

Tribal Treaty Rights in the Environmental Permitting Process

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WPPA 2019 Environmental Seminar
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Presentation Overview



Background: Tribal Treaty Rights

Treaty Rights in the Permitting Context

Strategies for Tribal Relationships and Resolving Conflicts

Western Washington Treaty Tribes

- Eight treaties in Washington with five treaties in Western Washington
- Most treaties cover more than one tribe
- Most treaties created reservations
- All Washington treaties provide for hunting and fishing rights on and off-reservation



Off-Reservation Treaty Fishing and Hunting Rights



Treaty Fishing Provision in “Stevens Treaties”:

“The right of taking fish at all usual and accustomed places is further secured to said Indians in common with citizens of the Territory, and of erecting temporary houses for the purposes of curing together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. . .”

Treaty with the Point Elliot,
Article 5, April 11, 1859

Treaty Fishing Rights Litigation

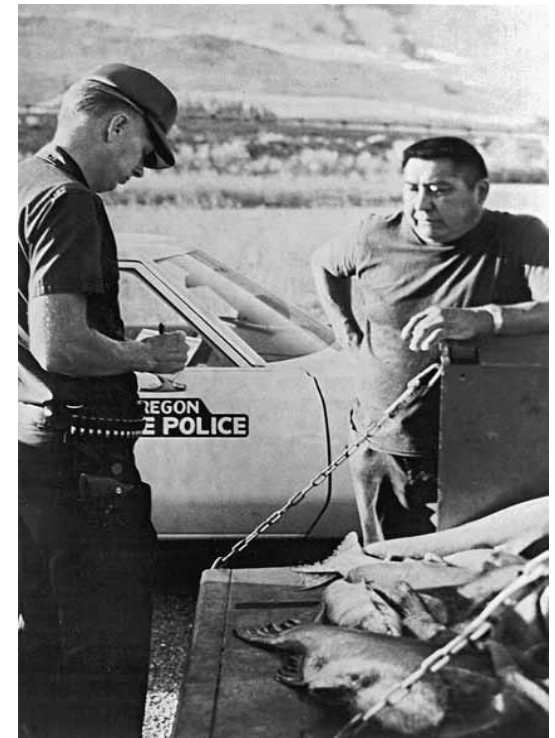


- *U.S. v. Washington*

- Phase I – Subproceedings
 - Geographic restrictions
 - Equitable allocation: Up to 50 percent
- Phase II – Environmental Servitude

- *U.S. v. Oregon*

- Columbia River Treaty Tribes



Culverts Subproceeding 2007 Ruling



“This duty arises directly from the right of taking fish that was assured to the Tribes in the Treaties, and is necessary to fulfill the promises made to the Tribes regarding the extent of that right.”

- Judge Martinez (W.D. Wash. 2007)

Culverts

2007 Order



- Blocked culverts impair Treaty rights
 - Fish harvest has been diminished and significant portion of diminishment is due to blocked culverts
 - Tribes ceded great tracts of their land in exchange for the perpetual right to take fish
- Court specifically noted it was not imposing a “*broad environmental servitude*” or requirement to take all possible steps to protect fish runs

Culverts

2013 Injunction



■ Permanent injunction

- Certain state agencies to provide and maintain fish passage for salmon at numerous culverts under state-owned roads

■ Cost implications

- Culvert repairs could cost the State of Washington over \$2.4 billion over next 17 years (according to State Department of Transportation)

Ninth Circuit Affirms June 2016



- The Ninth Circuit affirmed the District Court's order
- The Ninth Circuit concludes the State violated, and continues to violate, the Tribal Treaty fishing rights by building and maintaining barrier culverts
- *“The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, **but also that there would be fish sufficient to sustain them**”*

En Banc



- In August 2016 the State petitioned the Ninth Circuit for rehearing en banc
- The Ninth Circuit denied the petition in May 2017
- Nine judges dissented:
 - *“Fashioning itself as a twenty-first century environmental regulator, our court has discovered a heretofore unknown duty in the Stevens Indian Treaties of 1854 and 1855.”*
- Concurrence:
 - *“We are sure we have not opened the floodgates to a host of future suits.”*

The State of Washington Seeks Cert.



