



UPDATE: Extent of Habitat Protection Required for Indian Treaty Fishing Sites: *Washington v. United States*

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UPDATE: On June 11, 2018, an [evenly divided](#) Supreme Court affirmed the decision of the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) in [Washington v. United States](#), upholding a trial court decision and injunction finding Washington State in violation of Indian tribal treaty fishing rights and requiring remediation of state-built [culverts](#) that impede salmon from swimming to customary habitats protected by the treaties. Justice Kennedy had recused himself, having participated in the long-running case while he was serving as a judge on the Ninth Circuit.

The original post from May 22, 2018, is below.

On April 18, 2018, the Supreme Court heard argument in *Washington v. United States*, a case that arises out of a long-running dispute between Washington State on one side, and certain Indian tribes and the federal government on the other, concerning the scope of tribal fishing rights under treaties negotiated between the United States and 21 Indian tribes in the Pacific Northwest in the 1850s. Washington is challenging a U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) [decision](#) that affirmed a lower court [decision](#) holding that Washington violated the treaties by erecting and maintaining [culverts](#), which enable streams to flow below highways, that substantially impede salmon passage to and from tribal fishing sites and, thereby, deprive the tribes of access to the quantity of fish required for culture, sustenance, and commerce. In challenging the Ninth Circuit's decision, Washington argues, among other things, that the culverts do not violate the treaties, and to construe the treaties in such a way would interfere with the state's ability to manage its lands. The tribes and the U.S. argue, among other things, that the treaties provide the tribes a right to take fish, and the culverts directly interfere with that right, thus the Ninth Circuit's decision was correctly decided. As discussed further below, the Supreme Court's ruling has the potential to affect land management practices and tribal rights in Washington and other

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states in the Pacific Northwest. A decision is expected by June.

Background

Washington v. United States arises out of various 1854 and 1855 treaties in which Indian tribes—in what was then the Washington Territory—ceded large land areas to the United States in exchange for monetary payments; smaller areas of the land as tribal reservations; and guarantees of off-reservation fishing rights along with other stipulations. These treaties used similar language to guarantee the 21 tribes involved in current litigation: “the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory. . . .” The meaning of that language has been a continuing source of contention, bringing to the Supreme Court at least eight cases, including the present one. In the first such case, 1905’s *United States v. Winans (Winans)*, the Court interpreted the language broadly to give effect to how the Indians must have understood the language given their historical reliance on fishing for culture, subsistence, and commerce. In subsequent cases, the Court ruled on [specific aspects](#) of Washington’s [authority](#) to regulate tribal fishing.

The current dispute began in 1970 when several tribes and the United States sought a declaratory judgment and an injunction preventing Washington from interfering with tribal treaty fishing rights, to: (1) take a fair share of the fish; (2) include fish from state hatcheries in the tribal share; and (3) have the fish habitats protected. Over the next decades, numerous courts issued opinions on various elements of the issue. In a 1979 case, *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Supreme Court stated that “both sides have a right, secured by treaty, to take a fair share of the available fish.” A 1983 Ninth Circuit appellate court panel [interpreted](#) the treaty language as requiring both “the State and the Tribes [to] take reasonable steps . . . to preserve and enhance the fishery when their projects threaten then-existing harvest levels.”

Thereafter, in 2001, the tribes and the United States, for itself and as trustee for the tribes, asked the U.S. District Court for the Western District of Washington (district court) to declare that the treaty fishing rights require that Washington not diminish the number of fish at the fishing sites by erecting highway culverts that impede salmon passage at the sites. Washington claimed that there is no treaty-based duty to maintain the salmon runs at a particular level. The state also asserted that, even if such a duty exists, the claim is barred by laches or acquiescence because, over a course of years, various federal agencies raised no objections to the culverts when approving or acquiescing in highway designs that included the culverts.

