

THE CULVERTS CASE

Washington v. U.S., U.S. No. 17-269

Fronda Woods, Assistant Attorney General

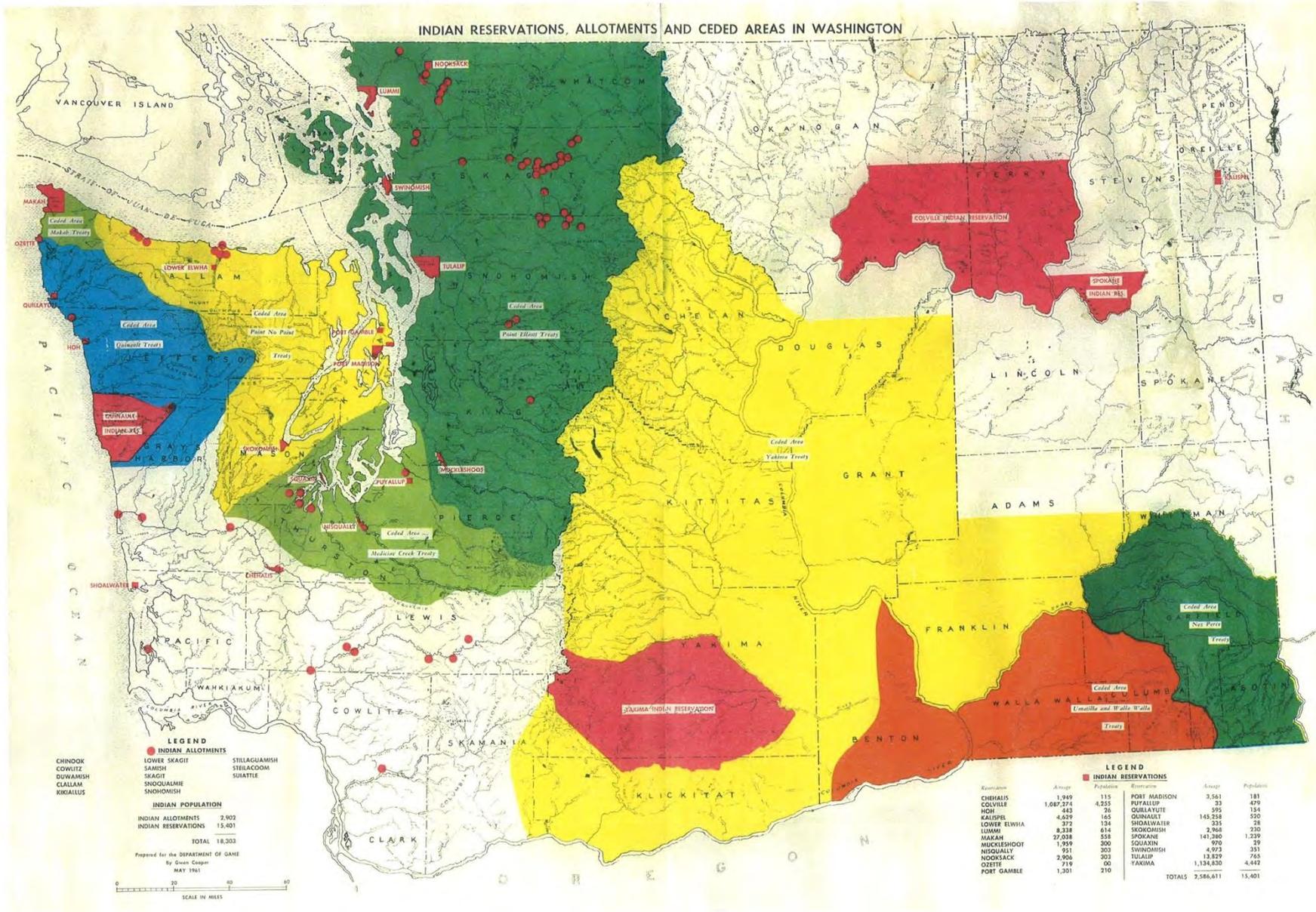
Washington Attorney General's Office

frondaw@atg.wa.gov

WAGLAC July 23, 2018

The opinions expressed herein are those of the author and are not necessarily shared by anyone else

INDIAN RESERVATIONS, ALLOTMENTS AND CEDED AREAS IN WASHINGTON



Medicine Creek Treaty (1854)

Article III

1132

TREATY WITH NISQUALLY, &c. DEC. 26, 1854.

FRANKLIN PIERCE,

Dec. 26, 1854.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING :

Title.

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

ARTICLE III. 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: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

Rights to fish.

“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”

1915 – 1970

Litigation re whether and to what extent the treaties preempt state fishing regulations

Nisqually River, Jan. 1962
Daily Olympian, John Bailey photograph



Tulee v. Washington, 315 U.S. 681 (1942) (Yakama Treaty preempts state fishing license fee)

Puyallup Tribe v. Dep't of Game, 391 U.S. 392 (1968) (Medicine Creek Treaty does not preempt nondiscriminatory state regulations necessary for the conservation of fish)

1970 – U.S. sues Washington in the federal court in Tacoma

U.S. says Washington must allow treaty Indian fishermen to catch a “fair and equitable share” of the available fish; state regulations that don’t provide a fair share are discriminatory.

1 STAN PITKIN
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7 United States of America

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
SEP 18 1970
By HAROLD W. ANDERSON, CLERK
Deputy

8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 STATE OF WASHINGTON,
14 Defendant.