- In August 2017, the state of Washington filed a petition for writ of certiorari; petition granted in January 12, 2018
- March 23, 2018, Justice Kennedy recuses himself because he had participated in an earlier phase of the case *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985) (en banc)
- Numerous amicus briefs on both sides
- Oral argument was held on April 18, 2018

U.S. Supreme Court: April 18, 2018 Oral Argument



- The State changes its interpretation of Treaty (“*I remember that answer well, your Honor, and that was a mistake . . .*”)
 - State: “***large decline***” and “***not justified by substantial compelling interests***”
 - U.S./Tribes: “***substantially degraded***”
- Justices Alito Jr., Gorsuch, and Kagan struggle, and probe the State and U.S. regarding the trigger and scope for a treaty right violation remedy.
 - Half of the salmon population? One to five percent? Appreciable or durable?
- The Federal Government and Tribes emphasized they were ***not*** seeking a ***moderate living standard***

The Supreme Court Decision

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.



Reactions to the Ruling



- AG Ferguson statement: *“It’s also time for others to step up in order to make this a positive, meaningful ruling for salmon.”*
 - *“And to ensure other culvert owners do their part to remove barriers to salmon passage”*
- Lorraine Loomis, Chair of the Northwest Indian Fisheries Commission: *“We are eager to continue our efforts with our co-managers and others to protect and restore the salmon resource for future generations.”*

Implications



- Ninth Circuit decision is now binding for the PNW
 - Court found that State has a Treaty obligation
 - Legal Standard unclear: “fish sufficient to sustain”?
- Win for the tribes and a loss for the State
 - Cost of removal
 - How much will salmon actually benefit from removal of State-owned culverts?

Presentation Overview



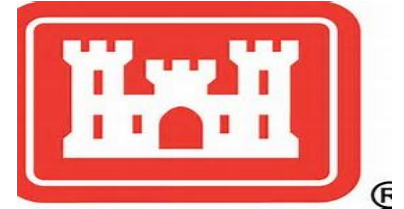
Tribal Treaty Rights in the Permitting Context

- Federal Permitting process– U.S. Army Corps of Engineers
- State and local permitting processes

Tribal Treaty Rights in the Permitting Context

- Federal Permitting process– U.S. Army Corps of Engineers
 - Section 10 of Rivers and Harbors Act (Obstructing Navigation in Navigable Waters)
 - Section 404 Clean Water Act (Discharge of Dredged or Fill Material into WOTUS)
- Individual vs. Nationwide Permits

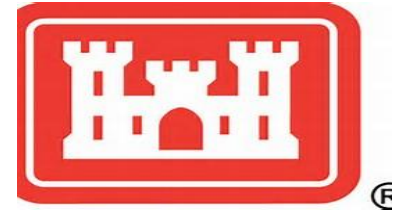
Corps of Engineers – Permitting Consideration of Treaty Rights



Corps Consideration of Treaty Rights:

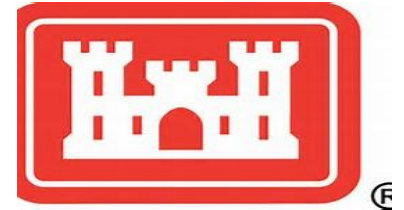
- Trust Responsibility
- Government-to-Government Consultation
- General Conditions for Nationwide Permits - GC 17
Tribal Rights – No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

Corps of Engineers – Permitting Consideration of Treaty Rights



- Northwest Division Tribal Consultation Guidance
 - Establishes “Prompt Review Requirement” for obtaining supplemental and supporting information from tribal government asserting impacts to tribal rights then proceeding to permit decision.
 - First Request: Supervisor; 30 day + 15 extension
 - Second Request: Regulatory Chief; 30 day + 30 extension
 - Third and Final Request: Commander; 30 day then proceed to Permit Decision
 - Further Extension: Commander; 30 days unless “extenuating circumstances”

Corps of Engineers – Permitting Consideration of Treaty Rights



- *Muckleshoot Indian Tribe vs. Hall*, 698 F. Supp. 1504 (W.D. WA 1988)
 - Proposed construction of new 1200 slip marina in Elliot Bay.
 - Granted Tribes' Preliminary Injunction Motion because marina would eliminate portion of U&A fishing areas and the loss would be “substantial.”
- *Lummi Indian Nation v. Cunningham*, No. C92-1023 (W.D. WA 1992)
 - Proposed Dredging and Dredge Disposal in Bellingham Bay.
 - Denial of Tribes' Preliminary Injunction Motion on alleged Impact on Treaty Fishing Rights because interference was “de minimis.”
- *Northwest Sea Farms Inc. vs. USACE*, 931 F. Supp. 1515 (W.D. WA 1996)
 - Proposed construction of net pens with 11.36 acres of anchorage.
 - Denied Fish Farm Operator's action to overturn Corps denial of §10 Permit.
 - Obstruction of 11.36 acres to tribal fishing is more than de minimis impact.

