

Understanding Tribal Treaty Rights in Western Washington

Introduction

Indian people have always relied on the natural resources of this land. Their personal, cultural and spiritual survival depended on the ability to fish, hunt and gather the bountiful natural resources that once blessed this country.

But the arrival of Europeans and the creation of the United States changed their lives forever. Most of the land and resources that tribes thought were theirs forever were slowly but surely lost over the centuries that followed.

Tribal Sovereignty

Prior to European contact, tribes governed their own affairs, and continue to do so today. Tribes have a sovereign right to govern their members and manage their lands and resources. The United States recognized tribes as sovereign nations and the rightful owners of the land through the signing of treaties that carry the weight of the U.S. Constitution. Tribal sovereignty is further recognized with the government-to-government relationship that the tribes have with the federal government.

“They made us many promises, more than I can remember, but they never kept but one; they promised to take our land, and they took it.”

– Chief Red Cloud, Oglala Lakota

Although Indian people were often driven from homes by force, treaties were the preferred method used by the United States to acquire Indian lands and resources.

At first treaties were used to establish peace with tribes, then to remove tribes from their traditional lands and create reservations for their exclusive use and occupancy. More than 500 treaties were negotiated between the U.S. and Indian tribes, and in almost every case promises made to tribes were forgotten or ignored in the years that followed.

Treaties in Western Washington

By the time westward expansion reached what is now the state of Washington, tribes had few choices. They could fight a war they could not win, or cede most of their land

Member Tribes of the Northwest Indian Fisheries Commission



and live on reservations. Tribes chose not to fight. Instead they agreed to live on reservations but reserved what was most important to them, which was the right to continue to fish, hunt and gather in all of their traditional places.

In 1854-55, territorial Governor Isaac Stevens negotiated five treaties with the tribes in what is now western Washington to obtain the land to accommodate the wave of oncoming homesteaders. These were the treaties of Medicine Creek, Neah Bay, Olympia, Point Elliott and Point No Point.

“Stevens knew from earlier talks with tribal leaders that they would not give up their right to fish, and that if they were going to be located on smaller reservations they were going to have to be guaranteed the right to fish off the reservations as well as alongside all citizens of the

territory,” said Professor Charles Wilkinson, an author and Indian law expert who teaches at the University of Colorado.

As a result, all of the treaties include the same provision for tribally reserved rights:

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

– Treaty of Point Elliott, 1855

It is important to note that treaties containing essentially the same language by which the tribes reserved the right to fish, hunt and gather were signed with the tribes in western Washington, the Columbia River and the Great Lakes regions.

Under the U.S. Constitution, treaties are defined as the “supreme law of the land,” which trumps state law in the event of a conflict. There was little conflict in western Washington in the early life of the Stevens treaties because there were plentiful fishery resources and few non-Indian fishermen.

But as the 19th century came to a close, more and more settlers crowded into the Washington Territory. Non-Indian commercial fisheries began taking more and more salmon. Canning technology allowed the fish to be preserved, while transportation improvements enabled the fish to be sent around the world. At the same time, logging, agricultural and other impacts began to take their toll on salmon habitat. Between the increased non-Indian harvests and the destruction of salmon habitat in the watersheds, the salmon resource began to decline steadily.

Instead of acknowledging their own impacts to natural resources, non-Indians blamed tribes for the dwindling resource, and encouraged state government to crack down on tribal harvests. The state was providing most of the available salmon harvest to non-Indian fishermen who caught the fish before they returned to tribal usual and accustomed fishing areas in or near their rivers of origin. Despite treaty promises to the contrary, the state began to arrest tribal fishermen for fishing off-reservation.

Throughout the first half of the 20th century, the non-Indian commercial fishing fleets expanded, logging continued unabated, and agriculture continued to expand. Non-Indian commercial fishermen began harvesting salmon farther and farther out to sea, intercepting the fish before they could return to their rivers of birth and the waiting tribes.



Tribes saw fewer fish returning to their rivers. When they tried to harvest fish off-reservation – a right they had reserved in the treaties – they were arrested by the state of Washington, which refused to recognize tribal treaty rights. The state jailed tribal fishermen caught fishing outside of reservation boundaries, often confiscating boats, nets and catches. Despite earlier U.S. Supreme Court rulings acknowledging tribal treaties and broad tribal rights, the state of Washington continued to enforce its discriminatory laws against the tribes.

The Fish Wars

Throughout the 1960s, tension grew steadily between Indian fishermen and the state of Washington, reflecting the struggle for civil rights that was occurring across the country. This period of time is referred to as the “Fish Wars” as tribes throughout western Washington battled for recognition of their treaty fishing rights.

