Conduit to Tribal and Environmental Justice? Unpacking *Washington v. United States*

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**INTRODUCTION**

Popularly referred to by the general public in Washington State as “the culvert case,” *Washington v. United States*1 ("Washington V") has ramifications beyond the removal of barrier culverts2 precluding safe fish passage. This case brought together several lingering and hotly contested legal issues in the Pacific Northwest: the conflicts between federally mandated construction designs and Washington State’s infrastructure and the scope of tribal rights under the Stevens Treaties. Affirming the Ninth Circuit decision, the Supreme Court correctly protected tribal Treaty rights by requiring Washington to replace state-owned, high-priority barrier culverts. Though this decision can also be seen as a victory for salmon populations and tribal rights, arguably this decision could have broader impacts for the legality of dams precluding safe fish passage.

I. **BACKGROUND**

A. **Stevens Treaties**

In 1854, Washington Territorial Governor Isaac I. Stevens entered into a series of treaties, now known as the Stevens Treaties.3 Though a full analysis of

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2. For the purposes of this case, the Ninth Circuit defined a “barrier culvert” as one that “inhibits or prevents fish passage.” Id. at 958. “High priority barrier culverts” were defined as “those blocking 200 linear meters or more of upstream habitat.” Id. at 974.
the Stevens Treaties is beyond the scope of this article, a contentious clause across the Treaties’ is the one reserving the Tribes’ right to off-reservation fishing. This clause, which is essentially the same language used in each treaty, reads:

The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, 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.

B. Origins of Washington V

Following the signing of the Stevens Treaties, the Dawes Act was passed in 1887, coercing more settlers to accept land grants of appropriated Indian land in the Columbia River Gorge. Concurrently, the invention of canneries as a method of preservation quickly developed the salmon exportation business into a profitable endeavor. This increased the demand for salmon fisheries, and competition for prime fishing sites ensued. One Indian agent for the Yakamas stated: “‘[I]nch by inch, [the Indians] have been forced back until all the best grounds have been taken up by white men, who now refuse to allow them to fish in common, as the Treaty provides.’” Inevitably, tribal members were blocked from their “usual and accustomed” fishing sites.

The Supreme Court first addressed this in United States v. Winans. The Supreme Court held that tribal members had a reserved right to hunt and fish in “usual and accustomed” places, which prevents Washington from granting


5. See Washington v, 853 F.3d at 954.
6. Id. See, e.g., Qui-nai-elt, supra note 3, art. III; Yakama, supra note 3, art. III; Walla-Walla, supra note 3, art. I; Dwámish, supra note 3, art. V; S’Klallam, supra note 3, art. IV; Nisqualli, supra note 3, art. 3.
7. Neah Bay, supra note 3, art. IV.
11. See id.
13. See id. at 954–55.
someone a license to construct and use a device that gives them exclusive possession of fishing places. In 1916, State v. Towessnute interpreted Winans to culminate into an easement right on all property that houses “usual and accustomed” fishing sites, while at the same time reinforcing state police powers to restrict tribal fishing rights.

Following this, Washington increasingly restricted and prevented off-reservation fishing by Indians. Tribal members protested these infringements on their treaty rights, most notably through “fish-ins,” in which many tribal members would exercise their treaty rights to fish only to be met with force by Washington Department of Fish and Wildlife officials. These battles between tribal members and the Washington Department of Fish and Wildlife became known as the “fish wars,” and culminated in two cases known collectively as the “Boldt decision.”

The first Boldt decision held that, when the tribal groups of the Pacific Northwest and the Columbia River Plateau originally ceded their land, they reserved their right to fish in all usual and accustomed places in common with all citizens. This reserved right gave the Tribes the right to take up to 50 percent of the harvestable fish, subject to the right of non-treaty fishers to do the same. Subsequently affirming this decision, the Supreme Court specified that 50 percent was a ceiling rather than a floor, and that the fishing clause guaranteed

15. Id.
17. See Washington V, 853 F.3d at 956–57. In United States v. Washington (“Washington I”), the court recognized that More than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing ha[d] resulted in deep distrust and animosity on both sides. This ha[d] been inflamed by provocative, sometimes illegal, conduct of extremists on both sides and by irresponsible demonstrations instigated by non-resident opportunists.