U.S. Army Corps of Engineers (USACE) Denial of Gateway Pacific Terminal Project

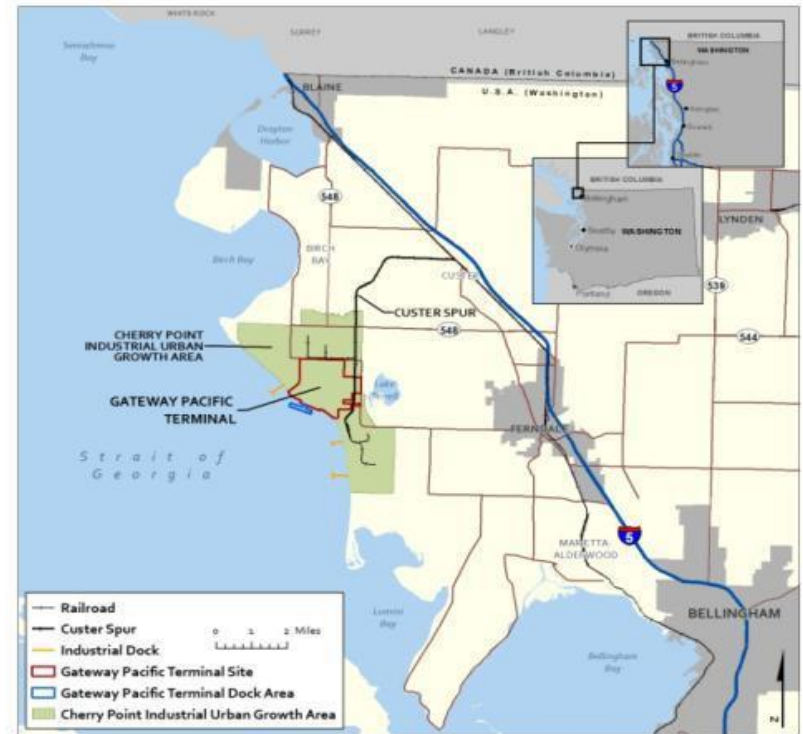


■ Gateway Project:

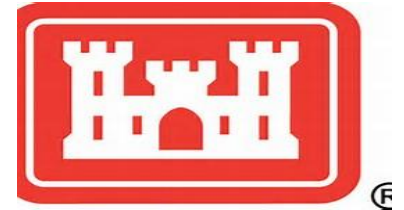
- Multimodal Marine Terminal at Cherry Point in Whatcom County
- Capacity to export/import 54 million metric tons per year of dry bulk commodities including coal, grain products, potash, and calcined petroleum coke
- 3,000' Wharf
- 1,285' Trestle
- 122 acre overwater coverage

■ Lummi Nation:

- Adjudicated U&A treaty fishing rights in northern Puget Sound, from Fraser River to Seattle, including Cherry Point



U.S. Army Corps of Engineers (USACE) Denial of Gateway Pacific Terminal Project



- USACE denied Project on basis that impacts on Treaty Fishing Rights would be greater than de minimis citing Lummi v. Cunningham (W.D. WA 1992)
 - 14 Lummi Declarations included annotated Cherry Point maps showing areas where members harvested fish and shellfish, information on productivity and gear loss, and technical report showing Lummi members spend 1/3 of time fishing in Cherry Point area
 - USACE rejected Gateway's argument that Project footprint was small in comparison to U&A

State and Local Government Coordination

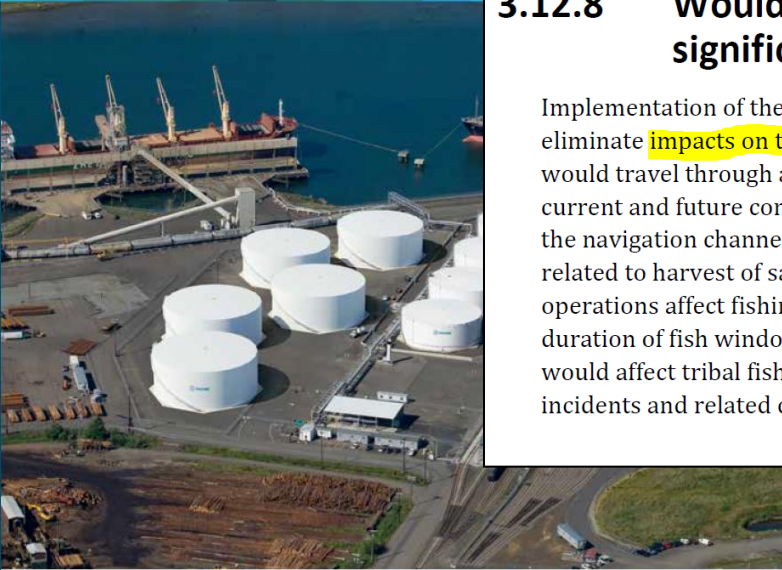
- State laws requiring Tribal coordination and collaboration:
 - Centennial Accord (1989), Centennial Accord Millennium Agreement (1999) and Ch. 43.376 RCW (2012)
 - SEPA Environmental Review, Ch. 43.21C RCW



