, Norman R. Monohan, Roger Nelson, Mae E. Purcell, Carolee Green, Nadine McKinney, Mary L. Wetzel, Joseph E. Cloquet, Richard Iyall, David Ike, Linda Foley, and Daniel Van Mechelen. In preparation for trial the witnesses provided genealogical information documenting their Cowlitz ancestry. Stuart Pierson and Dennis Whittlesey of Verner, Lippfert, Bernhard & McPherson, Washington, D.C., served as tribal legal counsel. Stephen Dow Beckham was expert witness for the Wahkiakum, Chinook, and Cowlitz tribes. The states retained Dr. Verne Frederick Ray, an anthropologist, as their expert.

The cases involved depositions of plaintiffs and expert witnesses, filing of reports, and hearings at the federal courthouse in Portland. The courtroom was filled with lawyers: three for the State of Washington, three for the State of Oregon, George Dysart for the Department of Interior, and Pierson and Whittlesey for the plaintiff tribes. A moment of drama occurred during the testimony of witness Verne Frederick Ray. The retired anthropology professor carried to the witness stand a large set of note cards to buttress his memory. During his time on the stand he lost control of the cards; they cascaded across the floor of the courtroom. For the next several minutes lawyers were on their hands and knees picking up Ray's crib notes. Following that event and the scrambling of his information, Ray was flustered and largely ineffective as a witness. His engagement was strangely on the side of Washington and Oregon. He had researched and published *Chinook Ethnographic Notes*, the standard monograph on that tribe, its fishing techniques, and its presence on the lower Columbia (Ray 1935).

The Wahkiakum case, template for the litigation, went to the Ninth Circuit Court of Appeals which ruled the Wahkiakum, Cowlitz, and Chinook tribes, like others identified in the Supreme Court decision in *Halbert v. United States* (1931), had a post-treaty affiliation under the Treaty of Olympia (12 Stat. 971) and President Ulysses S. Grant's Executive Order of November 4, 1873. Grant's order enlarged the Quinault Reservation "for the use of the Quinault, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians of the Pacific coast." The Ninth Circuit stated: "By this order the Chinook and other tribes became affiliated with the Quinault under the treaty." The Court found that the post-treaty affiliation did not "resurrect and protect any fishing rights the Wahkiakum may have had originally." The ruling meant the tribe's contention that it had a treaty-protected right to fish in the Columbia River was not sustained by the court. Importantly, however, the Ninth Circuit stated:

> As members of a tribe subsequently affiliated with the Quinault under **the treaty, they are, however, entitled to share such rights as are granted to the original signatories of the treaty. The members of the Wahkiakum, a tribe of fish-eating Indians of the locality, have the opportunity to take an allotment on the Quinault Reservation and to exercise the fishing rights which accompany that allotment. Those fishing rights are secured by Article III which protects the rights of the Quinault and any affiliated tribe to fish at all usual and accustomed Quinault fishing grounds** (655 F.2d 179-180). Emphasis supplied.

The Cowlitz thus technically gained the same fishing rights as those held by members of the Quinault Tribe. The unresolved issue was whether or not the Cowlitz dared to hunt and fish in southwestern Washington in light of their status as a non-federally recognized tribe, antipathy of the Quinault toward them, and the aggressive prosecution by the states of Washington and Oregon of perceived non-treaty tribes engaging in fishing and hunting in off-reservation areas.

State of Washington v. Whitner, et al.

In January and February, 1994, Washington State Police arrested five Indian hunters who had killed elk in the Margaret Game Unit in the Mount St. Helens National Monument. The kill site was in the upper Toutle River Valley of the Cowlitz watershed. The public was animated by reports that Indians had killed as many as forty elk in the Game Unit following close of the State season. Those arrested were Douglas J. and Michael J. Sanders, two of five Nisqually tribal members hunting in the area. The State also arrested David A. Whitner, Peter Kruger, Nisqually Tribe, and Melony R. Hause, a member of the Squaxin Tribe. The hunting cases first went to tribal court. The tribes had established their own hunting season that continued through February, longer by several weeks than the State hunting season. When the tribal courts failed to report any prosecution actions, the State proceeded with its criminal case. At issue was whether the Margaret Game Unit was within treaty-ceded lands and whether tribal seasons took precedent over State regulations (Paulu 1994a).

While these hunting cases were pending, a federal judge ruled in December, 1995, based on the Boldt Decision, that tribes had entitlement to take up to half of shellfish harvested on Puget Sound. The issue then rose whether this 50% share might also include elk and deer. Chris Mahre, attorney for Cowlitz County, insisted the shellfish decision had no bearing on the elk hunting prosecutions. He explained the issue was the location of the southern boundary of the Treaty of Medicine Creek. Signed on December 26, 1854, this was the land cession of the Nisqually, Puyallup, and other tribes inhabiting the southern end of Puget Sound. Further, the elk kill sites were on land owned by the Weyerhaeuser Timber Company. Mahre claimed that privately-owned land was not "open and unclaimed" as specified in the treaty (Kappler 1904b[2]:662-665; Paulu 1995a). The matter became *State of Washington v. Whitner et al.*, PA94-CR, litigated in State court in Kelso.