CIVIL NO. 9213
COMPLAINT

15
16
17 COMPLAINT FOR DECLARATORY
18 JUDGMENT AND INJUNCTION

19 The United States of America, by Stan Pitkin, United
20 States Attorney for the Western District of Washington,
21 acting under authority of The Attorney General and at the
22 request of the Secretary of the Interior, complains and
23 alleges as follows:

24 FIRST CLAIM FOR RELIEF

25 1. This Court has jurisdiction by reason of the
26 fact that the United States is plaintiff. 28 U.S.C. § 1345.
27
28 2. The United States brings this action on
29 its own behalf and on behalf of the Puyallup Tribe of
30 the Puyallup Reservation, the Nisqually Indian Community
31 of the Nisqually Reservation, the Muckleshoot Indian Tribe
32 of the Muckleshoot Reservation, the Skokomish

Stan Pitkin
Deputy Attorney General

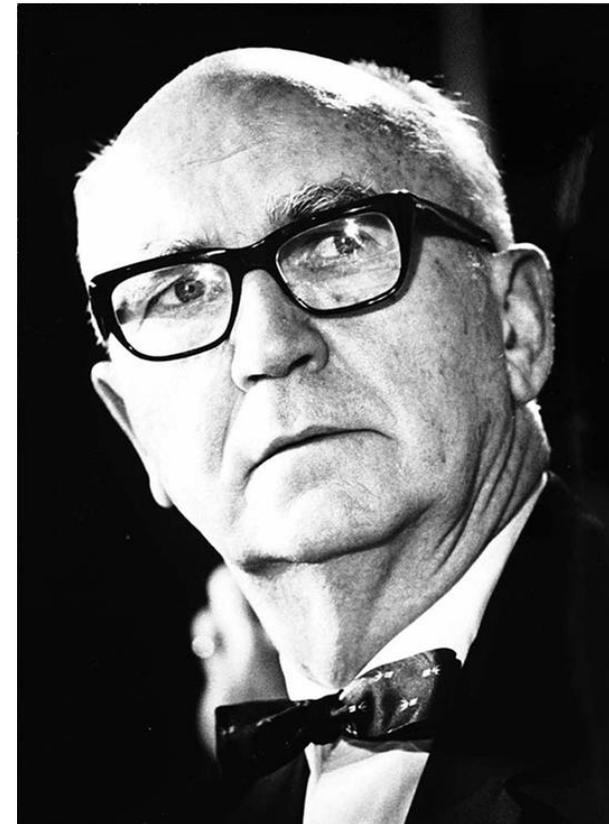
1974 “Boldt Decision”

- State fishing regulations must not discriminate against Indians
- Tribes have a right to a “fair share” of fish—state regulations that do not provide a “fair share” are discriminatory
- **“Fair share” = 50% of available fish**

United States v. Washington,
384 F. Supp. 312 (W.D. Wash. 1974)

**U.S. District Judge George H. Boldt
(1903-1984)**

Photo from Washington State Historical Society



1979 - U.S. Supreme Court affirms

“Both sides have a right, secured by treaty, to take a fair share of the available fish.” 50/50 injunction upheld as equitable, but State can seek an adjustment later if circumstances change.

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OCTOBER TERM, 1978

Syllabus

443 U. S.

WASHINGTON ET AL. V. WASHINGTON STATE
COMMERCIAL PASSENGER FISHING
VESSEL ASSOCIATION ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 77-983. Argued February 28, 1979—Decided July 2, 1979*

In 1854 and 1855, the United States entered into a series of treaties with certain Indian tribes whereby the Indians relinquished their interest in certain lands in what is now the State of Washington in exchange for monetary payments, certain relatively small parcels of land reserved for their exclusive use, and other guarantees, including protection of their “right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the Territory.” The principal question in this extensive litigation concerns the character of the treaty right to take fish. In 1970, the United States, on its own behalf and as trustee for seven Indian tribes, brought suit against the State of Washington in Federal District Court, seeking an interpretation of the treaties and an injunction requiring the State to protect the Indians’ share of runs of anadromous fish. At various stages of the proceedings, additional tribes, the State Departments of Fisheries and Game, and a commercial fishing group were joined as parties. The District Court held that under the treaties, the Indians are currently entitled to a 45% to 50% share of the harvestable fish passing through their recognized tribal fishing grounds in the case area, to be calculated on a river-by-river, run-by-run basis, subject to certain adjustments. With a slight modification of one of the adjustments, the Court of Appeals affirmed, and this Court denied certiorari. Pursuant to the District Court’s injunction, the Department of Fisheries promulgated regulations protecting the Indians’ treaty rights, but the State Supreme Court, in two cases (consolidated here in No. 77-983), ruled that the Fisheries Department could not comply with the federal injunction, holding, *inter alia*, that, as a matter of federal law, the treaties did not give the Indians a right to a share of the fish runs.

*Together with *Washington et al. v. Puget Sound Gillnetters Assn. et al.*, also on certiorari to the same court (see this Court’s Rule 23 (5)); and No. 78-119, *Washington et al. v. United States et al.*, and No. 78-139, *Puget Sound Gillnetters Assn. et al. v. United States District Court for the Western District of Washington (United States et al., Real Parties in Interest)*, on certiorari to the United States Court of Appeals for the Ninth Circuit.

WASHINGTON v. FISHING VESSEL ASSN.

659

658

Syllabus

The District Court then entered a series of orders enabling it directly to supervise those aspects of the State’s fisheries necessary to the preservation of treaty fishing rights. The District Court’s power to take such direct action and, in doing so, to enjoin persons who were not parties to the proceedings was affirmed by the Court of Appeals. That court, in a separate opinion, also held that regulations of the International Pacific Salmon Fisheries Commission (IPSC) posed no impediment to the District Court’s interpretation of the treaty language and to its enforcement of that interpretation.

Held:

1. The language of the treaties securing a “right of taking fish . . . in common with all citizens of the Territory” was not intended merely to guarantee the Indians access to usual and accustomed fishing sites and an “equal opportunity” for individual Indians, along with non-Indians, to try to catch fish, but instead secures to the Indian tribes a right to harvest a share of each run of anadromous fish that passes through tribal fishing areas. This conclusion is mandated by a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and, particularly, this Court’s prior decisions construing the treaties. *United State v. Winans*, 195 U. S. 371; *Puyallup Tribe v. Washington Game Dept.*, 391 U. S. 392 (*Puyallup I*); *Washington Game Dept. v. Puyallup Tribe*, 414 U. S. 44 (*Puyallup II*); *Puyallup Tribe v. Washington Game Dept.*, 433 U. S. 165 (*Puyallup III*). Pp. 674-686.

