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Learning Objective: What is the status of tribal rights and what are tribal jurisdictions in the Puget Sound; include overview of Northwest Indian Fisheries Commission.

Federal Treaty Rights of Tribes in Western Washington Continue to Ensure Native Stakeholders' Role in Managing the Puget Sound's Threatened Aquatic Resources

ABSTRACT: The legal rights of western Washington tribes are grounded in federal treaties signed by the U.S. government and Indian bands in the 1850s that have been affirmed through landmark court cases and decades of political and legal struggles. The state's federally recognized tribal authorities since the early 1900s have asserted their interests through these rights in order to manage fisheries and other resources in the Puget Sound and state waters, consistent with historic and cultural practices. Still, not all tribal groups have a status recognized by the courts and the federal government. Treaty-recognized tribes are actively involved in managing aquatic resources through the Northwest Indian Fisheries Commission and as co-participants in the costly state-run salmon recovery efforts. Washington's tribal stakeholders continue to assert their treaty-origin legal rights in calling for greater habitat protection in Washington.

Introduction: Three years after the historic 1974 ruling in the landmark *U.S. v. Washington* case (the Boldt Decision) that unequivocally affirmed 19 federally recognized tribes' fishing rights to salmon and steelhead runs in western Washington, Nisqually Tribal Council member Billy Frank, Jr. wrote: "The fight, that is, the fish-ins and demonstrations, is over now, I hope. My past is in the past; I'm looking forward to what will happen in the next 10 years . . . Now we have to sit down and be reasonable. The State [*sic*] is a reality we must deal with for the sake of the people and the resource."¹ Frank, Jr. went on to become the current chairman of the Northwest Indian Fisheries Commission (NWIFC), the organization created by the Boldt Decision that now represents 20 treaty-recognized western Washington tribes and serves as what the commission calls "natural resource co-managers," particularly over fisheries and shellfish resources (see appendix 1).²

However, as our case shows, there is great concern that the Puget Sound, the ecosystem around which most of these tribes have had longstanding historic and cultural claims, is unhealthy. Salmon and steelhead harvests guaranteed by the Boldt Decision are falling, due to what the NWIFC calls "degraded habitat."³ Only two-thirds of the Sound's historic Chinook salmon populations remain, and the remaining Chinook salmon are at only 10% of their historic numbers.⁴ The tribes are not sitting down; they are actively calling for vigorous federal intervention to apply salmon conservation measures to remedy what the NWIFC calls the "erosion of treaty-reserved rights."³ The latest concerns voiced by the recognized tribes is

another chapter in the Puget Sound's contentious history over competing interest groups and resources, further exacerbated by development and habitat disturbance that threatens both water quality and historic and culturally significant food sources for the region's first peoples.

History of Tribal Groups in the Puget Sound Area: To understand the competing interests and concerns among Native stakeholders over the health of the Sound and their rights to its aquatic resources, one must first understand the history and culture of the region's first peoples, the Puget Salish. The bands comprising them have called the shores of Puget Sound home for nearly 12,000 years.⁵ Today, they are made of 19 tribal bands, stretching the Canadian border, to Thurston County, and back north to the Strait of Juan de Fuca. Culturally, they are bound by a common language, Lushootsee. They share many cultural traditions built around subsistence harvesting of game animals such as elk and salmon—five species of Pacific salmon and steelhead trout—and other salt and freshwater fish and shellfish.⁵ Their millennial old diets and subsistence livelihoods, including the catching and curing of salmon species, were the later basis for their treaties signed with the United States. These practices were also at the heart of their political protests and legal actions that eventually won them rights by the Boldt Decision to half of the harvestable salmon returning to Washington waters and rights as legal co-managers of that resource.⁵

By the time European explorers arrived in the Puget Sound in the late 1700s, there was clear documentation the Puget Sound tribes harvested salmon and shellfish for primary consumption and trade. The people's salmon-rich diet and food preservation methods ensured they had high standards of living, good nutrition, and a high population density.⁶ In the 1850s, the U.S. federal government sought to avoid conflict between the Native residents and newly arriving white settlers. Territorial Governor Isaac Stevens was authorized to negotiate through treaties with the more than 50 tribes, with the goal of acquiring title to their historic lands for settlers and confining the tribes to reservations (see appendix 3). The U.S. government never intended to interfere with Indian commercial or subsistence fishing.⁶ The 1855 Point No Point Treaty, signed in the Kitsap Peninsula, specifically stated: "The right of taking fish and 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 purposes of curing; together with the privilege of hunting in open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens."²