State and Local Government Coordination

Final Environmental Impact Statement

Main Report



3.12.8 Would the proposed action have unavoidable and significant adverse impacts on tribal resources?

Implementation of the mitigation measures described above would reduce but may not completely eliminate **impacts on tribal resources**. More specifically, vessels related to the proposed action would travel through and dock in **usual and accustomed fishing areas** in Grays Harbor. Under current and future conditions, increased vessel activity could **restrict access to tribal fishing areas** in the navigation channel and adjacent to Terminal 1. This conflict is most likely to occur for fishing related to harvest of salmon, steelhead, and sturgeon. Because other factors besides vessel operations affect fishing opportunities, such as the number of fishers, fish distribution, timing, and duration of fish windows, the extent to which vessel operations related to the proposed action would affect tribal fishing is difficult to quantify. Potential impacts related to increased risk of incidents and related consequences are addressed in Chapter 4, *Environmental Health and Safety*.

State and Local Government Coordination

D. The county designates and adopts by reference the following policies as the basis for the county's exercise of SEPA authority pursuant to this section:

c. It is the County's policy to ensure applicants provide verifiable documentation of consistency with federal and state laws regarding treaty rights, clean water rights (both water quality and water quantity), and endangered species protection such as through attaining permits or conducting consultations. The decisionmaker may condition or deny the project to mitigate its adverse impacts if the decisionmaker finds that a proposed project would reduce or damage rare, uncommon, unique or exceptional plant or wildlife habitat, designated wildlife corridors, or habitat diversity for plants or animals species of substantial educational, ecological, or economic value, or interfere with treaty rights, clean water rights, or endangered species protection.

State and Local Government Coordination



April 18, 2018

Washington State Department of Fish & Wildlife (WDFW)
Region 4 Office
16018 Mill Creek Blvd
Mill Creek, WA 98012

We respectfully submit for your records, "The Lummi Nation Statement on the Cultural Significance and Management of the *Xwullemy* (the Salish Sea)" and the attached map. The Statement provides the overarching guiding principles and a management and consultation framework for agencies at the local, state, and federal level whose decisions directly or indirectly impact the natural and cultural heritage resources of the Salish Sea.

We would like to especially draw your attention to our position that **any action contrary to the position in this Statement would be a violation of the treaty** that, as emphasized in the United States Constitution, is the supreme law of the land. Please also note that the Statement declares that **"until such time as there is meaningful consultation with the Lummi Nation and it formally agrees with the proposed measures, our position should be construed as opposed to the proposed activity."**

Please acknowledge receipt of this document and for any matters relating to it contact Sheena Kinley-Sanders of the Chairman's Office at (360) 312-2150.

Respectfully yours,

Jeremiah Julius, Chairman
Lummi Indian Business Council

State and Local Government Coordination

- *Union Pacific v. Wasco City Board of Commissioners* – currently in Oregon State Court of Appeals
 - The Columbia River Gorge Commission upheld Wasco County’s decision to deny Union Pacific’s application because the proposal “*affects tribal treaty rights*”
 - Cited to the Ninth Circuit Culverts decision
 - “*Nothing in those decisions requires the tribes take a wait and see approach to **protecting their treaty-reserved fishing places from environmental degradation** where Wasco County’s administrative record contains substantial evidence that a derailment and spill into or adjacent to the Columbia River would damage or destroy habitat in Zone 6, which the federal government, the tribes, and others have spent decades restoring.*”

Presentation Overview



What makes a Tribe different than any other community or stakeholder?

