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United States v. Washington

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***United States v. Washington*, 827 F.3d 836 (9th Cir. 2016)**

Kirsa Shelkey

Pacific Northwest Treaties, now known as the Stevens Treaties, were negotiated in the 1850's between the U.S. and Indian tribes, including the Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallams, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribes, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Tribe, Swinomish Indian Tribal Community, and the Muckleshoot Indian Tribe ("Tribes"). The Stevens Treaties stated that "the right of taking fish, at all usual and accustomed grounds and situations, is further secured to said Indians, in common with all citizens of the Territory..." While Indian fishing rights under the Treaty were clearly established, disputes over scope and interpretation have spurred ongoing conflict and litigation between the Tribes and Washington State since 1970. *United States v. Washington* is yet another installment of case law interpreting these fishing rights in favor of the tribes, this time holding that Washington has a duty to refrain from building culverts that hinder fish passage and reduce the number of fish available for tribal harvest. The court further held that Washington's current culverts violated this duty, necessitating their removal.

I. INTRODUCTION

While the United States Court of Appeals for the Ninth Circuit previously overruled a "broad and undifferentiated [state] obligation to prevent environmental degradation" under the Stevens Treaties ("Treaty"), it did so for abuse of discretion, not because it disputed Washington's environmental treaty obligation.¹ Instead, the ruling left the environmental issue open to litigation articulating "concrete" case or controversy where state action negatively impacted salmon populations. *United States v. Washington's* allegations contained the concrete case and controversy that previous litigation lacked, including that the primary source of salmon stock decline was loss of breeding and feeding habitat.² The Tribes claimed Washington violated an environmental treaty obligation not to despoil fish habitat by constructing and maintaining culverts that blocked free passage of adult and juvenile salmon.³

While Washington denied the existence of an environmental treaty duty, the district court held that Washington had a treaty-conferred duty to refrain from building culverts that hindered fish passage and

1. *United States v. Washington*, 827 F.3d 836, 852 (9th Cir. 2016).
2. *Id.* at 848.
3. *Id.*

reduced their number available for tribal harvest.⁴ The district court enjoined “Washington to correct most of its high priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons.”⁵ On appeal, Washington maintained there was no “treaty-based right or duty of fish habitat protection.”⁶ The ninth circuit relied heavily upon historical context and precedent interpreting treaty language in favor of the Tribes, and affirmed the district court’s ruling. The court reasoned that while the United States’ purpose for treaty negotiation was to open western land for settlement, the Tribes’ “principle purpose was to secure a means of supporting themselves once the Treaties took effect.”⁷ The court determined that the Treaties inferentially and explicitly promised the Tribes a permanent adequate supply of fish. State-built and maintained culverts blocking fish passage reduced that promised supply and breached a treaty duty to supply the Tribes with fish necessary for their moderate living.⁸

II. FACTUAL AND PROCEDURAL BACKGROUND

From 1854 to 1855, Isaac Stevens, Washington Governor and Superintendent of Indian Affairs, negotiated treaties between the United States and Pacific Northwest Tribes.⁹ Under the Treaties, “the Tribes relinquished large swaths of land” west of Washington’s Cascade Mountains and north of the Columbia River drainage.¹⁰ The area included the Puget Sound watershed, the Olympic Peninsula watershed, and offshore areas adjacent to those areas.¹¹ In exchange, the Tribes were guaranteed in writing, “the right of taking fish, at all usual and accustomed grounds and situations . . . in common with all citizens of the Territory.”¹² While the United States’ agenda in negotiating the Treaties was to open land to Westward settlement, the principle treaty purpose for the Tribes was to “secure a means of supporting themselves once the Treaties took effect.”¹³ For the Tribes of the Pacific Northwest, securing an adequate amount of salmon was culturally tantamount to securing air for breath.¹⁴ During treaty negotiations, Governor Stevens assured tribal members

4. *Id.* at 848.

5. *Id.* at 865.

6. *Id.* at 847.

7. *Id.* at 851.

8. *Id.* at 853.

9. *Id.* at 841.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 851.