2. An equitable measure of the common right to take fish should initially divide the harvestable portion of each run that passes through a “usual and accustomed” place into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount. Cf. *Puyallup III*, *supra*. Although the District Court’s exercise of its discretion, as slightly modified by the Court of Appeals, is in most respects unobjectionable, the District Court erred in excluding fish taken by the Indians on their reservations from their share of the runs, and in excluding fish caught for the Indians’ ceremonial and subsistence needs. Pp. 685-689.

3. The Convention of May 26, 1930, whereby Canada and the United States agreed that the catch of Fraser River salmon should be equally divided between Canadian and American fishermen, subject to regulations proposed by the IPSC for approval by both countries, does not pre-empt the Indians’ fishing rights under the treaties with respect to Fraser River salmon runs passing through certain “usual and accustomed” places of treaty tribes. Pp. 689-692.

4. Any state-law prohibition against compliance with the District Court’s decree cannot survive the command of the Supremacy Clause,

***Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979)**

USvWA Phase II 1976-1985

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11 Nooksack, Steilacoom, Samish,
12 Snohomish, and Suquamish
13 Indian Tribes

14 UNITED STATES DISTRICT COURT
15 WESTERN DISTRICT OF WASHINGTON
16 AT TACOMA

17 UNITED STATES OF AMERICA)
18 Plaintiff) CIVIL NO. 9 2 1 3
19 and)
20 QUILUTE, MAKAH, LUMMI, MUCKLESHOOT,)
21 SQUAXIN ISLAND, SKOKOMISH, LOWER)
22 ELWHA, SNOQUALMIE, DUWAMISH, YAKIMA,)
23 STILLAGUAMISH, SAUK-SUIATTLE, HOH,)
24 NISQUALLY, SWINOMISH, TULALIP,)
25 PUYALLUP, QUINULT, UPPER SKAGIT,)
26 NOOKSACK, STEILACOOM, SUQUAMISH,)
27 SAMISH, SNOHOMISH, SWINOMISH, PORT)
28 GAMBLE AND SNOQUALMIE INDIAN TRIBES)
29 Plaintiff-Intervenors)
30 vs.)
31 STATE OF WASHINGTON)
32 Defendant)
33 and)
34 STATE OF WASHINGTON DEPARTMENT OF)
35 FISHERIES and STATE OF WASHINGTON)
36 DEPARTMENT OF GAME)
37 Defendant-Intervenors.)

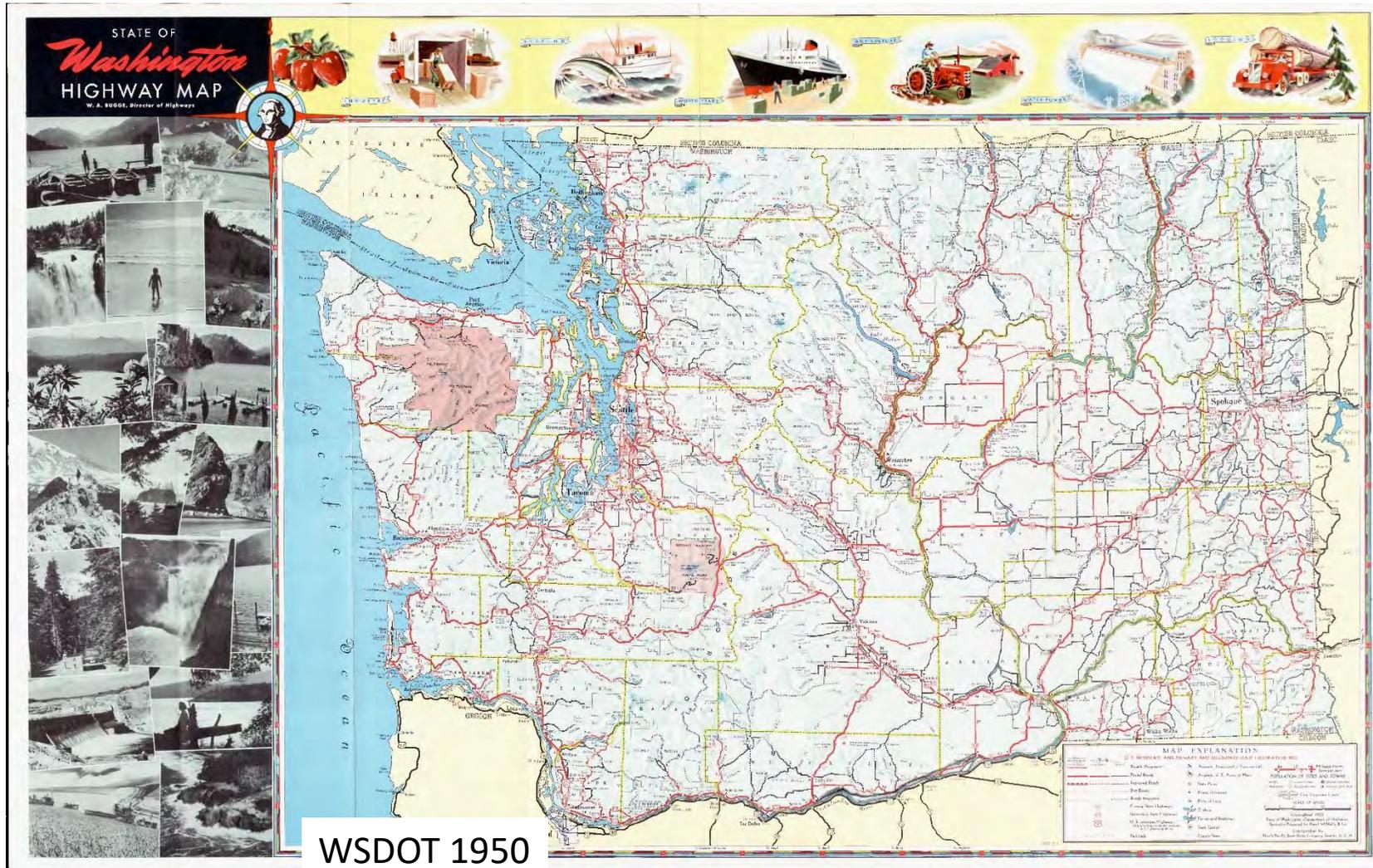
38 JURISDICTION
39 This amended complaint is supplemental to the complaints
40 filed by Plaintiff United States and Plaintiff Indian Tribes at
41 AMENDED AND SUPPLEMENTAL
42 COMPLAINT FOR DECLARATORY
43 JUDGMENT - Page One

