King County ↔ Indian Tribes
Government to Government Relations

From: Joe Hovenkotter / King County Tribal Relations Liaison
To: Mountains to Sound Greenway Trust & AmeriCorps
Date: January 16, 2020
Cultural Context
<table>
<thead>
<tr>
<th></th>
<th>Syllabus – “Working with Tribes”</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Indian Tribes / Fundamentals</td>
</tr>
<tr>
<td>2.</td>
<td>Indian Tribes in King County</td>
</tr>
<tr>
<td>3.</td>
<td>History / Stevens Treaties</td>
</tr>
<tr>
<td>4.</td>
<td>Ceded Territory / Reserved Territory</td>
</tr>
<tr>
<td>5.</td>
<td>Fishing Rights / Usual &amp; Accustomed Places</td>
</tr>
<tr>
<td>6.</td>
<td>Hunting &amp; Gathering Rights / Open &amp; Unclaimed Lands</td>
</tr>
<tr>
<td>7.</td>
<td>Recent Litigation and Appeal</td>
</tr>
<tr>
<td>8.</td>
<td>International Recognition of Tribal Rights</td>
</tr>
<tr>
<td>9.</td>
<td>Tribal Support Organizations / Tribal News Sources</td>
</tr>
<tr>
<td>10.</td>
<td>Closing, Questions, Discussion</td>
</tr>
</tbody>
</table>
Part 1

Indian Tribes / Fundamentals
Indian Demographics – King County
(U.S. Census 2010; U.S. Census American Community Survey 2016)

- **Population**: AI/AN* 16,147, General 1,931,249
- **Percent of Total Population**: AI/AN* 0.8%, General 100.0%
- **Male : Female Ratio**: AI/AN* 48.5 : 51.5, General 49.8 : 50.2
- **Median Age**: AI/AN* 30.7, General 37.1
- **Number of Households**: AI/AN* 6,459, General 804,700
- **Average Household Size**: AI/AN* 2.5 persons, General 2.4 persons
- **% Living in Poverty**: AI/AN* 24.0%, General 10.2%
- **Avg. Per Capita Income (16+ yrs.)**: AI/AN* $33,132, General $43,629
- **% w/ High School Diploma**: AI/AN* 80.5%, General 93.6%
- **% w/ Bachelors Degree or higher**: AI/AN* 15.9%, General 54.3%
- **Labor Force Participation Rate**: AI/AN* 61.9%, General 69.5%

*AI/AN = American Indian / Alaska Native
NW Indian Tribes
Prehistory / Time Immemorial

- Archeological Record + Carbon Dating + Genetic Testing
  - Life = 4.0 million years
  - Homo sapiens = 200,000-300,000 years
  - Clovis culture humans in PacNW = 16,000 years

- Language
  - Sophisticated lexicon / Salishan language / Lushootseed local dialect
  - Rudimentary common trading languages / Salish jargon
  - Oral tradition / glyphs & symbols, but no alphabet

- Mathematics / Measurement / Engineering / Natural History / Astronomy
  - Base 20 number system / no multiplication, division, algebra, or abstract geometry
  - Distance (paces, arm’s length, finger width) / Weight? / Volume? / Temperature?
  - Landform creation stories / Sky creation stories / Time (celestial/seasonal events)

- Technology
  - Hand tools / Rolling devices / Spindles / Spear points / Bow & Arrow / Fishing gear / Blades
  - Cedar watercraft / Cedar longhouses / Cedar containers
  - Plant part utensils (wood, braided leaves, fibrous ropes, etc.)
Indian Tribes – Historic Relationship with US

- **Coexistence** (1790 - 1828)
- **Removal & Reservations** (1829 - 1886)
- **Allotment & Assimilation** (1886 - 1932)
- **Reorganization** (1932 - 1945)
- **Termination & Relocation** (1945 - 1960)
- **Tribal Self-Determination** (1960 - 2019)

*Quote: What we have done with the American Indian is as bad as what we imposed on the Negroes. We took a proud and independent race and virtually destroyed them. We have to find ways to bring them back into decent lives in this country.*