The Cowlitz Tribe filed an amicus brief to join the State in this case. The tribal council argued the Margaret Game Unit was within its aboriginal use and occupancy area where its hunting rights were unextinguished. Although the Cowlitz Tribe was not federally-recognized in 1995, it was given standing in court and employed Dennis J. Whittlesey, legal counsel, of Washington, D.C. The tribe also engaged two expert witnesses: Stephen Dow Beckham, Pamplin Professor of History, Lewis & Clark College, and Judith Irwin, professor, Lower Columbia Community College, Longview (Paulu 1995b). The defendants engaged Dr. Barbara Lane, an anthropologist not connected with any academic institution who submitted a written report opining that Indians hunted everywhere. The defendants also flew in Dr. Louis DeVorsey, Jr., a geographer from the University of Georgia, to testify on the treaty boundary. During his *voir dire* it became obvious that he had no expertise relating to the issues. DeVorsey was excused and left the courtroom before oral arguments (Paulu 1996a).

Kevin Lyon, defense counsel, argued the defendants were hunting within the land cession of the Treaty of Medicine Creek. Lyon introduced an anonymous manuscript map, "Washington Territory west of the Cascades showing the Boundaries of lands ceded at Treaty of December 26th 1854 and the Reserves also Indian Tribes to be treated with and lands to be ceded at future Treaties" (Anonymous 1854/55 ?). The treaty had described the southern boundary of the land cession as extending "to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River . . ." (Kappler 1904b[2]:663). The treaty language defined the cession area because as of December, 1854, the cadastral surveys were only then approaching the southern tip of Puget Sound. Since subdivision surveys had not been carried out, the treaty could not provide the townships and ranges of the ceded lands other than with a general description.

Prof. Beckham pointed out numerous problems with the map:

1. The map's dash-mark boundary for the Treaty of Medicine Creek was incorrect. Rather than running west from the summit of the Cascade Range to the Skookum Chuck, the map illustrated a line south from Mt. Rainier to Mt. St. Helens along a non-existent summit. The actual divide of the Cascade Range lay more than twenty miles east of Mt. St. Helens on the summit extending south from Mt. Rainier toward Mt. Adams

through the Indian Heaven area of the Gifford Pinchot National Forest to the Columbia River, the route today of the Pacific Crest Trail.

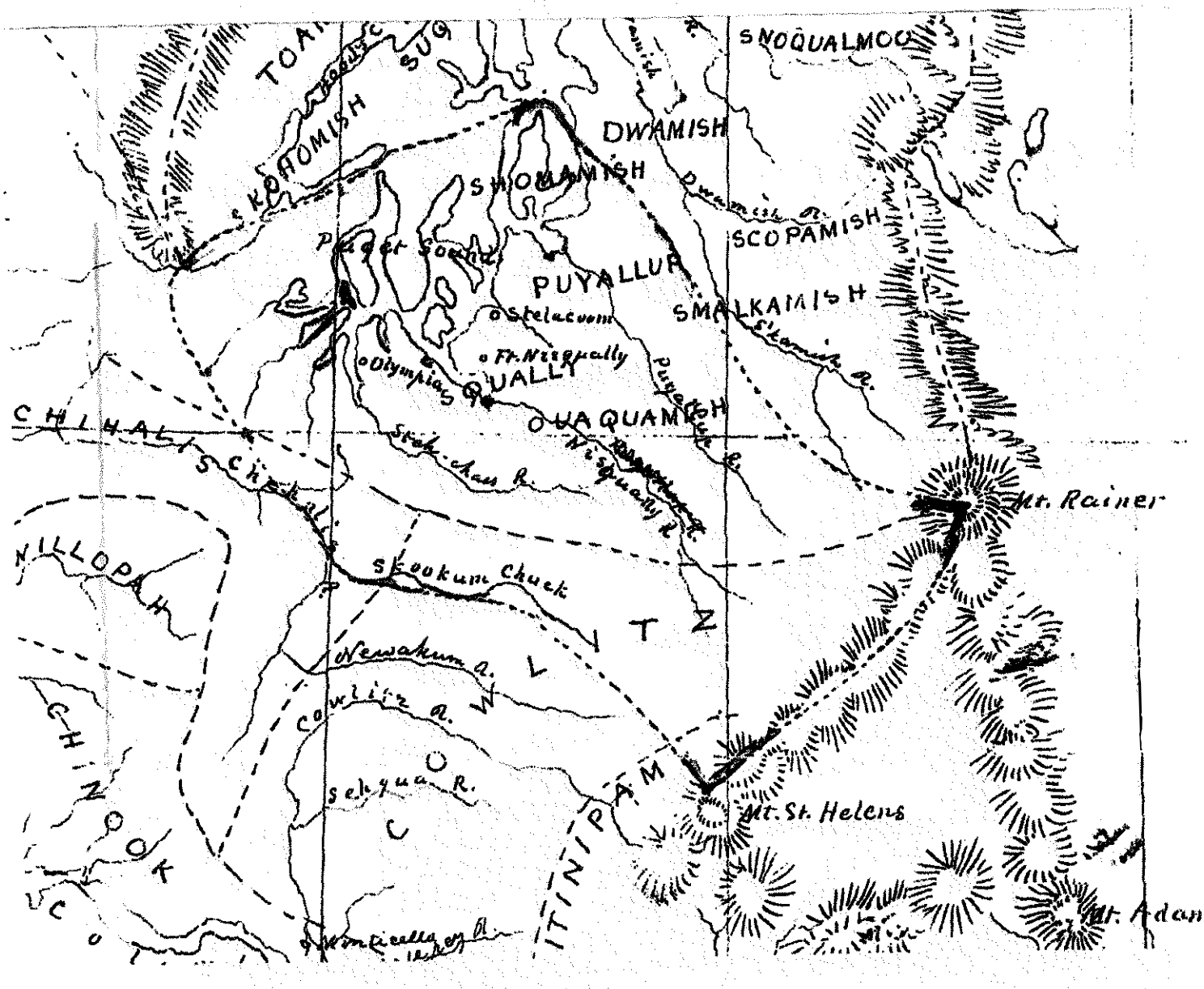

Fig. 7. Portion of manuscript map "Washington Territory west of the Cascades," defendant's exhibit in *State of Washington v. Whitner et al.* (Anonymous 1854/55 ?).