19. See WILKINSON, supra note 17, at 31–39; Chrisman, supra note 17.
21. Washington I and United States v. Washington (Washington II), 506 F. Supp. 187 (W.D. Wash. 1980), aff’d in part, 759 F.2d 1353 (9th Cir. 1985), are commonly referred to as the Boldt decision. In Washington I, the court upheld tribal rights to fish off-reservation. 384 F. Supp. at 401. In the subsequent case, the court determined public and private actions cannot impair salmon habitat and that the State has a duty to ensure that this does not occur. Washington II, 506 F. Supp. at 208.
22. Washington I, 384 F. Supp. at 401–04; see also Qui-nai-elt supra note 3, art. III; Yakama supra note 3, art. III; Walla-Walla supra note 3, art. I; Dwâmish supra note 3, art. V; Neah Bay supra note 3, art. IV; S’Klallam supra note 3, art. IV; Nisqualli supra note 3, art. 3.
only what was “necessary to provide the Indians with a livelihood—that is to say, a moderate living.”

Following this, the second phase of the Boldt decisions held that hatchery fish must be included in determining the share of fish the Tribes were entitled to, and that the Tribes’ right to a sufficient quantity of fish entitled them to have fishery habitat protected from man-made despoliation. The Ninth Circuit subsequently affirmed the district court’s ruling as to hatchery fish, but the court vacated the decision regarding habitat protection. In doing so, the court reasoned that habitat protection was too broad and varied to be resolved in a general and undifferentiated fashion; rather, human-caused environmental degradation must be resolved in the context of particularized disputes.

In 2001, a group of twenty Tribes, joined by the United States, continued this litigation by filing a Request for Determination seeking “the State of Washington to refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced.” The district court held that the Stevens Treaties imposes a duty upon Washington to refrain from building and maintaining culverts that hinder fish passage and thereby diminish the number of fish that would be available for harvest. It also found that Washington currently owned and operated such culverts and ordered the State to correct them.

II. Washington V

In reviewing the district court’s 2013 ruling, the Ninth Circuit addressed the overarching issue of the scope of Washington’s obligations under the Stevens Treaties. The Ninth Circuit upheld the district court’s ruling that barrier culverts that are impinging on tribal rights by contributing to the degradation of important salmon habitat must be removed.

Following the precedent that treaties between the United States and Indian tribes must be construed in favor of the Indians, the court interpreted the

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27. Id. at 1357.
28. See Washington V, 853 F.3d at 958–60. The “Request for Determination” was specifically created in the 1974 decision to allow both parties to invoke further litigation to determine lingering questions identified by the court. See Washington I, 384 F. Supp. at 419.
29. See Washington V, 853 F.3d at 960.
30. Id. at 961.
31. Id.
32. Id. at 962.
33. The court had already determined that “[t]he State of Washington is bound by the treaty.” See Washington III, 759 F.2d at 1357.
34. Washington V, 853 F.3d at 979.
35. See Winans, 198 U.S. at 380 (“[W]e will construe a treaty with the Indians as [they] understood it, and as justice and reason demand, in all cases where power is exerted by the strong over those to whom
Treaties to require Washington to conserve sufficient habitat to support the fisheries. The court recognized that the Tribes would never have accepted an agreement that preserved fishing rights without an adequate protection of their fish supply. Relying on the district court’s findings that state-owned culverts block roughly 1,000 linear miles of historic salmon-bearing streams and have the effect of reducing salmon populations, the court held that “[s]almon now available for harvest are not sufficient to provide a ‘moderate living’ to the Tribes.” Therefore, the court found that in building and maintaining barrier culverts, Washington had violated, and was continuing to violate, its obligations to the Tribes under the Treaties.

The court then addressed whether the United States had waived its arguments against Washington because (1) the state’s “Forest and Fish Report” was approved by the National Marine Fisheries Service, (2) the state had complied with federal highway design standards for culverts, and (3) the federal government had permitted, or not objected, to Washington’s culverts. The court held that, because Congress had not abrogated the Stevens Treaties, federal culvert design standards and federal permits for culvert construction were both irrelevant to Washington’s obligations under the Treaties, and to the relief legally due to the Tribes. Therefore, Washington had to comply with the Treaties.

The court next considered Washington’s injunction request, which would have required the United States to fix and maintain all culverts built or maintained by the United States before Washington was required to repair or remove any of its own culverts. The court denied Washington’s request on two grounds. First, the court found that the request for injunction was not a claim for recoupment; therefore sovereign immunity barred Washington’s injunction. Second, the court found that Washington did not have standing to independently litigate rights reserved to the Tribes against the federal government. Even though the court determined flatly that “the United States had also violated the

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36. See Washington V, 853 F.3d at 964 (holding that the Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places with the qualification that the government can diminish or destroy fish runs).