District Court Rulings

In August 2007, the district court issued an [opinion](#) and order requiring the state to repair or replace the culverts. This ruling was based on, among other things, the district court’s factual determination that the culverts “greatly diminished fish runs” and thus violate the treaties. The district court also dismissed various counterclaims that Washington brought against the United States because the court determined that the federal government had not waived its sovereign immunity. In 2013, the district court issued another [decision](#) that granted the tribes’ request for an injunction ordering the state to remediate the culverts. The court characterized removing the culverts as a “narrow and specific treaty-based duty” in light of the treaty promise to protect the salmon and provide the tribes with a means of continuing subsistence. The court also held that there were no available equitable defenses against the United States.

Ninth Circuit Proceedings

Washington appealed, claiming that it was under no treaty obligation to ensure the availability of salmon. A unanimous three-judge panel of the Ninth Circuit, in an opinion [issued in 2016](#) and [amended in 2017](#), affirmed the district court with respect to the breadth of the injunction and its interpretation of the treaty clauses. The appellate panel also rejected an argument advanced by Washington based on the Supreme Court’s decision in *City of Sherrill v. Oneida Indian Nation of N.Y. (Sherrill)*. Washington argued that the

long delay in raising the culvert issue should defeat the tribes' claims, like, in *Sherrill*, a long delay had served to defeat tribal claims to sovereignty over reacquired lands. The Ninth Circuit panel, however, distinguished the two cases by, among other things, the fact that *Sherrill* did not involve the United States. The Ninth Circuit also agreed with the district court that the United States could not waive treaty-based claims because they belong to the tribes, and that, in bringing the suit on behalf of the tribes, the United States did not waive its sovereign immunity against a counterclaim that federally erected culverts contributed to the degradation of the tribal fishing sites.

Supreme Court Arguments

The Supreme Court agreed to hear three issues: (i) whether the treaties are properly construed to guarantee the tribes a “moderate living” from the fishing sites; (ii) whether the government is barred from bringing the suit because U.S. agencies approved or acquiesced in the design and erection of the culverts over a long course of time; and (iii) whether the injunction violates principles of federalism and comity because it lacks a judicial finding of a clear connection between culvert replacement and tribal fishing. Only eight Justices heard argument in the case – the dispute has been in the courts so long that Justice Kennedy, who joined the Court in 1988, recused himself because of his involvement in the case while he was a judge on the Ninth Circuit. The Justices who heard argument appeared particularly interested in identifying a clear test for determining treaty violations and in searching for some quantitative measure of habitat degradation that could serve as a standard for determining when state, local, or private activity would interfere with tribal fishing rights. Attorneys for neither side would commit to an absolute percentage as a test of habitat degradation. Washington’s Solicitor General [proposed](#) a standard based on “a large decline in a particular river . . . not justified by a compelling state interest.” Attorneys for the United States and the tribes [argued](#) that the test should be whether the culverts caused a “substantial decline” in the salmon population. Considerable discussion also centered on the scope of the district court injunction, with Washington contesting its factual premises. However, the Supreme Court will likely focus on the question of the appropriate standard to be applied to treaty violations rather than address factual issues.

Potential Impact

The implications of the case may well reach far beyond its factual predicates. That a ruling in favor of the tribes may raise questions about how state activities impact hunting, fishing, and gathering provisions in many other treaties is essentially the argument set forth in an [amicus brief](#) filed in support of Washington by eleven other states (Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Montana, Nebraska, Oklahoma, Wisconsin, and Wyoming). These states [argue](#) that the Ninth Circuit’s decision “commandeer[ed] state decision-making processes over land use regulation [and] other areas of traditional state responsibility.” The United States disputes this argument, [claiming](#) that the “future reach of this [Ninth Circuit’s] decision and the contours of the treaty right” will depend on the facts of a particular case. On the other hand, [an amicus brief from law professors](#) argues that the lower court rulings are not breaking new legal ground in view of what they describe as a long common law tradition of prohibiting obstructions on waterways, streams, and rivers as nuisances and authorizing upstream property owners and the general public to bring actions at law to vindicate their rights to harvest fish free from those obstructions.