2. The map used the word "Cowlitz" to identify tribal territory from north of the Skookum Chuck and Newaucum rivers and south through all of the watershed of the Cowlitz River, the area where the Margaret Game Unit was located.

3. The map's identification of the locations of the "Puyallup," "qually, and "O-ua-wamish" tribes were in watersheds draining into southern Puget Sound and in no way connected with the Chehalis or Cowlitz rivers.

4. The map was anonymous. No one knew who drew it, when it was drawn, or when it may have been subsequently altered.

5. The map displayed a poor understanding of the geography of western Washington.

6. The map excluded all of the Cowlitz watershed from the purported land cession agreed upon at Medicine Creek.

7. The map overlooked the lands of the Chehalis Tribe lying in the watershed of the Chehalis River and its tributaries that included the Skookum Chuck and Neuwacum rivers.

The inaccurately drawn, anonymous map and a letter of Governor Isaac I. Stevens were the primary documentary evidence the defense presented to buttress the argument that the elk-killers were hunting within the Medicine Creek Treaty ceded lands area (Paulu 1997a).

By May, 1997, Judge David Koss had heard five days of testimony in the Whitner case. The court was apprised that the entire Cowlitz watershed was within the adjudicated claims area of the Cowlitz Tribe, a Finding of Fact in Docket 218, determined by the Indian Claims Commission. While the judge considered the arguments and evidence, in August, 1997, the Squaxin, Nisqually, and Puyallup tribes escalated the dispute by issuing tribal hunting regulations for game in Lewis and Cowlitz counties. State hunting season was open from September 1 to December 15. The tribes fixed their seasons open from August 1 to February 28. Chris Mahre, Cowlitz County prosecuting attorney said: "Our office will charge anyone, tribal or non-tribal, who hunts outside of the state regulated seasons." Dave Acuri, chief criminal prosecutor for Lewis County said that the county did not recognize the Treaty of Medicine Creek reserving any rights in Lewis County. "We have drawn the line and they can interpret it as they wish," he said (Stepankowsky 1997a).

In August, 1997, the Washington Court of Appeals upheld a ruling dismissing illegal hunting charges against Donald Ray Buchanan, a member of the Nooksack Tribe. In 1995 the Fish and Game officers arrested Buchanan for possessing two, five-point elk in the Oak Creek Wildlife Area near Naches. Buchanan claimed a treaty right to hunt on the land. A superior court judge in Yakima ruled against Buchanan, but the Court of Appeals decided Indian hunting rights extended to anywhere there was "open and unclaimed" land in the State. In light of the Buchanan decision, Judge Koss felt bound by it and adopted the appellate court's ruling. By the Fall of 1997 the outcome of the Whitner case remained ambiguous. Yakima County filed an appeal to the finding of the Washington Court of Appeals. Cowlitz County argued the Margaret Game Unit was land owned by Weyerhaeuser Timber Company and therefore was not "open and unclaimed" (Paulu 1997b).

The Washington Supreme Court ruled in the Buchanan case in June, 1999. The Court found the Oak Creek Wildlife Area qualified as "open and unclaimed" because it was publicly owned, unoccupied, and used for hunting. The Court however required Buchanan to prove the Nooksack Tribe had used the area for its traditional hunting. Washington tribal leaders expressed resistance to carrying this burden of proof and suggested they might take the matter to the U.S. Supreme Court. They questioned the right of State courts to rule in matters of treaty hunting rights. "This is a mixed ruling," said Billie Frank, Jr., chair of the Northwest Indian Fisheries Commission, "but one thing is clear; the treaty hunting right is as valid today as the day the treaties were signed" (Dunagan 1999a).

The context of Indian hunting in Washington was the subject in 2001 of a hearing before the U.S. Senate Committee on Indian Affairs. The hearing focused on "Challenges Confronting Tribal Fish and Wildlife Land Management Programs in the Pacific Northwest (U.S. Senate 2003). The Hearing report quoted the testimony of Hannibal Bolton, chief, Division of Fish and Wildlife Management, U.S. Fish & Wildlife Service, Department of the Interior:

> The treaty Indian tribes in western Washington have a long history of co-managing natural resources with the State of Washington. The tribes and state have had numerous successes in implementing cooperative natural resource management efforts to protect, restore and enhance the productivity of natural resources in Washington. In a recent policy decision, the Washington Fish and Wildlife Commission recognizes that 'the preservation of healthy, robust and diverse fish and wildlife populations is largely dependent on the state and tribes working in a

cooperative and collaborative manner.'