*Dkt # 2490
filed Sept. 28, 1976*

RECEIVED
SEP 29 1976
DEPARTMENT OF GAME
ATTORNEY GENERAL'S OFFICE

- Tribes allege the treaties bar State actions that “significantly and adversely affect fish habitat” and thereby “reduce the number or quality of fish available to treaty Indians”
- Phase II, “Round One” Inconclusive Outcome:
 - Judge Orrick Decision: 506 F. Supp. 187 (1980).
 - Ninth Circuit Panel Decision: 694 F.2d 1374 (1983) (reversing).
 - Ninth Circuit En Banc: 759 F.2d 1353 (1985) (vacating).
- Main problem Found by En Banc Judges – the lack of a concrete, factual context

Meanwhile, roads had been built.



The State Used Federal Culvert Guidance

Capacity Charts for the Hydraulic Design of Highway Culverts

Hydraulic Engineering Circular No. 10

March 1965

Prepared by the Hydraulics Branch, Bridge Division, Office of Engineering and Operations, Bureau of Public Roads, Washington, D. C. 20235

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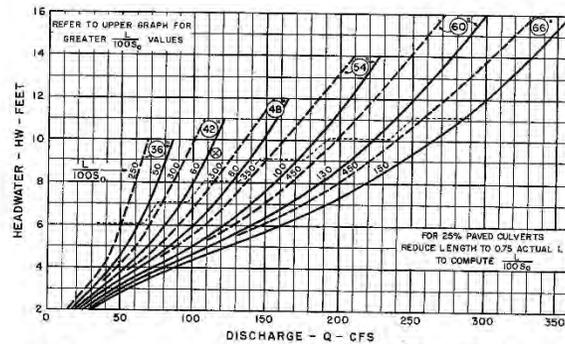
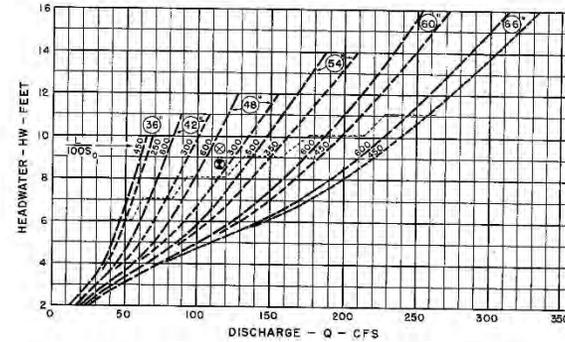
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U. S. DEPARTMENT OF COMMERCE Bureau of Public Roads

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D. C., 20402 - Price 56 cents

State's Exhibit W-092-C T1013757
Page 00001
Case No. 70-9213, Subproceeding D1-1

CHART 20



EXAMPLE

- ⊗ GIVEN:
15 CFS; HW=2.4 FT.
L=125 FT.; $S_0=0.0034$
- ⊙ SELECT 48" UNPAVED
HW=8.8 FT.

CULVERT CAPACITY STANDARD
CIRCULAR CORR. METAL PIPE
PROJECTING ENTRANCE
36" TO 66" ○

BUREAU OF PUBLIC ROADS JAN. 1963

10-52

State's Exhibit W-092-C T1013617
Page 00051
Case No. 70-9213, Subproceeding D1-1

Washington State Scientists Develop Better Fish Passage Design Methods

1949 State-of-the-art fish passage
Fish passage barrier per 2018 standards



ROAD CULVERTS are often total or delaying barriers to fish. Installation of a fish ladder in culvert solved the problem on this Washongal river tributary.

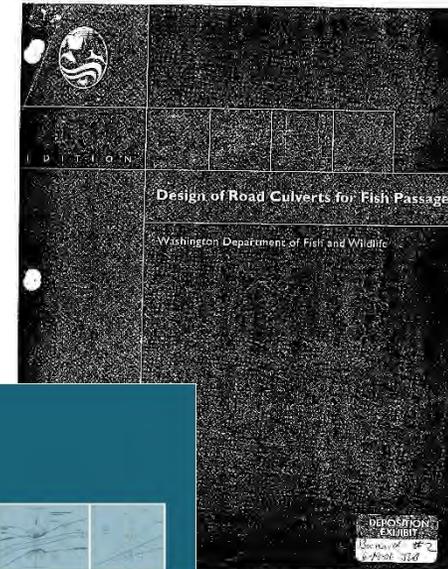
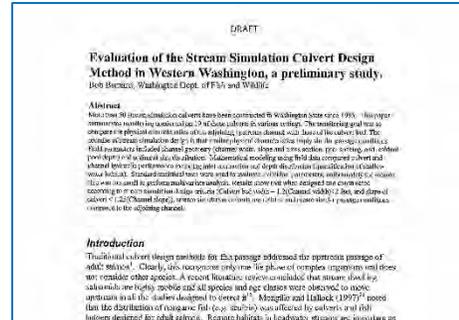
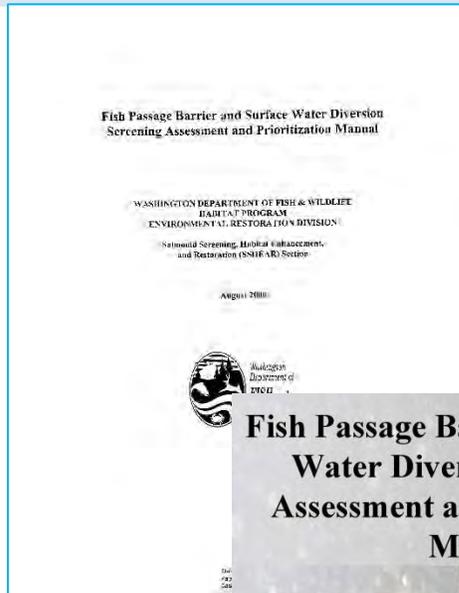
Wash. Dep't of Fisheries 1949
USvWA 01-1 Ex. AT-011

2016



Wash. State Dep't of Transp.

