

# Washington Public Ports Association

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## Understanding Indian Law:

### Treaty Rights to Off-Reservation Habitat Protection

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# The Stevens Treaties - 1854/1855

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## The Fishing Clause

“The right of taking fish, at all usual grounds and stations, is further secured to said Indians in common with all other citizens of the Territory . . .”

# The Stevens Treaties – 1854/1855

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## Litigation in Early 1900's & Off-Reservation Treaty Rights

- Courts ruled that tribal treaty rights not limited to on-reservation activities.
- Treaties not a granting of rights to the tribes, but a granting of rights from the tribe and a reservation of rights not expressly granted.
- Treaties subject to contract law principles, including interpretation in favor of non-drafting party.
- Example: State and private landowners could not prevent tribal members from physically accessing fishing sites.

# The Stevens Treaties - 1854/1855

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## Boldt-Era Litigation

Puyallup Cases: US Supreme Court establishes non-discriminatory regulation of state and tribal fisheries.

1974 Boldt Decision: “In common with” fishing clause means 50/50 allocation and co-management; 9<sup>th</sup> Circuit affirms; U.S. Supreme Court declines to review case; State non-compliance.

1979 Fishing Vessel Decision: US Supreme Court affirms Boldt principles and federal government oversight.

# The Stevens Treaties – 1854/1855

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## Boldt “Phase II” – Hatchery Fish and Habitat Protection

- Phase II decision orders to state to not damage habitat; 9<sup>th</sup> Circuit affirms in “environmental servitude” decision (1985) – later vacated by the 9<sup>th</sup> Circuit.
- Whether a state action damaging habitat is a treaty violation must be based on a specific, particular dispute.
- Western Washington case area tribes file culverts lawsuit against the State of Washington in 2001.
- Federal District court finds treaty violation from culverts, orders removal, 9<sup>th</sup> Circuit affirms, limits decision (somewhat) on State’s Motion for Rehearing.

# The Culverts Decision(s)

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- State of Washington petitions to US Supreme Court, which accepts case. J. Kennedy recuses, Court deadlocks 4-4.
- The “Decision” = Federal Court injunction
  - 9<sup>th</sup> Circuit Opinion
  - 9<sup>th</sup> Circuit Opinion on Motion for Rehearing
  - Briefs and Arguments of the Parties

There is no single decision or coherent rule of law on when an off-reservation habitat impact is a treaty violation.

# What Does the Decision Mean?

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- State funding obligation on culvert removal, between \$2.0 billion and \$3.7 billion; state funding source discussions in 2019 Session.
- Other culverts (city, county, private)???
- Tribes are “co-managers” of fisheries (hatchery operations, allocation) - what about co-managers of habitat???
- Most recent example: State Supreme Court Hirst water rights decision and legislation – “from consult to consent” position.