14. *Id.*

“there would always be an adequate supply of fish.”¹⁵ Washington is bound by the Treaties.¹⁶

Since Treaty ratification, the fishing clause has spurred conflict between the Tribes and Washington over fishing rights, historically to the Tribes’ disadvantage. In 1894, a Secretary of the Interior Report noted that “[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.”¹⁷ Though the Supreme Court ruled in *Winans v. United States* in 1905 that devices built to give settlers exclusive possession of fishing places violated Treaty fishing rights, the Washington Supreme Court narrowly interpreted *Winans* as requiring Indian fishing easements on private non-Indian land.¹⁸ Rather, Washington continued the historical trend of systematically restricting tribal fishing rights by codifying regulatory restrictions that outlawed Indian fishing methods and required fishing licenses and policing off-reservation fishing.¹⁹ As a result, “the Indians’ share of the overall catch was relatively small.” For example, the Indian share of the Puget Sound’s salmon catch from 1958-1967 amounted to only 6% compared with 85.5% for commercial fishing.²⁰ Additionally, salmon stocks “declined ‘alarmingly’ since the Treaties were signed,”²¹ and were no longer “sufficient to provide a ‘moderate living’ to the tribes as inferentially promised by the Treaties.”²²

Not until 1970 did the United States file suit against Washington on behalf of the Tribes over interpretation of the Treaties’ fishing clause. This first phase of litigation held that Treaty language required an even distribution of allocable fish between the Tribes and Washington.²³ In 1985, phase two affirmed that the evenly-split allocable fish population included hatchery propagated fish.²⁴ However, the same court refused to find that Treaty language imposed a general environmental duty on Washington to prevent fish habitat despoliation for procedural lack of justiciable controversy.²⁵ The court explicitly noted that resolution of the substantive environmental issue depended on future litigation articulating concrete facts and a particular dispute.²⁶

15. *Id.*

16. *Id.* at 852-53 (citing *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985)).

17. *Id.* at 841-2 (citing REPORT OF THE SECRETARY OF THE INTERIOR, 1894 (3 cols., Washington, D.C., 1894, II, 326).

18. *Id.* at 843 (citing *United States v. Winans*, 198 U.S. 371, 384, 25S. Ct. 662, 665 (1905)).

19. *Id.*

20. *Id.* at 844.

21. *Id.* at 848 (internal citation omitted in original).

22. *Id.* at 853; *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 99 Ct. 3055 (1979)).

23. *Id.* at 846.

24. *Id.*

25. *Id.* at 847.

26. *Id.*

In 2001, the Tribes filed a Request for Determination in the United States District Court for the District of Washington that state-built and maintained culverts restricted salmon movement and appreciably reduced salmon populations available to the Tribes in violation of treaty fishing rights.²⁷ The United States joined the Tribes and sought a permanent injunction requiring Washington to “repair, retrofit, maintain or replace culverts that degraded appreciably the passage of fish.”²⁸ In 2007, the district court granted summary judgment in favor of the Tribes and United States.²⁹ In 2013, the court issued a permanent injunction against Washington to gradually correct offending culverts.³⁰

III. ANALYSIS

On appeal, Washington objected to the district court’s ruling on a number of grounds. Washington first objected to the court’s interpretation of the Stevens Treaties, then reasserted its argument that the United States waived its claim by federally funding and regulating culvert construction. Washington further objected to the court’s cross-request dismissal against the United States and the issued injunction. The court addressed each objection in turn.³¹

A. Washington’s Duty Under Treaties

The main issue before the court was whether the Treaties’ fishing clause imposed an environmental obligation on Washington to refrain from culvert despoliation of fish habitat, and whether, if a duty existed, Washington had violated it. The court affirmed the district court’s ruling. While Washington argued on appeal that “no treaty-based duty to refrain from building and maintaining barrier culverts” existed, the court disagreed and stated that “Washington had a remarkably one-sided view of the Treaties.”³²

Applying *Winans*, the court determined that the proper standard for interpreting treaty language was “as [the Indians] understood it, and as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care.”³³ Relying on the historical context framing treaty negotiations and a practical construction beyond written words, the court found that “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

27. *Id.* at 847.

28. *Id.*

29. *Id.* at 848.

30. *Id.* at 841.

31. *Id.* at 849.

32. *Id.* at 851.