State Leadership in Improving Fish Passage Provides Facts for a New Case Better Science = Greater Liability?



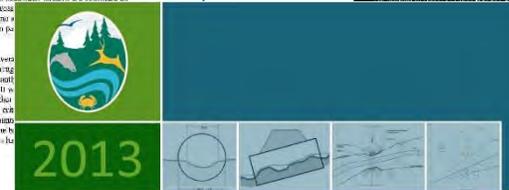
Fish Passage Barrier and Surface Water Diversion Screening Assessment and Prioritization Manual



WASHINGTON DEPARTMENT OF FISH & WILDLIFE

HABITAT PROGRAM

Technical Applications (TAPPS) Division



Water Crossing Design Guidelines

Washington Dept. of Fish and Wildlife

2001 – 21 Tribes and U.S. File Culverts Case

1 RECEIVED
2 JAN 16 2001
3 OFFICE OF THE CLERK OF COURT
4 FEDERAL JUDICIAL CENTER
5 HONORABLE JUDGE BARBARA JACOBS ROTHSTEIN
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE
10 UNITED STATES OF AMERICA, et
11 al.,
12 Plaintiff,
13 v.
14 STATE OF WASHINGTON, et al.,
15 Defendants.
16
17 Civil No. C70-9213
18 Sub-Proceeding No. 01-01
19 (Culverts)
20 REQUEST FOR DETERMINATION

INTRODUCTION AND DESCRIPTION OF THE SUBPROCEEDING

21 The Tribes bring this subproceeding to enforce a duty upon the
22 State of Washington to refrain from constructing and maintaining
23 culverts under State roads that degrade fish habitat so that adult
24 fish production is reduced, which in turn reduces the number of
25 fish available for harvest by the Tribes. In part due to the
26 reduction of harvestable fish caused by those actions of the State,
27 the ability of the Tribes to achieve a moderate living from their
28 Treaty fisheries has been impaired.

29 The Tribes seek mandatory relief requiring Washington to
30 identify and then to open culverts under state roads and highway

31 REQUEST FOR DETERMINATION
32 PAGE - 1

33 RAAS, JOHNSON & SULLIVAN
34 ATTORNEYS AT LAW
35 1500 BELL CENTER PLAZA
36 BELLEVUE, WASHINGTON 98007
37 (206) 461-1100

Tribes and U.S. allege the treaties require the State not to diminish fish runs by operating culverts that block fish passage and deprive the Tribes of a “moderate living from the fishery.”

2001 – District Court Strikes State’s Defenses

cc: 9213 encl, BK

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WESTERN DISTRICT OF WASHINGTON
DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,	NO. C70-9213
Plaintiffs,	Subproceeding No. 01-1 (Culverts)
v.	
STATE OF WASHINGTON, et al.,	ORDER GRANTING UNITED STATES' AND DENYING WASHINGTON'S MOTIONS FOR JUDGMENT
Defendants.	

THIS MATTER comes before the court on two related motions. The United States has filed a motion to strike, or for judgment on, fifteen of the twenty affirmative defenses asserted in the State of Washington's Answer to the Plaintiff Tribes' Request for Determination ("RFD") and to the United States' Response to the RFD. Washington has also filed what is essentially a cross-motion, seeking judgment on the pleadings regarding the "law of the case" in which it contends that the relief sought in the Tribes' RFD is barred by prior judicial decisions.¹ Having now reviewed the pleadings filed in support of and in opposition to

¹ Washington's motion for judgment re: law of the case separately seeks judgment as a matter of law on this affirmative defense, which is also embraced by the United States' motion to strike.

ORDER
Page - 1 -

17220
85

- State’s Answer alleges U.S. caused this problem by supplying culvert designs and funding highway construction.
- Court says State can’t use equitable defenses against the U.S. in a case involving Indian treaty rights. *United States v. Washington*, 19 F. Supp. 3d 1317, 1336-37 (W.D. Wash. 2001).

2007 – District Court Grants Tribes’ SJ Motion

Case 2:01-sp-00001-RSM Document 388 Filed 08/22/2007 Page 1 of 12

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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7
8 UNITED STATES OF AMERICA, et al.,
9 Plaintiffs,
10 v.
11 STATE OF WASHINGTON, et al.,
12 Defendants.

13
14 CASE NO. CV 9213RSM
Subproceeding No. 01-01
15 ORDER ON CROSS-MOTIONS FOR
16 SUMMARY JUDGMENT

17
18 This matter was initiated by a Request for Determination (“Request”) filed in 2001 by plaintiffs
19 Suquamish Indian Tribe, Jamestown S’Klallam, Lower Elwha Band of Klallam, Port Gamble Clallam,
20 Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island
21 Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian
22 Nation, Puyallup Tribe, Hoh Tribe, Confederated Bands and Tribes of the Yakama Indian Nation,
23 Quileute Indian Tribe, Makah Nation, and Swinomish Tribal Community (hereafter, “the Tribes”). It is
24 now before the Court for consideration of cross-motions for summary judgment filed by defendant State
25 of Washington (“State”) and by the plaintiff Tribes.¹ Dkt. ## 287, 295. Oral argument was heard on the
26 motions on February 1, 2007. The parties were then referred to the Honorable J. Kelley Arnold, United
27 Magistrate Judge, for a settlement conference. The Court was advised on May 10, 2007 that the
28 mediation was unsuccessful, and the matter was ripe for issuance of a decision on the summary judgment
motions. The matter is set for trial on September 24, 2007.

The memoranda, exhibits, and arguments of the parties have been fully considered by the Court,

¹Plaintiff United States of America has substantially joined in the Tribes’ opposition to the State’s motion. Dkt. # 313.

ORDER ON CROSS-MOTION FOR
SUMMARY JUDGMENT - 1

“The Court hereby declares that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.” *United States v. Washington*, 20 F. Supp. 3d 828, 899 (W.D. Wash. 2007).