- Richard W. Dunn

*Quote:*
Fundamentals re: Indian Tribal Governments

- Until 1871, the United States conducted its official relations with Indian tribes by treaty. The central policy was to attempt to separate Indians from non-Indians and to place interaction between the two groups subject to federal control. *American Indian Law*, 5th Ed. Canby, 2009; see also *U.S. Const. Art. I, Sec. 8. Cl. 3.*

- Rights of the conqueror/discoverer applied to United States’ interaction with Indian tribes and therefore Indian tribes did not retain right to convey land (to anyone but U.S.) and did not retain power to make agreements with foreign sovereigns. *Johnson v. McIntosh*, 21 U.S. 543 (1823).

- Indian tribes are sovereigns, but not foreign, they are “domestic dependent nations.” *Cherokee Nation v. Georgia* 30 U.S. 1, 17 (1831).

- Indian tribes are “distinct political communities, having territorial boundaries, within which their authority is exclusive.” *Worcester v. Georgia*, 31 U.S. 515 (1832).

- Indian tribes are subject to plenary power of Congress. *U.S. v. Kagama*, 118 U.S. 375 (1886).
Part 2

Indian Tribes in King County

- Tulalip Tribes
- Suquamish Tribe
- Snoqualmie Tribe
- Muckleshoot Tribe
- Puyallup Tribe
<table>
<thead>
<tr>
<th>Tribe / Location</th>
<th>Organic Document</th>
<th>Ceded Territory</th>
<th>Reservation</th>
<th>Membership Population</th>
<th>Governing Body</th>
<th>Organic Document</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tulalip Tribes (Tulalip, WA)</td>
<td>Treaty of Point Elliott, 12 Stat. 927, January 22, 1855; Executive Order of December 23, 1873</td>
<td>E. Puget Sound Basin; 6.47M acres</td>
<td>Tulalip Indian Reservation; 22,567 acres</td>
<td>~4,600</td>
<td>Board of Directors x7; 3 yr. terms (March)</td>
<td>Ind. Reorg. Act § 16 Constitution; 01/24/1936</td>
</tr>
<tr>
<td>Suquamish Tribe (Suquamish, WA)</td>
<td>Treaty of Point Elliott, 12 Stat. 927, January 22, 1855; Executive Order of October 21, 1864</td>
<td>E. Puget Sound Basin; 6.47M acres</td>
<td>Port Madison Indian Reservation; 7,657 acres</td>
<td>~1,200</td>
<td>Tribal Council x7; 3 yr. terms (March)</td>
<td>Ind. Reorg. Act § 16 Constitution; 09/07/1939</td>
</tr>
<tr>
<td>Snoqualmie Tribe (Snoqualmie, WA)</td>
<td>Final Determination to Acknowledge, 62 FR 45864, August 29, 1997; DOI Solicitor’s Letter of October 6, 1999; Indian Entities Recognized, 65 FR 13298, March 13, 2000; Reservation Proclamation, 71 FR 63,347, October 30, 2006</td>
<td>E. Puget Sound Basin; 6.47M acres</td>
<td>Snoqualmie Indian Reservation; 55.84 acres</td>
<td>~650</td>
<td>Tribal Council x9; Alternates x2; Elder x1; H’rdtry Chiefs x3; 4 yr. terms (May)</td>
<td>Constitution; 06/24/2006</td>
</tr>
<tr>
<td>Muckleshoot Tribe (Auburn, WA)</td>
<td>Treaty of Point Elliott, 12 Stat. 927, January 22, 1855; Executive Orders of January 20, 1857 and April 9, 1874</td>
<td>E. Puget Sound Basin; 6.47M acres</td>
<td>Muckleshoot Indian Reservation; 3,910 acres</td>
<td>~3,000</td>
<td>Tribal Council x9; 3 yr. terms (January)</td>
<td>Ind. Reorg. Act § 16 Constitution; 05/13/1936</td>
</tr>
<tr>
<td>Puyallup Tribe (Puyallup, WA)</td>
<td>Treaty of Medicine Creek, 10 Stat. 1132, December 26, 1854</td>
<td>SE Puget Sound Basin &amp; Vashon I.; 2.24M acres</td>
<td>Puyallup Indian Reservation; 18,270 acres</td>
<td>~4,000</td>
<td>Tribal Council x7; 3 yr. terms (June)</td>
<td>Ind. Reorg. Act § 16 Constitution; 05/13/1936</td>
</tr>
</tbody>
</table>
Indian Tribes – Tribal Business Enterprises