37. Washington V, 853 F.3d at 964 (“Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise.”). This is an extension of the rational articulated in Winters in which the Supreme Court refused to accept the argument that tribal members intentionally relinquished rights to water when agreeing to cede vast tracks of land in exchange for the creation of the Fort Belknap Reservation. Winters v. United States, 207 U.S. 564, 577 (1908).

38. Washington V, 853 F.3d at 966.

39. Id.; see also Fishing Vessel Ass’n, 443 U.S. at 686.

40. Washington V, 853 F.3d at 966.

41. Id. at 967.

42. Id.

43. Id.

44. Id. at 979.

45. Washington V, 853 F.3d at 968–69.

46. Id. at 968.
Treaties by building and maintaining its own barrier culverts," it reasoned that this issue was between the Tribes and the United States. As such, the court held that Washington had no relief against the United States, nor was Washington absolved of its duty under the Treaties.

Finally, the court addressed Washington’s objections to the district court’s permanent injunction that detailed the actions it had to take. Washington argued that the district court “did not properly consider costs and equitable principles” in reaching its decision. The court swiftly dismissed this argument, stating that “it was not an abuse of discretion to require the State to pay for correction of its own barrier culverts.” The court also dismissed Washington’s argument that the order would require it to cut other important state programs. The Ninth Circuit added flexibility to the ruling by adding, “It is possible that, during this extended period, changed or newly revealed facts or circumstances will justify a modification of the injunction. The district court should not hesitate to modify its injunction if this proves to be the case.”

III. Supreme Court Decision

On appeal the Supreme Court had to decide: 1) whether the Stevens Treaties guarantee the Tribes a certain quantity of fish; 2) whether Washington’s compliance with federal government culvert designs was a defense; and 3) whether removal of barrier culverts under Washington’s jurisdiction would have a material impact on the health of fish runs in the State of Washington.

In an evenly divided decision, the Supreme Court affirmed the Ninth Circuit’s decision upholding the district court’s order to “[c]orrect most of [Washington’s] high-priority barrier culverts within seventeen years.” However, the Court’s decision provided no rationale, nor did it identify of the four dissenting justices.

While the rationale of the court cannot be gleaned from the opinion, the oral argument may shed light on the justices’ thoughts. In oral argument, several justices conspicuously asked both parties whether the large federal dams on the

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47. Id. at 969.
48. Id. (“The Tribes have not sought redress against the United States in the proceeding now before us.”).
49. Id. at 972 (“Contrary to the State’s contention, the Tribes presented extensive evidence in support of the court’s conclusion that state-owned barrier culverts have a significant adverse effect on salmon.”).
50. Washington V, 853 F.3d at 970–79.
51. Id. at 971.
52. Id. at 977.
53. Id. at 978 (“[T]he State could comply with the order without cutting vital state programs.”).
54. Id. at 979.
57. Washington V, 853 F.3d at 979.
58. See Washington VI, 138 S. Ct. 1832. Justice Kennedy took no part in the decision. Id.
Columbia River were a violation of the Stevens Treaties, even though this question was not central to Washington V. Justices also asked how the Court should define the term “substantial” in the context of declining salmon populations. Justice Gorsuch wondered aloud whether a 5 percent reduction, a threshold derived from securities case law, was an appropriate standard for determining whether culverts or dams materially degrade salmon populations.

IV. ANALYSIS

Without establishing a quantifiable threshold for declining salmon populations, the Ninth Circuit and the Supreme Court upheld the district court’s holding that salmon populations were not sufficient to provide a “moderate living” to the tribes. Although Washington VI is narrowly tailored, and the resulting order only affects Washington, fishing groups and tribal advocates may consider whether the result raises the question of the legality of dams blocking fish passage throughout the Pacific Northwest. Using Washington V’s application of the moderate living standard, tribal advocates may now have a strong basis to argue that dams blocking fish passage violate fishing rights under the Treaties and arguably other treaties with similar language.