A separate agreement, the Point Elliot Treaty, was also signed in 1855 between Gov. Stevens and the Duwamish, Snoqualmie, and 13 other tribes, in which the Native peoples ceded their land.^{7,8} While some tribes like the Lummi retained their federally recognized treaty status, the sparsely numbered Snoqualmie and Duwamish tribes lost their status in the 1950s and 1960s, denying them rights provided by Judge George Boldt's decision giving recognized tribes rights to half the area's harvestable salmon.⁸ The Duwamish Tribe, whose ancestors include Chief Seattle, lost their bid for federal tribal recognition in late 2001 for lacking a continuous history and community, but the Snoqualmie Tribe regained their status in 1999, which helped move forward a casino on the tribe's reservation. The Snoqualmie Tribe also won a place as a stakeholder in later salmon recovery efforts because of the recognition (see appendix1 & 2).^{7,8}

A Century of Conflict and Then Cooperation: The first half of the 20th century saw increasing restrictions on tribal harvests of salmon and steelhead, rules on where fishing could be practiced, regulations on fishing practices like snaring and snagging, and the assertion by the state that its conservation laws applied to all persons, including treaty Indians. Traditional methods to harvest fish, such as nets and traps, were banned, and steelhead harvests limited, while the non-Indian commercial and sports fishing industry expanded. During these decades, the building of dams, logging activities, and development that caused erosion of waterways and the destruction of spawning beds —concerns that remain today—led to the decline of fisheries and riparian ecosystems that support salmon in Washington.^{3,6} The post World War II era through the Boldt Decision saw tribes throughout Washington engage in widespread civil disobedience with the state and assert political rights, based squarely on treaty rights to harvest salmon in “usual and accustomed” fishing places.³ The state and tribes battled each other over conservation practices to allot, manage, and conserve the resources in a series of lawsuits by tribes, each seeking to resolve the competing legal claims and assert tribal treaty interests.³ The Boldt Decision ultimately reaffirmed those rights, and tribal leaders chose not to “sit down and be reasonable.” More legal challenges by the tribes were brought to assert shellfish harvest rights under federal treaties, resulting in the 1994 decision by Federal District Court Judge Edward Rafeedie, later affirmed by the U.S. Supreme Court in 1999. That decision recognized the tribes’ harvest rights to half of all shellfish from all of the “usual and accustomed” places, except areas already staked or set aside for non-Indian cultivation.^{9,10} This meant tribes could access private property, including tidal areas, which in Washington can be privately owned.

Following the Boldt Decision, 19 tribes (expanding later to 20, see appendix 1) created the Olympia-based NWIFC to facilitate their shared management of aquatic resources. The NWIFC's constitution asserts the importance of fisheries to Indian peoples and calls for "effective and progressive management." The commission is run by tribal appointed commissioners and speaks as a unified voice on issues of tribal concern. The organization has 3 field offices around the Sound and a staff of 70, including technical fisheries, biology, and habitat policy experts. According to the NWIFC, the tribes' federally recognized rights involve the commission agreeing every year, as a co-manager, on salmon fishing seasons and on hatchery production objectives in the Sound and on the coast.¹¹

The treaty-recognized tribes' legal jurisdiction outside of their reservations is mostly guided by the *U.S. v. Washington* decision. It has created government-to-government policy implementation mechanisms with the state of Washington, giving tribes the rights to manage fisheries and hunting activities.¹² Cooperation between the tribes and the state has largely followed the battles over shellfish harvests. The federally recognized tribes around Puget Sound are participants in the Puget Sound Salmon Recovery Plan (see appendix 2). The \$1.4 billion, 10-year plan was launched in 2007 to address the threatened listing status of salmonid species in the Puget Sound under the U.S. Endangered Species Act—a remarkably complex task in a region with nearly 5 million people and the state's largest city, multiple oil refineries, and heavy industry.¹³ As participants, tribes in the Puget Sound and statewide have received hundreds of thousands of dollars in state and federal grants annually for salmon habitat restoration activities.¹⁴