October 2009 – 7-day Remedy Trial

March 2013 – District Court Issues Injunction

Case 2:01-sp-00001-RSM Document 753 Filed 03/29/13 Page 1 of 7

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE	
UNITED STATES OF AMERICA, et al., Plaintiffs,	No. C70-9213 Subproceeding No. 01-1 (Culverts)
v.	PERMANENT INJUNCTION REGARDING CULVERT CORRECTION
STATE OF WASHINGTON, et al., Defendants.	

This matter came before the Court for trial beginning on October 13, 2009, for the purpose of determining the appropriate remedy for the violation by the defendants of certain of the Plaintiff Tribes' rights under treaties between the Tribes and the United States. By amended order dated August 23, 2007, the Court has ruled that the State of Washington has built and currently operates stream culverts that block fish passage to and from the Tribes' usual and accustomed fishing places, depriving the Tribes of the fishing rights reserved in the treaties. The Court has carefully and fully considered the Court's prior rulings in this subproceeding, the evidence presented at the remedy phase trial, the pre-trial and post-trial briefings of the parties, the arguments of counsel and applicable law, and on March 29, 2013 entered Findings of Fact and Conclusions of Law. Based upon the foregoing, it is hereby:

PERMANENT INJUNCTION
REGARDING CULVERT CORRECTION
No. C70-9213, SUBPROCEEDING 01-1
(CULVERTS)

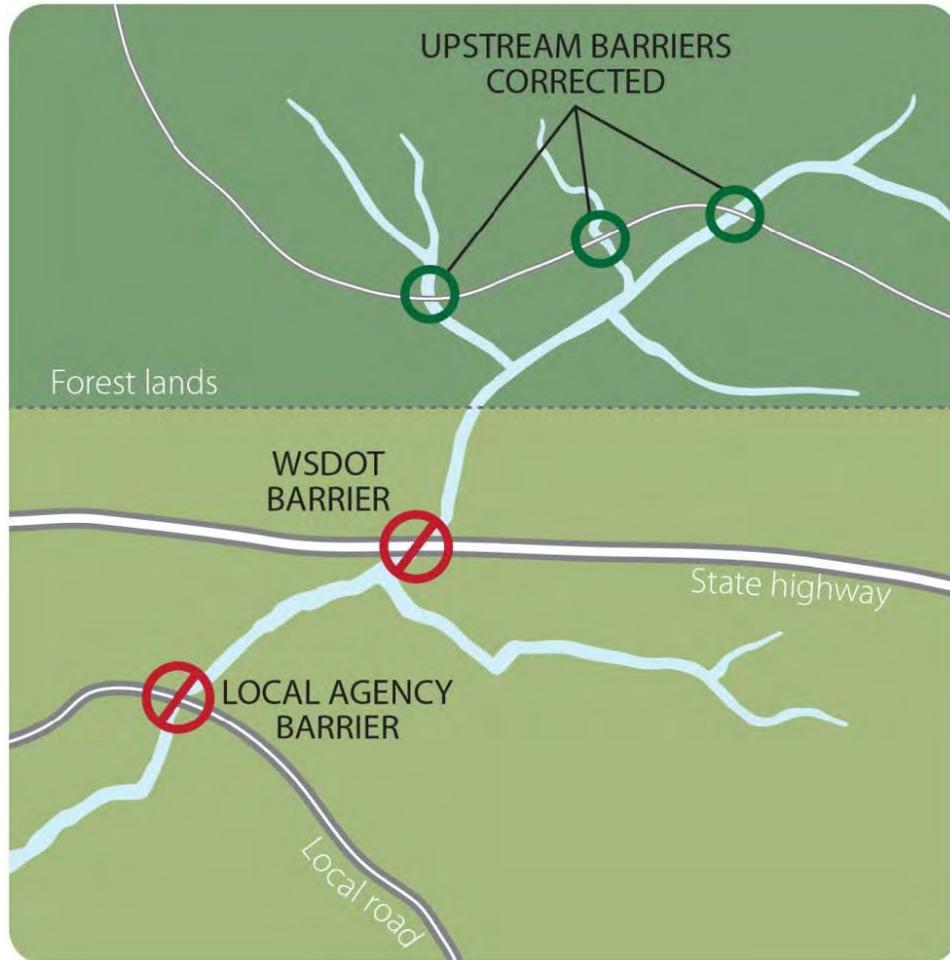
KANI & KATZEN, PLLC
401 SECOND AVE. S., SUITE 700
SEATTLE, WA 98104
206.344.8100
FAX: 1.866.283.0178

Court orders state agencies with forest roads to fix all culverts in the Case Area by 10/31/2016 (already required by state law);
WSDOT to fix all culverts by 2030.
United States v. Washington, 20 F. Supp. 3d 986, 1024 (W.D. Wash. 2013).

No connection between the actions ordered and outcomes for fish or fisheries.

State appeals.

Fixing only state culverts will not solve the problem.



- Local governments have more fish-blocking culverts than the State does.
- Some are downstream or just upstream of state barriers.
- Funding to fix them is limited.

Example = I-5 Fisher Creek



8-foot diameter culvert installed 1960s
was a partial fish passage barrier

In 2016-17, WSDOT replaced the culvert with two bridges, diverting traffic over temporary bypass lanes in the median during construction.
Cost = \$8.6M (all state \$, no federal \$)