Dams throughout the Pacific Northwest obstruct fish passage and damage fish habitat. Applying Washington V’s approach to dams, if Washington

60. During oral argument, Justice Sotomayor asked the Petitioner whether “it has to be a material decline” to qualify as substantial. Id. at 5.
61. Id. at 15.
62. Id.
63. At oral argument, many justices indicated their desire to establish a quantifiable threshold past which a reduction in fish population violates the guarantees of the Stevens Treaties. Justice Kagan also pushed for a quantifiable threshold, while Justice Alito asked for a definition of substantial degradation. Transcript of Oral Argument, supra note 59, at 58.
64. Washington V, 853 F.3d at 979; Washington VI, 138 S. Ct. at 1833.
65. During oral argument, three of the Justices asked whether the large federal dams represent a Treaty violation. Transcript of Oral Argument, supra note 59, at 17–18, 24.
66. The court found that culverts had diminished salmon population to a point that salmon available for harvest were not sufficient to provide a “moderate living” to the Tribes because tribal economies had been damaged. Washington V, 853 F.3d 966.
67. United States v. Washington (Washington IV), 20 F. Supp. 3d 986, 1006, 1014 (W.D. Wash. 2013); Michael C. Blumm, Indian Treaty Fishing Rights and the Environment: Affirming the Right to Protection and Restoration, 92 WASH. L. REV. 1, 29 (2017). The Northwest Power and Conservation Council estimates that the large dams on the Columbia have destroyed or permanently blocked “more than 55 percent of the spawning and rearing habitat once available to salmon and steelhead.” NORTHWEST POWER & CONSERVATION COUNCIL, Dams: Impact on Salmon and Steelhead, https://www.nwccouncil.org/reports/columbia-river-history/damsimpacts (last visited Oct. 29, 2018). Despite the existence of surveys documenting declines in native salmon runs, partial causation by the dams is more difficult to establish as the declines are a result of multifaceted “harvest, habitat degradation, hydroelectric development, an emphasis on hatchery supplementation, and climatic and ocean conditions.” Phaedra Budy et al., Evidence Linking Delayed Mortality of Snake River Salmon to Their Earlier Hydrosystem Experience, 22 NORTH AMERICAN JOURNAL OF FISHERIES MANAGEMENT 35, 35 (2002). However, the Columbia River Systems Operations, a joint initiative between the U.S. Army Corps
affirmatively acts by building and maintaining a dam that diminishes salmon populations, and the action proximately causes damage to the Tribes and their members, then Washington could be in violation of the Treaties. Because dams have diminished fish populations, and the Ninth Circuit explicitly and unqualifiedly acknowledged that “[s]almon now available for harvest are not sufficient to provide a ‘moderate living’ to the Tribes,” it seems likely that some dams will be found in violation of the Stevens Treaties.

Even though removing dams might be costly, Washington V makes it more likely that costs will not prevent a court from ordering the removal of dams. The Ninth Circuit determined the costs of culvert removal, though well into the hundreds of millions, were “marginal” and would not force Washington to cut “vital state programs.” Although modification or removal of dams undoubtedly will be expensive, a court might find that these costs—at least in areas subject to the Stevens Treaties—are “marginal” because dam removal may be required, or chosen to comply with federal law. Therefore, the consequence of an order would be acceleration of dam correction, making the cost of acceleration the only costs attributable to the order. Moreover, the costs might be seen as “marginal” because dam removal has been part of the Washington Department of Fish and Wildlife Fish Passage Program like culvert removal.

If the court does find that these costs are marginal, then a court might be less
likely to find that the cost of dam removals would interfere with vital state functions, making it more likely that a court will order dam removal.\textsuperscript{78}

\textbf{CONCLUSION}

The Stevens Treaties made broad guarantees to the Tribes in perpetuity: in taking massive rights and extensive resources from the tribes, the United States, and its states and territories, offered substantial guarantees in return, namely the right to hunt and fish in all “usual and accustomed” locations. The litany of failures to comply with these guarantees is long and gruesome,\textsuperscript{79} and tantamount to cultural genocide.\textsuperscript{80} But \textit{Washington V} is part of an emerging body of rulings attempting to rectify these injustices by curbing further degradations of previous treaty agreements.\textsuperscript{81} It also raises interesting questions about infrastructure and what public infrastructure will be deemed a treaty violation requiring modification or removal in the future. Moreover, it makes it even more likely that dams blocking fish passage could be in violation of treaties.

\textsuperscript{78} See \textit{Washington V}, 853 F.3d at 978.


\textsuperscript{80} See ELISA NOVIC, \textit{THE CONCEPT OF CULTURAL GENOCIDE: AN INTERNATIONAL LAW PERSPECTIVE} 19 (2016).

\textsuperscript{81} See \textit{Fishing Vessel Ass’n}, 443 U.S. 658; \textit{Winters}, 207 U.S. at 576–77; \textit{Winans}, 198 U.S. at 382; \textit{Adair}, 723 F.2d 1394.