While working jointly on recovery with state and federal partners and receiving fiscal support, the tribes have not abandoned litigation to assert their treaty claims. The tribes, supported by the NWIFC, went to court under *U.S. v. Washington* asking for the state to fix culverts that impacted salmon habitat. The final judgment has not been issued as of this year, and likely will be appealed.¹ A July 2011 report by the treaty-recognized tribes asserts that salmon harvest declines have been exacerbated by an impaired habitat.³ The tribes' legal argument, as it has been for decades, is that state and federal governments are failing to protect the tribes' treaty-reserved rights, in this case by not adequately protecting habitat and supporting salmon recovery. The tribes assert federal agencies can use statutory authority to prosecute parties who harm salmon habitat in the Sound, but have failed to do so since plans were developed in 1995. The tribes

strongly object to federal restrictions of salmon harvests as the means to protect threatened salmonid species.³

Back to the Case: Though the tribes remain culturally reliant on salmon, steelhead, and shellfish harvests, they are no longer solely dependent on those resources for their livelihoods. Casinos run by the tribes—Snoqualmie, Squaxin Island, Chehalis, Nisqually, among others—and even tribal-managed correction facilities are providing revenues and job opportunities.¹⁵ So are tobacco sales. In researching annual reports, I could find no annual budget posted by the NWIFC, making it impossible to know how their funding streams flow or how they manage their finances, as one might find for a public agency. A 2009 report to Congress showed that federal salmon recovery funding to all West Coast tribes in Washington, and to a lesser extent California, Idaho, and Oregon, from 2008 to '09 totaled \$66.1 million.¹⁶ Despite this continuing government support, the tribes have not relinquished their assertion against state and federal authorities for treaty rights over impaired aquatic resources, as they have for more than a century.

Questions: 1) As we have discovered in past COPHP cases, tribal economic interests can conflict with larger public health interests, seen in tribes' vigorous promotion of gaming establishments and the discount sale of tobacco products. From a public health perspective only, have tribal interests in western Washington successfully positioned themselves to be perceived publicly as wise natural stewards who have endured great historic injustices among nonprofit and political allies promoting environmental and wildlife restoration, while getting a free pass on their economic activities that are well-documented as unhealthy or harmful to people by most public health practitioners? 2) Can parties who have never lived from subsistence ever truly understand the full significance of harvesting, cleaning, curing, and eating wholesome, wild food originating from aquatic and wildlife resources?

Appendix 1: There are currently 7 tribes in Washington that are not federally recognized and are landless compared to 29 federally recognized tribes, according to the state of Washington.¹⁷ There are 20 federally recognized treaty tribes in western Washington, listed below, with membership in the NWIFC. Source for reservations map: NWIFC²:

- Hoh Indian Tribe
- Jamestown S'Klallam Tribe
- Lower Elwha Klallam Tribe
- Lummi Nation
- Makah Nation
- Muckleshoot Tribe
- Nisqually Indian Tribe
- Nooksack Tribe
- Port Gamble S'Klallam
- Puyallup Tribe of Indians
- Quileute Indian Tribe
- Quinault Indian Nation
- Sauk-Suiattle Tribe
- Skokomish Tribe
- Squaxin Island Tribe
- Stillaguamish Tribe
- Suquamish Tribe
- Swinomish Tribe
- Tulalip Tribes
- Upper Skagit Tribe



Appendix 2: Federally recognized treaty tribes in western Washington participating in the Puget Sound Salmon Recovery Plan (18 bands total)¹⁸:

- Elwha Klallam Tribe
- Jamestown S'Klallam Tribe
- Lummi Nation
- Muckleshoot Tribe
- Nooksack Indian Tribe
- Nisqually Indian Tribe
- Port Gamble S'Klallam Tribe
- Puyallup Tribe of Indians
- Samish Indian Nation
- Sauk-Suiattle Indian Tribe
- Skokomish Tribe
- Snoqualmie Tribe
- Squaxin Island Tribe
- Stillaguamish Tribe of Indians
- Suquamish Tribe
- Swinomish Tribe
- Tulalip Tribes
- Upper Skagit Indian Tribe

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