> It is important to understand that tribal hunters do not hunt for sport. Hunting is a spiritual and personal undertaking for each hunter. All tribes prohibit hunting for commercial purposes. Western Washington treaty tribal hunters account for only about 1 percent of the total combined deer and elk harvest in the state. According to state and tribal statistics for 2001-a typical year-non-Indians harvested 40,977 deer, while tribal members harvested 508. For the same period, non-Indians took 8,278 elk; tribal hunters harvested only 215. Most tribal hunters do not hunt only for themselves. The culture of tribes in western Washington is based on extended family relationships of parents, grandparents, aunts, uncles, cousins and other relatives. A tribal hunter usually shares his game with several families. In some cases, tribes may designate a hunter to harvest one or more animals for elders or families who cannot provide for themselves (U.S. Senate 2003:72).

The Senate did not explore the matter of hunting or fishing rights for tribes in Washington not possessing ratified treaties.

Simon Plamondon, On Relation of the Cowlitz Tribe of Indians v. United States, Docket 218

The quest for the Cowlitz Tribe to gain settlement for its aboriginal lands in southwestern Washington was a difficult mission. It was fraught with almost inexplicable events and huge frustrations. The problems were largely the consequence of the failure of the Chehalis River Treaty Council of February-March, 1855, and the lack of follow through by Governor Stevens subsequent to the Fort Vancouver council in May, 1855.

On July 8, 1864, an order of the Secretary of Interior J. P. Upshur allegedly took title for the Untied States of the "Country between Nisqually and Quinaielt territory on the N., Cascade mountains on the E., and Columbia river on the S." The tribal lands belonged to the "Chehalis, Klatsop, Chinook, Klikitat, and other tribes." This was the explanation in Charles E. Royce in *Indian Land Cessions* (1899) reporting this "taking:"

> These tribes originally claimed this territory. The U. S. took possession of it without any treaty, assigning to the Indians first only one small

> reserve (Chehalis) and afterward another (Shoalwater Bay). The territory thus acquired by the U.S. is here shown [Map area 458] (Royce 1899:832-833). [Exhibit 4]

The Secretary of Interior could not legally take Indian land. Tribal land "takings" were made by treaty, Act of Congress, or Executive Order. The Secretary of Interior had no legal authority to appropriate tribal lands of southwestern Washington Territory. On July 8, 1864, J. P. Upshur, Secretary of Interior, wrote to William P. Dole, Commissioner of Indian Affairs as follows:

> I return herewith the papers submitted with your request of the 17th of May last in relation to a proposed reservation for the Chehalis Indians in Washington Territory.
>
> I approve the suggestion made in relation to the subject, and you are hereby authorized and instructed to purchase the improvements of D. Mounts, which are on the lands selected for the reservation, if it can now be done for the price named for them, viz, $3,500, including the crops grown or growing this season upon the premises (Usher 1864 in Kappler 1904a[1]:903).

On October 1, 1886, President Grover Cleveland issued an Executive Order defining the Chehalis Reservation. Neither Upshur's letter of July 8, 1864, nor Cleveland's order of October 1, 1886, identified the "taking" of any Indian lands in southwestern Washington (Kappler 1904a[1]:903-904). Royce's assertion in *Indian Land Cessions* was a lie, but once published, it started to assume the substance of fact. [Area 458, Exhibit 4]

Contrary to the contention in *Indian Land Cessions*, the original Constitution of the State of Washington (1889) in Article 26 gave explicit guarantee of the validity of Indian land titles:

> **That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying with the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States** and that the lands belonging to citizens of the United States residing without the

> limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use (State of Washington 1889).

The Cowlitz Tribe mounted a long effort to secure a jurisdictional act to sue for the taking of its lands without ratified treaty. On March 3, 1863, Congress prohibited tribes from suing the federal government (12 Statutes-at-Large 765. 767, 28 U.S. Code 1502). Indian tribes thus had to gain congressional permission to sue. Between 1863 and 1946 Congress passed only 133 jurisdictional acts (Wilkinson et al. 1986:151). Repeatedly the Cowlitz sought enabling legislation. That agenda shaped discussion in tribal meetings, fund-raising by the tribe, sending tribal members to Washington, D.C., to lobby and testify, and hiring legal assistance.

Table 3

Bills to Permit the Cowlitz Tribe to Sue the United States

Senate Bill 2458, December 16, 1915
House of Representatives Bill 6862, January 4, 1916
House of Representatives Bill 224, April 2, 1917
Senate Bill 3663, January 31, 1918
House of Representatives Bill 9611, February 6, 1918
Houses of Representatives Bill 15480, January 31, 1919
Senate Bill 1521, June 9, 1919
House of Representatives Bill 2424, April 11, 1921
House of Representatives Bill 71, December 5, 1923
Senate Bill 2557, May 16, 1924
House of Representatives Bill 2694, February 12, 1925
House of Representatives Bill 167, December 5, 1927

These bills demonstrated the steadfast and unrelenting efforts of the Cowlitz to try to get the United States to come to terms with the failure of the treaty negotiations in February-March, 1855, at the Chehalis River Treaty Council. None of these bills passed.

With passage of the Indian Claims Commission Act (60 Stat. 1049) on August 13,1946, the Cowlitz Tribe filed the case of *Simon Plamondon, On Relation of the Cowlitz Tribe of Indians v. United States.* The case, identified

as Docket 218, was litigated before the Commission. The enabling legislation in Section 19 prescribed the "Final Determination."

> The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of fact upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claiming and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions (P.L. 726, p. 1054).

The Indian Claims Commission published its *General Rules of Procedure Promulgated July 4, 1947* and a second *General Rules of Procedure*. Sec. 9, 60 Stat. 105 (25 U.S.C. 70h). Nothing in these manuals explained awards or ramifications of adjudication by the Commission (Indian Claims Commission 1947, 1972).