33. *Id.* (quoting *Winans*, 198 U.S. at 380).

sufficient to sustain them.”³⁴ They reasonably understood that they would have, in Stevens’s words, ‘food and drink... forever.’”³⁵ Where state-maintained barrier culverts blocked 1,000 linear miles of streams and directly contributed to fish habitat loss and overall declines in salmon allocable to the Tribes, Washington violated its treaty duty.³⁶ The “consequent reduction in tribal harvests has damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes in addition to economic harm.”³⁷ The court reasoned that these results directly violated what the fishing clause had promised the Tribes “an adequate supply of fish.”³⁸

B. Waiver by the United States

On appeal, Washington alleged that it reasonably relied on federal inaction and funding to conclude that it had satisfied any Treaty obligations. Thus, Washington argued that the United States waived its claim when it approved and funded state culvert projects.³⁹ The court disagreed, and affirmed the district court’s holding. Congress never abrogated the Stevens Treaties and no waiver defense was available because “the treaty rights belonged to the Tribes rather than the United States.” The United States could enforce tribal rights and could not waive them because the rights still belonged to the Tribes.⁴⁰

C. Washington’s Cross Request

At the district court level, Washington asserted a cross-request against the United States, arguing that “if its barrier culverts violate[d] the Treaties, so too [did] the United States’ barrier culverts.”⁴¹ Washington further sought an injunction requiring federal culvert correction before it was required to correct its culverts. The ninth circuit affirmed the district court’s dismissal of the cross-request and injunction on two grounds. First, “Washington’s cross request for an injunction did not qualify as a claim for recoupment and was barred by [the] sovereign immunity [of the United States].”⁴² Second, while the United States was also bound by the Treaties, the Tribes had not filed suit against the United States.⁴³ The district court held, and the ninth circuit agreed, that Washington did not have standing

34. *Id.* at 851.

35. *Id.*

36. *Id.* at 853.

37. *Id.*

38. *Id.* at 851.

39. *Id.* at 853.

40. *Id.* at 854.

41. *Id.* at 855.

42. *Id.* at 856.

43. *Id.*

to assert the Tribes' Treaty rights on their behalf. Instead, if any parties had authority to bring this claim, it was the Tribes, not Washington.⁴⁴

D. Injunction

Finally, Washington objected to the district court's issuance of a permanent injunction on several grounds. The injunction ordered high-priority culverts to be removed within seventeen years, but allowed deferral to ensure cost-effectiveness.⁴⁵ High-priority culverts were classified as those blocking 200 linear meters of upstream habitat.⁴⁶ A more flexible approach was applied to low-priority culverts, which could be phased out at the end of their useful life or by a subsequent highway project.⁴⁷ Again, the court rejected Washington's arguments and upheld the district court's injunction.⁴⁸

While Washington argued that no evidence connected state culverts to the decline in salmon population, the court pointed to evidence from Washington itself that "fish passage at human made barriers such as road culverts is one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington."⁴⁹

Furthermore, while Washington argued that the injunction did not account for culvert correction costs and equitable principles, the court did not find merit in this argument. The court determined that Washington's cost estimates were exaggerated and not supported by the record, that federal and state law required Washington to remove its barrier culverts anyway, and that from 2011-2017, Washington would receive over \$22,000,000 in federal funds for fish passage barrier projects.⁵⁰ The court sided with the district court that "the balance of hardships tips steeply toward the Tribes in this matter . . . Equity favors requiring the State of Washington to keep the promises upon which the Tribes relied when they ceded huge tracts of land by way of the Treaties."⁵¹

Finally, the court was not compelled by Washington's argument that the federal government's operations violated principles of federalism. The court affirmed the district court's issuance of a permanent injunction ordering correction of culverts blocking fish passage.⁵²

IV. CONCLUSION

After over forty years of litigation, *United States v. Washington* is a huge courtroom victory for the Tribes, further interpreting Stevens

44. *Id.*

45. *Id.* at 860.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 858. (internal citation omitted in original).

50. *Id.* at 862.

51. *Id.* at 863.

52. *Id.* at 865.

Treaties fishing rights in their favor. While litigation previously determined that tribal treaty fishing rights meant a right to half of the allocable fish population, including hatchery fish, *United States v. Washington* broadens this interpretation to include an environmental right to sustainable fish habitat. Thus, Washington had an environmental duty to refrain from actions impairing fish habitat. In ruling that Washington's State-maintained culverts violated this duty, *United States v. Washington* opens the door for litigation, based in concrete fact, which claims other state actions also violate Washington's environmental treaty duty. The logical leap from culverts to dams is not so large. Furthermore, *United States v. Washington* enables the Tribes and the United States to assert their definitions of fish habitat in previously state-dominated arenas.