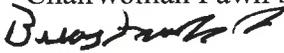




# Northwest Indian Fisheries Commission

6730 Martin Way E., Olympia, Washington 98516-5540  
Phone (360) 438-1180 [www.nwifc.org](http://www.nwifc.org) FAX (360) 753-8659

## Memorandum

**TO:** Chairwoman Fawn Sharp and Commissioner Robert Anderson  
**FROM:**  Billy Frank, Jr., Chairman  
**SUBJ:** NWIFC Initial Comments to the Commission on Indian Trust Administration Reform  
**DATE:** September 30, 2013

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Knowing that the National Commission on Indian Trust Administration and Reform will soon be submitting its report to the Secretary of Interior, I would like to provide you with some initial comments concerning the lack of accountability for the federal agencies to protect the treaty-reserved resources of the Tribes. We hope these comments will be useful to you as you prepare your report.

For many years preceding the Boldt decision in 1974, the state of Washington illegally discriminated against tribes by allowing non-Indian fisheries to harvest most of the allowable salmon harvest before the fish returned to the tribes' usual and accustomed fishing areas and thus limiting them to 1-3% of the annual harvestable portion of the salmon and steelhead runs. As such, the federal government filed suit in the support of the treaty-reserved and civil rights of twenty western Washington Tribes. In *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), (Boldt Decision), the court reaffirmed the Tribes inherent sovereign right to manage their fishers and to act as "co-managers" of the fisheries resources alongside the State. In addition, the courts have ordered, *inter alia*, that the Tribes have a right to take 50% of the harvestable portion of each salmon and steelhead run, that hatchery produced fish are part of the treaty-reserved right of the Tribes, and the treaty right to take fish impliedly includes the duty on the part of the state of Washington, and federal government, to protect and restore fish habitat. The Boldt Decision was a historic landmark case in terms of recognizing the Tribes right to harvest fish and manage their fisheries. To deny the Tribes their treaty-reserved rights to fish is to deny them of their civil rights. Unfortunately, 40 years later, the treaty-reserved rights are still being denied and the federal government must change the way it carries out its authorities so that it is adequately fulfilling its trust responsibility to protect the treaty-reserved resources of the Tribes.

### **Tribes are Co-Managers and Have a Treaty Right to 50% of the Harvest**

In 1974, the Boldt court looked at the 1854-55 treaty negotiations to interpret the meaning of the language "in common with" as the United States described it to the Tribes, holding that the

United States intended for there to be an equal sharing of the fish resource between the Tribes and the settlers. As the court stated, the phrase means "sharing equally the opportunity to take fish...therefore, nontreaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish...and treaty right fishermen shall have the opportunity to take up to the same percentage."

The court further recognized the inherent self-regulating authority of the Tribes to govern their fishers. The State and each of the signatory Washington treaty tribes have independent and differing authorities, mandates and responsibilities for developing and implementing management programs to protect, enhance, and utilize fish and wildlife resources in a sustainable manner within their respective jurisdictions. The overlapping nature of their respective jurisdictions and authorities creates a co-management relationship between the State and treaty Tribes.

### **Hatchery Fish are Part of the Treaty Right**

The court also clarified that artificially-propagated hatchery fish were included in the allocable fish population. The court held that hatchery fish must be included in the treaty allocation based on three independent factors. These factors were the lack of any basis for State ownership of the fish once released, the competition between hatchery and natural fish for the same resources in a given stream, and the mitigation function of the hatcheries. The primary purpose of the hatcheries is to mitigate for the production and harvest lost due to the destruction of habitat.

### **Treaty Right Includes a Duty on the State and Federal Governments to Protect and Restore the Habitat**

The Tribes recognized the court imposed the ultimate conservation burden on their fisheries, that is, the treaty right did not allow the Tribes to take the last fish. As such, the State has an obligation to ensure the resource is not depleted so as to cause a conservation necessity that would require the tribes to bear the conservation burden to protect the resource by further reducing their fisheries.

The Tribes argued the State of Washington cannot continue to permit destruction or "take" the salmon resource through habitat destruction, which has been occurring throughout the Case Area. The State cannot allow the loss of productivity of the habitat no more than it can foreclose tribal harvesting of the fish that are available. To protect the continued availability of the resource, which was guaranteed to the Tribes by treaty, curtailment of destructive or potentially destructive activities is required. The Tribes argued, and the court agreed, the right of taking fish incorporates the right to have the treaty fish protected from environmental degradation.

Though the Ninth Circuit Court of Appeals ultimately vacated the lower court's holding, it directed the parties to bring an actual case and controversy based on specific facts. The court has stated that the scope and nature of the habitat duty must be left for a case-by-case determination in subsequent proceedings in *United States v. Washington*.

Subsequent to the Appellate decision in 1985, a number of courts have dealt with specific facts on a case-by-case determination and held that fish habitat must be protected as part of the treaty rights of the Tribes. For example, the courts have held that the fishing rights of the tribes implicitly reserved sufficient water flows to maintain temperatures below levels harmful to fish. Also, the treaty rights reserved the water quantity necessary to protect salmon redds subject to Indian fisheries and to maintain the livelihood of the Tribes.

A variety of courts outside of *United States v Washington* have all come to the same conclusion that the treaty right to fish impliedly includes a duty to protect the habitat for the fish. But for the habitat, there are no fish. If there are no fish---there is no treaty right to take fish. In 2001, the United States brought suit in *United States v. Washington* regarding the question of an implied right for habitat protection. In 2007, the court declared once again that the treaties implicitly imposed on the State a duty not to degrade and diminish habitat through its fish barrier culverts.