Sovereignty

- Tribes are recognized sovereigns
- Article 1, Section 8 of U.S. Constitution
- Government-to-Government Consultation
- Immunity



Treaties

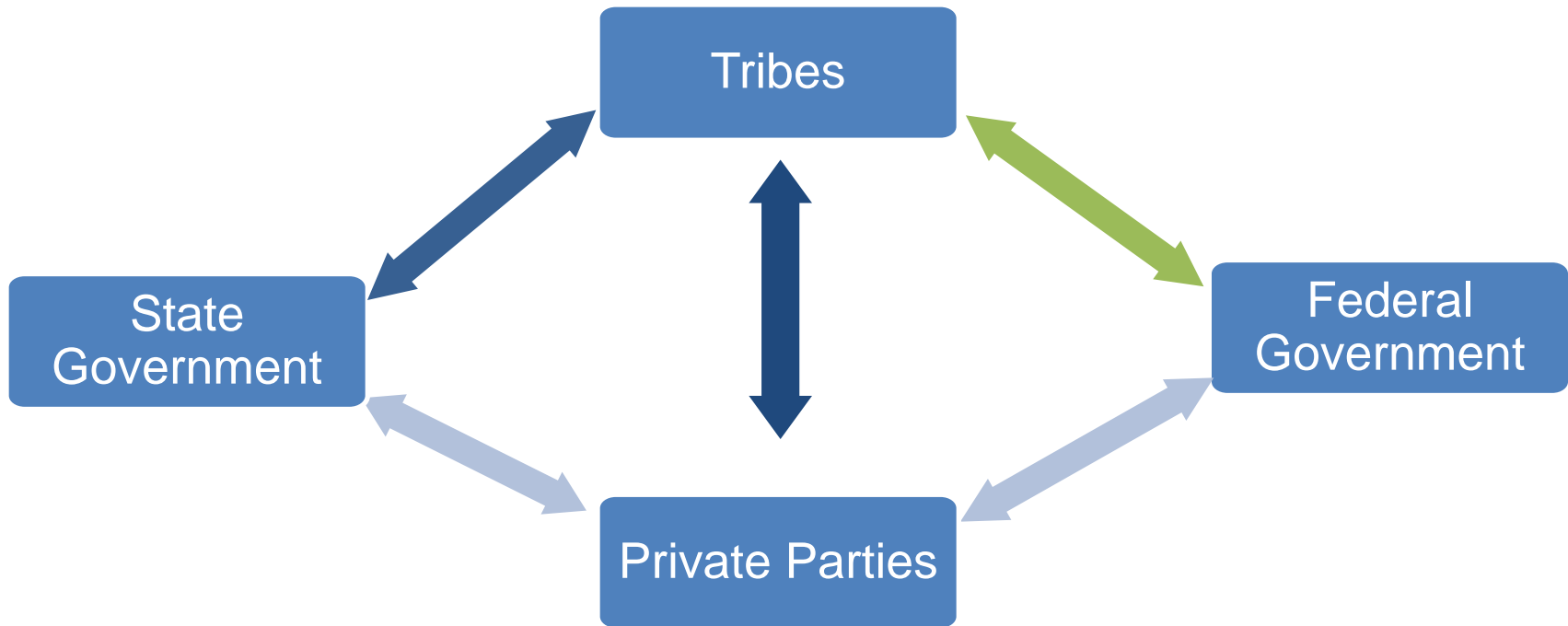
- Creation of Reservations: a restricted land base with preserved jurisdiction
- Preservation of Off-Reservation Rights: most frequently water rights, and the right to hunt and fish in traditional areas (and now the environmental servitude associated with those rights)

Federal Trust Responsibility

- A broad obligation of the federal government
- Tribes are “domestic dependent nations” and “wards” of the federal government

Tribal Consultation and Coordination

-  Government-to-Government Consultation: Federal Trust Obligation
-  Coordination



Private Party/Stakeholder Coordination

- Cannot fulfill the Trust Obligation but is invaluable
- Need not depend on federal or state agencies
- Can go beyond the singular project/development and permitting
- Can focus on broad issues faced by Tribal government, including cultural issues

Themes of Successful Tribal Relationships

- Distinguish Tribes from stakeholders, environmental groups, and NGOs
- Built upon an understanding of the individual Tribe – treaty rights, government, history, businesses, etc.
- Trust between the parties and managing relationships for the long-term
- Multi-level outreach with long-term strategic focus – know Tribal structure and reach out to appropriate agencies, departments, and councils
- Recognition of Tribal governmental and cultural concerns
- Should include multiple contacts at various levels within the Tribal government (and parity between representatives)

Best Practices

- Effective tribal consultation requires a ***strong, persistent,*** and ***credible*** organizing force. It will take time and money – prepare your management and project staff for it early in the process.
- Understand each project and the specific Tribal interests in terms of historical context and the range of potential Tribal rights.
- Communication should be multi-level and in good faith.
- Successful consultation is based in dialogue.
- Involve and update federal decision-makers but do not rely on them to lead the process.
- There's no exact roadmap so customize the process

For more information:

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