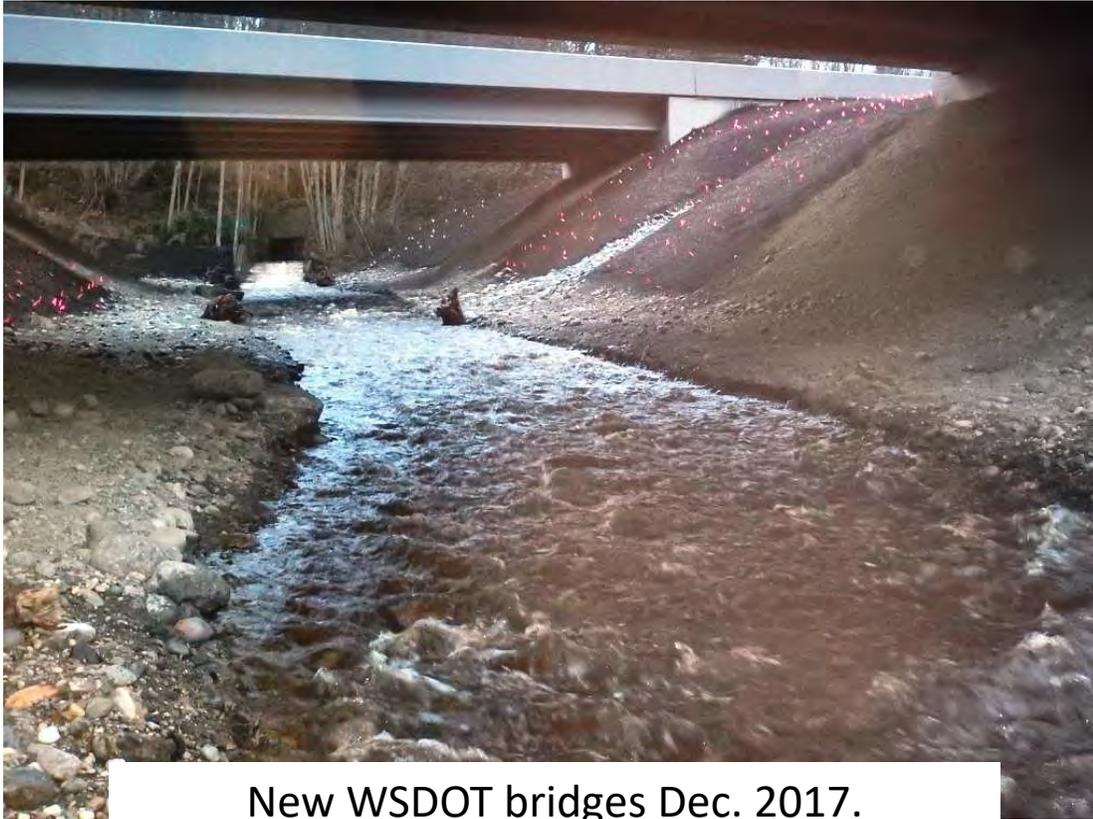


Wash. Dep't of Transp. April 2017 looking north

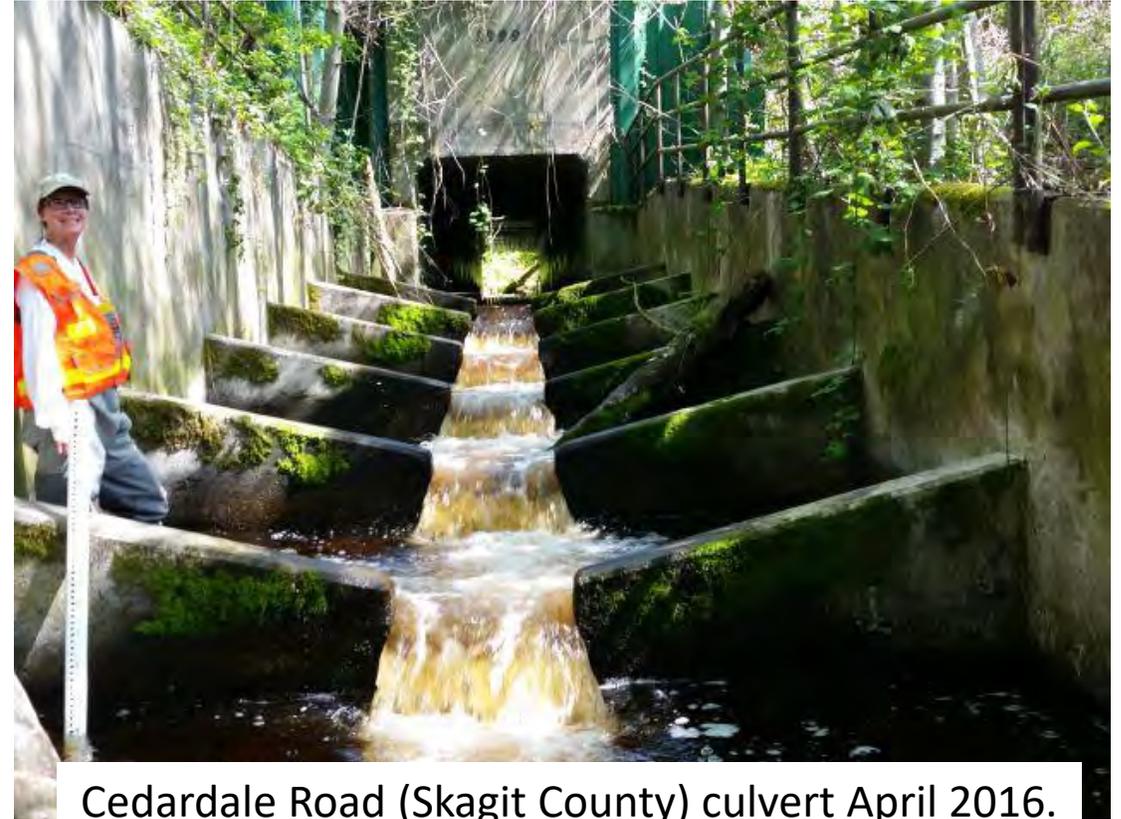


Wash. Dep't of Transp. Aug. 2017

But a county barrier culvert lies just upstream.



New WSDOT bridges Dec. 2017.
County culvert w/ fishway visible upstream.
(Wash. Dep't of Transp.)