“It was essentially unlike any series of events in American history in terms of the violence and the wide spread of it throughout a particular region,” Wilkinson said. “The only real comparison is a series of events happening at about the same time over segregation in the South.”

At the forefront of the civil rights movement, the tribes were fighting to protect their tribal sovereignty and treaty rights. Tribes employed tactics similar to those being used to advance civil rights for African Americans and others at the time, substituting “Fish-Ins” for “Sit-Ins” and using other forms of civil disobedience to defy state law and bring public attention to their plight.

The late Billy Frank Jr., a Nisqually tribal member and leader of the treaty fishing rights struggle, was arrested more than 50 times throughout his life for fishing in defiance of state laws that denied tribal treaty rights.

“When we were fighting for our treaty rights in the 1960s, we marched with Dr. Martin Luther King,” he said. “When we returned home we continued the struggle by protesting, getting arrested, getting out of jail and starting over again.” Beatings often accompanied arrests, Frank said, and sometimes included women and children.

The Boldt Decision

“On Sept. 9, 1970 we had a fish camp under the Puyallup River Bridge near Tacoma. The state of Washington came down on us that day, just like they had done many times before, to stop us from exercising our treaty right to fish. They gassed us Indians and threw us all in jail,” Frank said.

“But someone else got gassed that day, too. His name was Stan Pitkin, the U.S. Attorney for western Washington. He was part of the crowd that gathered that day to watch the event unfold. Stan was troubled by what he saw, and quickly took the first steps to file the *U.S. v. Washington* court case that would lead to the 1974 Boldt decision that upheld our treaty rights.”

George Boldt, a conservative judge appointed to the federal court by President Dwight Eisenhower, was chosen to hear the case in *U.S. v. Washington*. The trial began on Aug. 27, 1973.

“The testimony of the tribal elders was very important at trial,” Wilkinson said. “They told stories about treaty times and the state’s attorneys objected. But Judge Boldt let the testimony in because he understood that the oral tradition can send down very valuable information.”

Judge Boldt intentionally chose Feb. 12, 1974 – Lincoln’s birthday – to issue his landmark decision in the case, “... which by any reasonable standard is one of the great moments in American law,” Wilkinson said.

In his decision, Boldt upheld tribal treaty-reserved rights by:

- Interpreting the treaty language, “*The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory...*” to mean that the tribes were entitled to half the harvestable number of salmon returning to or passing through the tribes’ usual and accustomed fishing places.
- Establishing the tribes as co-managers of the salmon resource with the state. “He ruled that tribes were governments, sovereigns, and that if the state of Washington can regulate, so can the tribes,” Wilkinson said.
- Established conservation standards that restricted the ability of the state to regulate treaty Indian fishing.

In Phase II of *U.S. v. Washington*, Judge William Orrick issued a decision in 1980 that further upheld treaty rights by:

- Confirming that salmon produced in hatcheries, not just wild salmon, were also subject to the 50/50 sharing formula.

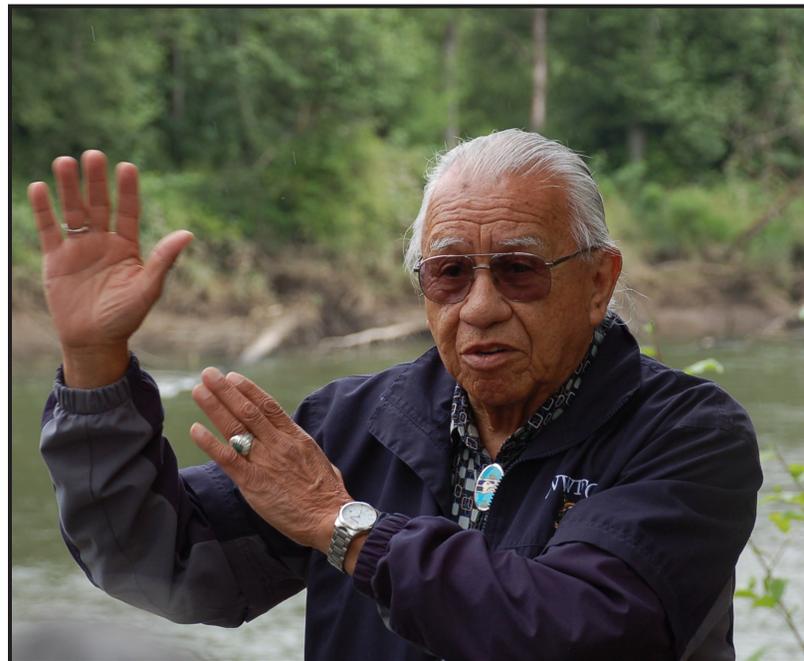
- Confirming that the state and federal governments have a duty to protect salmon habitat. For the treaty right to have meaning, there must be fish available for harvest.