The general principles of the Indian Claims Commission, though not clearly stated in the Act of 1946 nor its "Procedures," included the following:

1. Claimants could not receive any land in settlement.

2. Claimants could receive a financial settlement of the value of land at the "dating of taking," namely the time the land was effectively removed from tribal control.

3. Claimants were not allowed any interest on the award.

4. Claimants would receive a deduction (offsets) in the value of the claim based on gratuities (appropriations and services) provided by the United States. [The Indian Claims Commission by 1978 awarded over $2 billion to settle claims, reduced to $818 million by offsets.]

5. Claimants had to prove exclusive "use and occupancy" of the land, the exceptions being when overlapping treaties confirmed more than one tribe's use of an area.

6. Claimants who litigated and received an adjudicated judgment (whether they accepted it or not) were deemed to have lost all aboriginal rights in the claim area unless reserved by ratified

treaty.

None of the documents produced by the Indian Claims Commission explicitly stated the sixth point, but, in practice, this was the position of the United States for all tribes litigating before the Commission. Vine Deloria, Jr., described the presumed loss of aboriginal rights in an adjudicated claims area. By accepting a claims judgment, wrote Deloria, a tribe signed off forever any residual rights its members might have had to the land involved (Deloria 1976:26-29). This appears to be the situation of the Western Shoshoni who signed the ratified Treaty of Ruby Valley (1863). In 1976 Congress appropriated $26 million to settle the case; interest raised the amount to $100 million in 1998. In 2004 Congress passed the Western Shoshoni Claims Distribution Act authorizing payment of $145 million. Some bands of Western Shoshoni, however, continued to refuse to accept the award, contending their treaty was for "peace and friendship," not a land cession, and that accepting the award would terminate their land ownership and other rights (Indian Law Resource Center 2019).

The Cowlitz Tribe hired the law firm Abraham W. Weissbrodt (1914-2007) and I. W. Weissbrodt of Washington, D.C. The lawyers retained Dr. Verne Frederick Ray (1905-2003), anthropologist, as expert witness for the Cowlitz. For the case Ray researched and eventually published the *Handbook of Cowlitz Indians* (1974). The tribe also called Cowlitz elders to testify. In August, 1953, Mary Kiona, Emma Milet Luscier, and Sarah Costama testified before a court reporter in Seattle. James E. Sareault, Cowlitz local counsel, served as interpreter (Indian Claims Commission 1953).

On June 25, 1969, Indian Claims Commission decided: "The plaintiff Cowlitz Tribe did have aboriginal or Indian title to an area of land, albeit lesser than that claimed, which lands were taken from the plaintiff by defendant on March 3, 1855, without payment of compensation therefor." Ray had argued the Lewis River Cowlitz, identified by Lewis & Clark as the "Hul-lu-et-tell," were also members of the Cowlitz Tribe. The Claims Commission rejected that claim and excluded the entire Lewis River watershed and also the Willapa Hills to the west, home of the Mountain Cowlitz, from the adjudicated claims area. The Commission determined the entire Cowlitz watershed and the Tootle River drainage were exclusively the "use and occupancy area" of the Cowlitz Tribe. The ruling excluded all of the Lewis and Kalama River country and the Willapa Hills from the proven Cowlitz territory (Indian Claims Commission 1969:144-147, 21 Ind. Cl. Comm. 143).