Cedardale Road (Skagit County) culvert April 2016.
Built ca. 1937, retrofitted w/ fishway 1999.
Still a partial fish passage barrier.
(Wash. Dept. of Fish & Wildlife)

2016 – Ninth Circuit Affirms and then some

Case: 13-35474, 03/02/2017, ID: 10339453, DktEntry: 139, Page 1 of 69

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA; SUQUAMISH INDIAN TRIBE; SAUK-SUIATTLE TRIBE; STILLAGUAMISH TRIBE; IHOH TRIBE; JAMESTOWN S' KLALLAM TRIBE; LOWER ELWHA BAND OF KLALLAMS; PORT GAMBLE BAND CLALLAM; NISQUALLY INDIAN TRIBE; NOOKSACK INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; SQUAXIN ISLAND TRIBE; UPPER SKAGIT INDIAN TRIBE; TULALIP TRIBES; LUMMI INDIAN NATION; QUINAULT INDIAN NATION; PUYALLUP TRIBE; CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION; QUILEUTE INDIAN TRIBE; MAKAH INDIAN TRIBE; SWINOMISH INDIAN TRIBAL COMMUNITY; MUCKLESHOOT INDIAN TRIBE, <i>Plaintiffs-Appellees,</i>	No. 13-35474 D.C. Nos. 2:01-sp-00001-RSM 2:70-cv-09213-RSM ORDER AND AMENDED OPINION
v.	
STATE OF WASHINGTON, <i>Defendant-Appellant.</i>	

- Holding = the treaties “promise that the number of fish would always be sufficient to provide a ‘moderate living’ to the Tribes.” Therefore, the State violates the treaties by operating culverts that affect fish. *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017) (amended opinion).
- No one knows what a “moderate living” is.

2017 – 9th Circuit Denies Rehearing En Banc

Case: 13-35474, 05/19/2017, ID: 10440900, DktEntry: 140-1, Page 1 of 38

(1 of 47)

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA;
SUQUAMISH INDIAN TRIBE;
SAUK-SUIATTLE TRIBE;
STILLAGUAMISH TRIBE; HOH
TRIBE; JAMESTOWN S' KLALLAM
TRIBE; LOWER ELWHA BANK OF
KLALLAMS; PORT GAMBLE
BAND CLALLAM; NISQUALLY
INDIAN TRIBE; NOOKSACK
INDIAN TRIBE; SKOKOMISH
INDIAN TRIBE; SQUAXIN ISLAND
TRIBE; UPPER SKAGIT INDIAN
TRIBE; TULALIP TRIBES; LUMMI
INDIAN NATION; QUINULT
INDIAN NATION; SUQUAMISH
INDIAN TRIBE; PUYALLUP
TRIBE; CONFEDERATED TRIBES
AND BANDS OF THE YAKAMA
INDIAN NATION; QUILEUTE
INDIAN TRIBE; MAKAH INDIAN
TRIBE; SWINOMISH INDIAN
TRIBAL COMMUNITY;
MUCKLESHOOT INDIAN TRIBE,
Plaintiffs-Appellees,

No. 13-35474

D.C. Nos.
2:01-sp-00001-RSM
2:70-cv-09213-RSM

ORDER

v.

STATE OF WASHINGTON,
Defendant-Appellant.

Nine judges dissent:

“The panel opinion fails to articulate a limiting legal principle that will prevent its holding from being used to attack a variety of development, construction, and farming practices, not just in Washington but throughout the Pacific Northwest.”

U.S. v. Washington, 864 F.3d 1017, 1024 (9th Cir. 2017).

2018 – U.S. Supreme Court Accepts Review

John Sledd (tribal attorney)
& Fronda Woods 4/18/2018



- Tribes and U.S. disavow “moderate living” as the standard
- Briefs at <http://www.scotusblog.com/case-files/cases/washington-v-united-states/>
- Oral argument April 18, 2018 https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-269_n6p1.pdf

June 11, 2018 – U.S. Supreme Court Deadlocks 4-4

(Slip Opinion)

Cite as: 584 U. S. ____ (2018)

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Per Curiam

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SUPREME COURT OF THE UNITED STATES

No. 17–269

WASHINGTON, PETITIONER *v.*
UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 11, 2018]

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE KENNEDY took no part in the decision of this case.

- Justice Kennedy recused because he participated in 1985 Ninth Circuit *en banc* decision.
- Now what?

Did the Supreme Court process make a difference?

21 ORAL ARGUMENT OF ALLON KEDEM
22 ON BEHALF OF THE RESPONDENT UNITED STATES

23 MR. KEDEM: Mr. Chief Justice, and may
24 it please the Court:

9 The United States has never
10 asked for and did not receive a ruling
11 guaranteeing to the tribes a moderate living
12 from their fisheries.

13 JUSTICE GORSUCH: Well, you may not
14 have sought it, but isn't that what the Ninth
15 Circuit panel did?

16 MR. KEDEM: It's not.

ORAL ARGUMENT OF WILLIAM M. JAY ON BEHALF OF
THE RESPONDENTS SUQUAMISH INDIAN TRIBE, ET AL.

5 CHIEF JUSTICE ROBERTS: So if we were
6 to write an opinion in this case, you would
7 have no objection if it said that there is no
8 moderate living standard at issue here?

9 MR. JAY: We would have no objection
10 to that at all.

- Was this case only about fish passage? U.S. and tribal briefs say YES.
- Is “moderate living” dead? U.S. and tribal oral argument say YES.
- Would the Court grant cert. if another case raises the issue? Maybe.
- Would the U.S. support another case like this? Maybe not.

Is there anything left of the 9th Cir. reasoning? Only time will tell.

“[Michigan State U. law professor Matthew] Fletcher said this case will impact essentially any tribe with off-reservation fishing and hunting treaties. The ruling implies that these protect not just the right to fish, but also the right to a habitat for these fish to exist. . . . In the 9th [Circuit], where this case was originally argued, a tribe can use proof of habitat degradation to claim a breach of the treaty.”

Michigan Radio 6/15/2018

Wouldn't this reasoning apply to on-reservation fishing rights, too?

If this case was only about fish passage, are these things “fish passage?”

- Instream flows
- Water quality
- Impervious surfaces (roads, parking lots, buildings) that accelerate stormwater runoff

Litigation to watch

- Water quality in Maine. *Maine v. Wheeler*, No. 1:14-cv-264 (D. Me.)
- Railroads in Oregon. *Union Pac. R.R. v. Wasco County Bd. Cmmr's*, No. A166300 (Or. Ct. App.)
- Dakota Access Pipeline. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 1:16-cv-1534 (D.D.C.)