### **Treaty Intent is Not Being Fulfilled – Treaty Rights at Risk**

Though the Tribes secured their right to take 50% of the harvestable portion of the runs through the federal court and with the improvement of the process to manage the fisheries with the State they have been able to access the fish that are harvestable. However, there are now few fish available to harvest due to the destruction of their habitat. The tribes are harvesting no more fish today than they were 40 years ago. Forty years ago the fish were not available to the tribes because the state was allowing them to be harvested before they returned to the tribes' fishing areas. Today the fish are no longer available because the state and federal governments are allowing the continued destruction of their habitat so the fish are no longer being produced. The fundamental issue is that the intent of the Treaties is not being fulfilled and the federal agencies are not being held accountable. The Tribes are unable to meet their ceremonial, religious, subsistence, and economic needs from the fisheries resources.

- When the United States entered into treaties with the Tribes, Governor Stevens stated, "This paper secures your fish." *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 at 667, n. 11. However, this is becoming an empty solemn promise due to the failure of the United States to ensure the habitat of the fish is fully protected. Recent catch data shows the overall harvest for the Tribes has diminished to the point where they have been taking approximately the same number fish today as they were at the time of the Boldt decision in 1974.
- Governor Stevens knew that fish were essential to the Tribes, *United States v. Washington*, 873 F.Supp. 1422, 1436 (W.D. Wash. 1994) and "[i]t could never have been the intention of Congress that Indians should be excluded from their ancient fisheries." *Fishing Vessel*, 443 U.S. at 666, n. 9. Moreover, Stevens saw the federal interest in maintaining the tribes as self-sufficient consumers and sellers of fish. *United States v. Washington, Shellfish I*, 873 F.Supp. at 1436, 1439. However, fisheries throughout the Case Area are no longer available to the tribes and they are not able to make even a moderate living as commercial fishers nor are they able to meet their most basic cultural and subsistence needs.

- Stevens found most tribes willing to cede their land, but “[w]hatever land concessions they made, the Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty.” 873 F.Supp. at 1437. However, the federal government is failing to fulfill its responsibilities and duties to ensure the treaty fishing rights are permanent. There are fish runs that have gone extinct and others are more recently listed under the Endangered Species Act (ESA) as threatened or endangered. Extinct and depleted fish runs deny the Tribes an opportunity to exercise their treaty-reserved fishing rights.
- To compound the problem the Tribes worked hard with federal, state and local governments to develop recovery plans for these listed fish and these plans were adopted by the federal government under their ESA authority but they are not holding agencies accountable for implementing these plans. Each federal, state, and local government agency has its own authorities and there is no effective mechanism to coordinate their actions so they are consistent with these recovery plans and making them accountable to implement the plans to meet their obligation to protect treaty-reserved resource and to meet the intent of the ESA.

Governor Stevens stated, “I want that you shall not have simply food and drink now but that you may have them forever.” *United States v. Washington, (Culverts) Summary Judgment*, p. 11. However, as described above, Tribes do not have enough fish for subsistence, ceremonial, or religious needs. The Tribes have to go outside the region to purchase fish for these purposes. There are fish runs for which the tribes have been excluded from harvesting for decades and recovery has still not occurred. For example, NOAA has concluded that no amount of harvest restrictions will lead to recovery of the Nooksack spring Chinook run for which the tribes have not been fishing for years. Only through restoration of the habitat will this run recover.

- The United States expected to develop their new territory, but neither side anticipated that doing so would hinder Indian fishing. *United States v. Washington, (Culverts) Summary Judgment*, p. 10-11. Thus, both sides intended there to be fish, and for the Indians to be able to support themselves by fishing, free of non-Indian interference, forever. *United States v. Washington, (Culverts) Summary Judgment*, at 10; *Final Decision 1*, 384 F.Supp. at 381). However, development has significantly hindered Indian fishing and the federal agencies are part of permitting these activities. The Tribes must substantially rely on hatchery fish that were produced to mitigate for habitat impacts which are now being challenged under the Endangered Species Act due to their potential impact to naturally spawning salmon. With less habitat and fewer hatcheries, the treaty-reserved harvest right is at an ever increasing risk.
- "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). Unfortunately, the federal agencies are implementing their authorities in such a way that they are imposing a disparate impact to the Tribes. While imposing greater restrictions

on tribal harvest and hatchery operations, they turn their back to continued take of the resource through habitat destruction. The federal government requires, under their ESA authorities, that harvest and hatchery activities by the tribes be shown to contribute to recovery while they allow habitat destructive activities, at best, to show that they are neutral to recovery. Today, NOAA is refusing to take enforcement action against a Corps of Engineers dam and fish trap on the White River that is shown to be killing ESA listed salmon and reducing the number of fish escaping to spawn upriver in direct conflict with a NOAA Biological Opinion while at the same time demanding that the Tribes reduce their harvest on ESA listed salmon to allow more spawning escapement. This leads to a “death spiral” effect on tribal fisheries as they are being required to continually reduce their fisheries as the fish runs continue to decline as the habitat is allowed to be continually destroyed. We simply cannot restore habitat as fast as it is being allowed to be destroyed.

The end result is the Treaty-reserved rights of the Tribes, which were guaranteed by the United States in perpetuity, are at greater risk today than they have ever been. To address this obligation to protect the Tribes’ treaty-reserved resources, the federal government needs to develop mechanisms to hold all agencies accountable to this obligation. While conducting their other statutory authorities, each agency must also be accountable to their statutory obligation to protect the treaty right and to implement their authorities consistent with our salmon recovery plans.