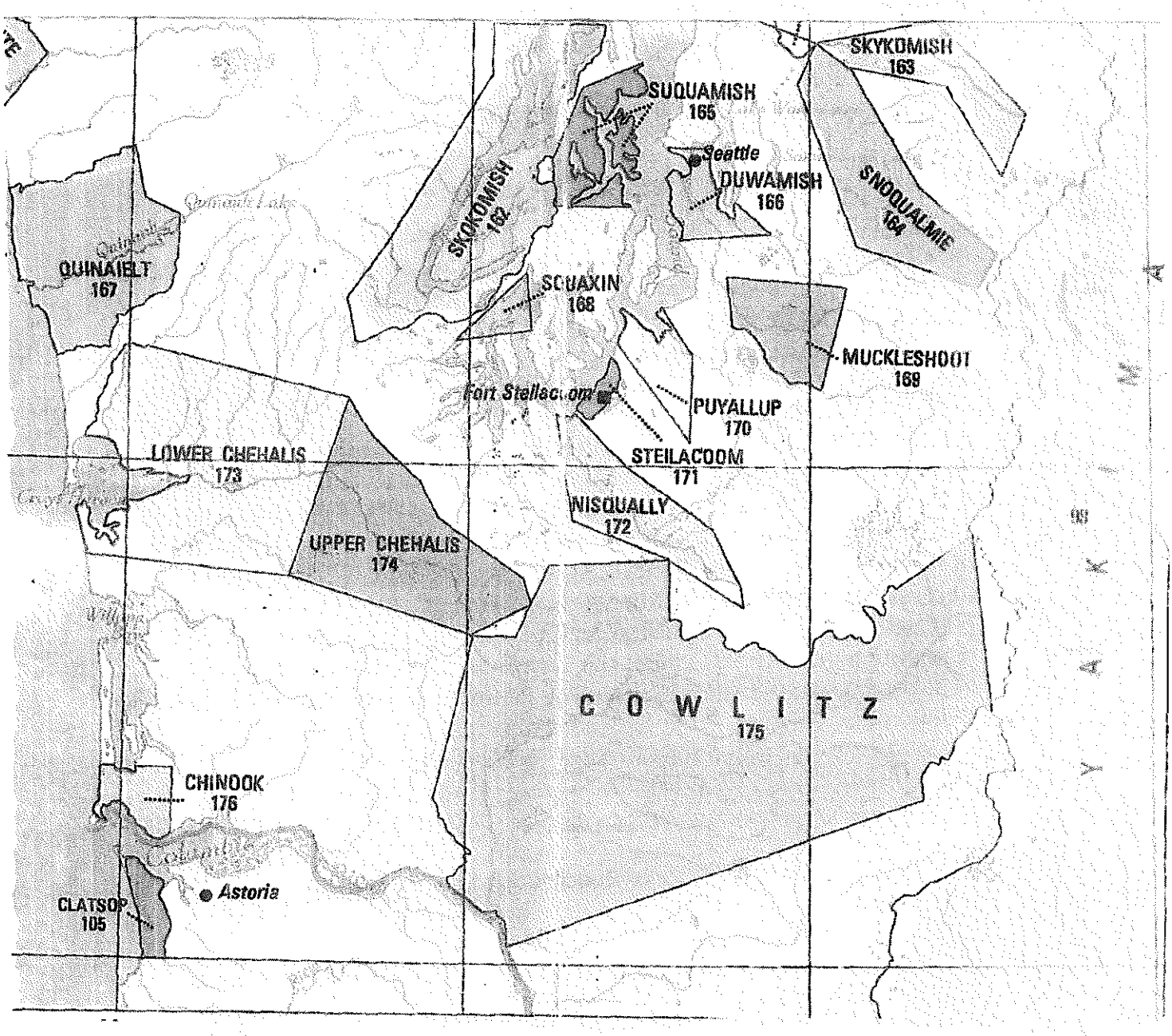

Fig. 8. Portion of Map of "Indian Land Areas Judicially Established" illustrating arbitrary straight lines of Cowlitz Area 175, Docket 217 (Indian Claims Commission 1978).

The Cowlitz objected to the March, 1855, "date of taking." The tribe instead proposed: (1) February 20, 1893, date of creation of the Pacific Forest Reserve, (2) February 22, 1897, date of the presidential proclamation of the

Pacific Forest Reserve, or (3) January 3, 1900, date when the Northern Pacific Railroad sold lands granted to it in 1864 and 1870 to Weyerhaeuser Timber Company. On June 23, 1971, the Commission decided the "date of taking" was March 20, 1863, the date of a presidential proclamation opening lands for public sale of the tribes of the Chehalis Reservation (Indian Claims Commission 1971:442-451, 23 Ind. Cl. Comm. 442).

Congress had to appropriate and approve the distribution plan for an award made by the Indian Claims Commission. Because the Bureau of Indian Affairs refused to acknowledge the Cowlitz Tribe, the appropriated funds remained undistributed for years in the Department of the Treasury. In 1982 Senators Slade Gorton and Henry "Scoop" Jackson, Washington State, introduced Senate Bill 2931 to release the judgment fund in Docket 218 to the Cowlitz Tribe. The bill had hearings on December 7, 1982, in Washington, D.C. Witnesses on behalf of the tribe were Marsha Williams, vice-chair of the tribal council, Dr. Verne F. Ray, ethnohistorian for the tribe in Docket 218, and Dr. Stephen Dow Beckham, ethnohistorian for the tribe in its fishing rights litigation. The bill died in the "lame duck" session of Congress (U.S. Senate 1982). On October 9, 1985, Norm Dicks and Don Bonker, members of the House of Representatives from the State of Washington, introduced House of Representatives Bill 3534 (99 Congress, 1 Session). The bill endorsed the tribal plan with a 100% set aside of the fund to the tribe and no per capita distribution. On June 24, 1986, the Senate Select Committee on Indian Affairs held hearings on the bill (U.S. House of Representatives 1985). The legislation did not pass. Release of the judgment fund in Docket 218 did not occur until subsequent to the extension of federal acknowledgment to the Cowlitz Tribe in 2002.

Confederated Tribes of Grand Ronde Community of Oregon, et al. v. Sally Jewell

In this case the Confederated Tribes of Grand Ronde in Oregon, Clark County, Washington, the City of Vancouver, Washington, and others challenged the efforts of the Cowlitz Tribe to have 151.87 acres in Clark County taken into trust for the purposes of gaming. The Cowlitz had used the "restored lands for a restored tribe" clauses, (§ 2719(b)(1)(B), in the Indian Gaming Regulatory Act (1988) to select its "initial reservation," as permitted to a "restored" tribe. Fearing loss of market share, the Grand Rondes, operators of the largest casino in Oregon, tried to block the fee-to-trust determination. The lawsuit challenged the Cowlitz Environmental Impact

Statement alleging non-compliance with the National Environmental Policy Act, claimed violation of the Administrative Procedures Act, and cited the case *Carcieri v. Salazar*, 555 U.S. 379 (2009), alleging the Cowlitz Tribe was not federally-recognized at the time of passage of the Indian Reorganization Act (1934). Further the plaintiffs argued the Cowlitz Tribe lacked "significant historical connection" to the proposed trust land in Clark County. It pointed out the tract as fourteen miles south of the boundary of the Cowlitz adjudicated land claims "Finding of Fact" in Docket 218.