Initially the state largely refused to implement Boldt’s ruling, leading to violent clashes between Indian and non-Indian fishermen and chaos on the fishing grounds. The unrest continued until 1979 when the Boldt decision was upheld by the U.S. Supreme Court.

The Supreme Court in a footnote wrote: “other than some desegregation cases in the South, the civil disobedience by Washington State officials is the single greatest act of defiance of federal law witnessed in this century.”

Due to the decline of wild salmon, hatchery production has played an even more significant role in salmon management in western Washington. Without hatchery fish, the opportunity for tribes to exercise their fishing rights would greatly diminish, and in some cases be completely eliminated.

Today, the 20 treaty Indian tribes in western Washington combine modern science and traditional knowledge to effectively manage the salmon resource. Tribal hatcheries annually produce an average of 40 million fish, which are harvested by both Indian and non-Indian fishermen. The tribes are leading the effort to protect and restore habitat with the goal of recovering salmon in the region.



NWIFC Chairman Emeritus Billy Frank Jr.

Post *U.S. v. Washington*

U.S. v. Washington remains an active case with a number of sub-proceedings and associated cases, in which the principles of the Boldt decision have been applied:

- The 1981 decision in *Hoh v. Baldrige* ruled that salmon should be managed on a river system by river system, run by run basis to protect the tribes' treaty rights. It further mandated that the state and tribes mutually develop long-term plans with practical and flexible rules for the management and allocation of salmon. The principles outlined in the case have transformed the way state fisheries are managed.
- In 1994 federal court Judge Edward Rafeedie followed in the footsteps of Judge Boldt, ruling that tribes also were entitled to half the harvestable shellfish on most Washington beaches. Rafeedie also ruled that shellfish are the same as fish under the treaties. "A treaty is not a grant of rights to the Indians, but a grant of rights from them," he wrote in his ruling.
- The ruling in Phase II that the state has a duty to protect salmon habitat was confirmed in the Culvert Case filed by the tribes in 2001 and decided by Judge Ricardo Martinez in 2013, requiring the state to fix fish-blocking culverts in its roads. The court found that failing culverts deny salmon access to hundreds of miles of good habitat and important spawning grounds in western Washington, harming salmon at every stage in their life cycle. The state was given 17 years to fix the culverts but is appealing the ruling.

Trust Responsibility

A unique relationship exists between the tribes and the federal government due to treaties, federal statutes and court rulings. This trust responsibility establishes legal obligations of the federal government to the tribes, including the protection of their treaty-reserved fishing rights. Although tribes are sovereign nations, the U.S. has a trust responsibility to the tribes to protect tribal trust resources and treaty rights.

Treaty Rights at Risk

Despite the hard-fought efforts of the tribes for recognition of their treaty fishing rights, those rights are more threatened today than ever before. They are being rendered meaningless because the federal and state governments are continuing to allow salmon habitat to be damaged and destroyed faster than it can be restored. Sadly, this trend is not showing signs of improvement, and is leading to the failure of salmon recovery in western Washington.

Salmon populations have declined sharply because of the loss of spawning and rearing habitat. Tribal harvest levels have been reduced to levels not seen since before *U.S. v.*



Washington. Four species of salmon and steelhead in western Washington are listed as "threatened" under the Endangered Species Act, some for more than a decade. Some tribes have lost even their most basic ceremonial and subsistence fisheries – a cornerstone of tribal life.

"Habitat – if we can't get the fish back with habitat, we've got a problem. People are going to have to sacrifice to get restoration, and that requires internal cooperation right now. There aren't going to be any quick fixes."

– Guy McMinds, Quinault Indian Nation.

Through the Treaty Rights at Risk Initiative that the tribes took to the White House in 2011, tribes are calling on their federal trustee to assume control and responsibility for salmon recovery and to lead a more coordinated effort among federal agencies. Coordinating and aligning agency actions is necessary if salmon are going to be recovered successfully and for the federal government to uphold its trust obligation to tribes. All agencies of the federal government must understand that they have the responsibility to conduct their actions in a manner that is protective of the tribes' treaty rights.

The existence of fish for harvest is fundamental for the right to take fish to have meaning. The signatories to the treaties reserved the right to continue fishing perpetually. Without these rights and fish to harvest, the treaties would be abrogated.

"We kept our word when we signed the treaties that ceded almost all of the land that is in western Washington," said Billy Frank Jr. "We expect the United States to keep its word, too."



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