In April, 2013, the Department of Interior issued a Record of Decision accepting the Cowlitz land into trust and stating it was eligible for gaming. The Record of Decision did not comment on whether the land met the test of "restored lands."

On December 12, 2014, Judge Barbara Rothstein denied the plaintiff's motions for summary judgment and found in favor of the Cowlitz Tribe. Her opinion stated:

- "Specifically, the Secretary found that the Cowlitz Tribe had demonstrated its significant historical connection to the Parcel through evidence that the Tribe had occupied or used land in the vicinity of the Parcel."

- "The regulation does not require that the occupancy and use be 'long term' or that the tribe claim any ownership or control, exclusive or otherwise, over the land. Nor does the regulation require the Cowlitz Tribe to have occupied or used the Parcel or the land adjacent to it."

- "As discussed above, the regulations do not require the Cowlitz to demonstrate that the Parcel is within the Tribe's 'historical territory,' or that the Tribe used or occupied the Parcel itself. The regulations simply require that the Parcel be located within an area where the tribe has significant historical connections, which, in turn, can be demonstrated through tribal use or occupancy of land in the vicinity of the Parcel."

- "In particular, the Secretary found the following evidence of the Cowlitz occupancy and use in the vicinity of the Parcel to be credible: (1) the Cowlitz's occupancy, namely hunting camp sites and "treaty-time" villages, at Warrior's Point, a site on the

> Columbia River and only three miles from the Parcel; (2) the Cowlitz reliance on the natural resources of the Columbia River for subsistence use and trade; (3) Cowlitz' 'extensive and intensive' trading activities at both Bellevue Point (ten miles from the Parcel), and the intersection of the Lewis River and Columbia River (three miles from the Parcel); (4) a major battle between the Cowlitz and the Chinook at a site three miles from the Parcel; (5) historical report about an individual Cowlitz who used the Lewis River area for subsistence hunting, (about 6 miles from the Parcel); (6) the fact that Cowlitz were expert boatmen and helped guide large boats carrying goods through the mouth of the Lewis River, less than three miles from the Parcel; (7) census information showing that the Cowlitz occupied the lands in the vicinity of the Parcel" (Rothstein 2014).

Judge Rothstein's decision in this case is significant. It accepted into trust the "initial reservation" for the Cowlitz Tribe. Her examination of the record also buttressed the "significant historical connection" of the Cowlitz beyond the boundaries of the adjudicated land claims area in Docket 214 as determined by the Indian Claims Commission. Since the Cowlitz Tribe had no adjudicated claim in the watersheds of the Kalama and Lewis Rivers in southwestern Washington, it can be argued in that area is unextinguished Cowlitz title. The area is 1,251 square miles (800,640 acres) and is significant habitat for salmon, steelhead, sturgeon, smelt, elk, deer, and other traditional resources used by the tribe.

Findings of Fact

1. In *Halbert v. United States* (1931) the United States Supreme Court found the Cowlitz and other tribes to be beneficiaries of the ratified Treaty of Olympia (1855) and entitled to allotments on the Quinault Reservation. Several Cowlitz Indians obtained on-reservation allotments.

2. Under the Indian Homestead Act (1875) and 4th Section of the General Allotment Act (1887) at least twenty Cowlitz Indians secured trust lands in the Cowlitz watershed between 1888 and 1940. Mayfield and Mossyrock dams subsequently flooded several of these Cowlitz properties.

3. In the 1950s to 1964 the State of Washington and the Bureau of Indian

Affairs administered the Blue Card Program. Members of the Cowlitz Tribe obtained Blue Cards to fish and hunt as Indians in the aboriginal lands of the tribe in southwestern Washington. The State suspended this program for non-treaty Indians in 1964 and repeatedly alleged the declining fish runs in the State were the fault of Indian fishers, largely ignoring evidence to the contrary.

4. The case of *U. S. v. Washington* and related cases in Washington and Oregon led to landmark rulings by Judges George Boldt and Robert Belloni upholding the treaty-protected fishing rights of the tribes in Washington and Oregon. The decisions opened the opportunity for Indians to catch as much as 50% of the allowable harvest of fish and brought the tribes directly into decisions about fisheries management.

5. Because the non-treaty tribes of southwestern Washington were excluded from *U.S. v. Washington* and related cases, the Wahkiakum Band of Chinook, Cowlitz Tribe, and the Chinook Indian Tribe, Inc., sued the states of Washington and Oregon over their unextinguished fishing rights in the Columbia River and tributary streams in southwestern Washington. The 9th Circuit Court ruled that the three tribes possessed a post-treaty affiliation under the Treaty of Olympia, affirming their opportunity fish under the protections of that treaty.

6. The Cowlitz Tribe filed an amicus brief and participated actively in the elk hunting case of State of *Washington v. Whitener*. The State prosecuted Nisqually and Squaxin Island tribal members for killing elk in the Margaret Game Unit of the Mt. St. Helens National Monument in the Toutle watershed of the Cowlitz River. Before Judge David Koss ruled in the case, the appeal in *State of Washington v. Buchanan,* found that hunting rights were expansive but the tribe had to prove the site of a game kill was within its traditional "use and occupancy" area. There was no decision in the Whitener case in spite of five days in the courtroom.

7. In *Simon Plamondon, On Relation of the Cowlitz Tribe* the Cowlitz litigated the non-treaty taking of their lands in southwestern Washington before the Indian Claims Commission, Docket 217. After years of filings, depositions, and expert witness information, the Commission established an adjudicated claims area of approximately 1.7 million acres for the Cowlitz Tribe. The Commission excluded the Willapa Hills and all of the watersheds of the Kalama and Lewis rivers and defined the claims area

with arbitrary diagonal lines ignoring watershed and resource catchment areas. The legal consequences for tribes filing cases with the Claims Commission, litigating the claim, and securing a judgment terminated all aboriginal rights within the adjudicated claims area.

8. Because the Bureau of Indian Affairs considered the Cowlitz Tribe non-federally recognized, it refused the tribe's efforts to secure release of the judgment fund in Docket 214 appropriated by Congress. Two bills were introduced in Congress to release the fund but neither passed. The Cowlitz judgment was not turned over to the tribe until subsequent to its federal acknowledgment in 2000.

9. The case of *Confederated Tribes of Grand Ronde Community et al. v. Sally Jewell* disputed the efforts of the Cowlitz to select an "initial reservation" and site for gaming in Clark County, Washington. Ultimately Judge Barbara Rothstein rejected the several objections relating to the affirmative Department of the Interior fee-to-trust decision for the Cowlitz and articulated several ways in which the Cowlitz had documented "significant historical connection" to Clark County and lands outside the adjudicated claims area in Docket 214.

10. The rulings in 2014 of the Federal District Court for the District of Washington confirmed Cowlitz use and occupancy area of 1,251 square miles (800,640 acres) in southwestern Washington where there is no adjudicated settlement for quieting aboriginal title. This area may be the primary focus for the Cowlitz Tribe to negotiate with the State of Washington for fishing and hunting rights and to play a direct role in resource management and conservation.

4. Conclusions

The Cowlitz Tribe has endured decades of difficult relationships with the federal government and the states of Washington and Oregon. The Cowlitz were legally protected by the Oregon Organic Act (1848), the extension of the concept of "Indian Country" to the Pacific Northwest (1850), and the assumption of trust responsibility by the Office of Indian Affairs in the 1850s. In reality these philosophical guarantees proved largely meaningless.

In good faith the Cowlitz participated in Chehalis River Treaty Council of February-March, 1855. When the Cowlitz, Chehalis, and Chinook refused to move to an undefined and unknown reservation among the Quinault, Governor Stevens broke up the council. The Cowlitz became a non-treaty tribe that continued occupy its homelands in southwestern Washington. Many tribal members were dispossessed by settlers using the Donation Land Act, Homestead Act, other land give-aways, and cash purchases of land at the General Land Office. The greatest dispossession, however, was through federal grants to the Northern Pacific Railroad and the withdrawals of lands for the Pacific Forest Reserve, later the Gifford Pinchot National Forest. The Cowlitz Tribe fought the City of Tacoma when it launched hydro power projects in the 1950s to build Mayfield and Mossyrock dams on the Cowlitz. The dams had dramatic impacts on fisheries and forced Cowlitz families from their homes, fisheries, and hunting areas on individual trust lands.

Starting in the 1920s the State of Washington began tightening regulations over non-treaty Indians. The Cowlitz endured arrests, trials, fines, and jail time for fishing and hunting for subsistence in their unceded lands. In the 1950s to 1964 the State of Washington and the Bureau of Indian Affairs administered the Blue Card Program that permitted Cowlitz Indians to fish and hunt without state licenses in southwestern Washington. The litigation in *U.S. v. Washington* and related fishing rights cases excluded non-treaty tribes from participating. Thus in the 1980s the Cowlitz joined the Wahkiacum and Chinook tribes to sue Washington and Oregon over their fishing rights in the Columbia River and its tributaries. The Ninth Circuit Court ruled the plaintiff tribes had a post-treaty affiliation under the Treaty of Olympia (1855) and possessed the same rights as the Quinault and Quileute by that treaty. The matter left ambiguous the fishing and hunting rights in southwestern Washington. The Cowlitz Tribe participated in State of *Washington v. Whitner,* an elk-hunting case in the Toutle River country. The case remained unresolved because of the appellate court ruling in *Washington v. Buchanan.*

The Cowlitz filed suit in the Indian Claims Commission to try to obtain a conscionable settlement for the value of nearly two million acres of lands appropriated by the United States. The case went on for years and ultimately resulted in a final decision by the Commission that affirmed Cowlitz exclusive "use and occupancy" in the watershed of the Cowlitz River. The Commission excluded the Willapa Hills occupied by the Mountain Cowlitz and the Kalama and Lewis River watersheds also occupied by the Cowlitz. Subsequent to Cowlitz restoration to a federal relationship in 2000, the Bureau of Indian Affairs released the judgment fund in Docket 218. The construction of having filed suit, prosecuted the case, winning a judgment, gaining appropriation of funds, and accepting the award is generally interpreted as voiding all aboriginal rights to the lands within the adjudicated claims area.

In litigation over selection by the Cowlitz Tribe of its "initial reservation" as a restored tribe, Judge Barbara Rothstein ruled in 2014 that the Cowlitz had documented "significant historical connection" to lands in Clark County, Washington. Those lands lay fourteen miles south of the adjudicated claims area boundary in Docket 214. Rothstein's ruling thus has opened the prospect the Cowlitz Tribe retains unextinguished fishing and hunting rights in the watersheds of the Kalama and Lewis Rivers, nearly 1,251 square miles in southwestern Washington in Clark and Cowlitz counties.

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