- Indian Reorganization Act – Section 17
  - Federally chartered corporations
  - Tribally owned & operated business enterprises

- Muckleshoot Tribally-owned businesses:
  - White River Amphitheater
  - Muckleshoot Casino & Hotel
  - Muckleshoot Bingo
  - Muckleshoot Market & Deli
  - Muckleshoot Smoke Shop
  - Joint Rivers Marijuana Dispensary
  - Emerald Downs
  - Muckleshoot Federal Corporation / Tomanamus Forest
  - Muckleshoot Seafood Products
  - Four Seasons Hotel & Private Residences (investor only)

- Snoqualmie Tribally-owned businesses:
  - Snoqualmie Casino
  - Salish Lodge & Spa
  - Snoqualmie Tobacco Company & Liquor Store
  - Crescent Market at Snoqualmie
  - Eighth Generation
  - Snoqualmie Fireworks Supply

### Revenue by MIT Business Organization (2017)

<table>
<thead>
<tr>
<th>Business</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Muckleshoot Casino</td>
<td>63%</td>
</tr>
<tr>
<td>Muckleshoot Tribal Government</td>
<td>13%</td>
</tr>
<tr>
<td>Muckleshoot Bingo</td>
<td>6%</td>
</tr>
<tr>
<td>Emerald Downs</td>
<td>5%</td>
</tr>
<tr>
<td>Muckleshoot Federal Corporation</td>
<td>4%</td>
</tr>
<tr>
<td>Salish Lodge</td>
<td>4%</td>
</tr>
<tr>
<td>Muckleshoot Smoke Shop</td>
<td>2%</td>
</tr>
<tr>
<td>Muckleshoot Market &amp; Deli</td>
<td>2%</td>
</tr>
<tr>
<td>Muckleshoot Tribal Housing</td>
<td>0.50%</td>
</tr>
<tr>
<td>Muckleshoot Seafood Products</td>
<td>0.50%</td>
</tr>
</tbody>
</table>

0.00% 10.00% 20.00% 30.00% 40.00% 50.00% 60.00% 70.00%
# Sovereign History of King County

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
<th>Jurisdiction/Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aboriginal Territory</td>
<td>Time Immemorial</td>
<td>Rules of the Conqueror</td>
</tr>
<tr>
<td>Provisional Gov’t of Oregon</td>
<td>July 5, 1843</td>
<td>Organic Laws of Oregon</td>
</tr>
<tr>
<td>“Until such time as the United States of America extends their jurisdiction over us.”</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Clark County (King County)</td>
<td>August 20, 1845</td>
<td>Prov. Govt. of Oregon</td>
</tr>
<tr>
<td>Lewis County (King County)</td>
<td>December 19, 1845</td>
<td>Prov. Govt. of Oregon</td>
</tr>
<tr>
<td>Oregon Treaty</td>
<td>June 15, 1846</td>
<td>United States &amp; United Kingdom</td>
</tr>
<tr>
<td>Established northern US Border at 54⁰40' west of Louisiana Purchase (i.e. Continental Divide)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Territory of Oregon</td>
<td>August 14, 1848</td>
<td>Stat. 30th Cong. 1st Sess. 923</td>
</tr>
<tr>
<td>Thurston County (King County)</td>
<td>January 12, 1852</td>
<td>Oregon Territorial Legislature</td>
</tr>
<tr>
<td>King County</td>
<td>December 22, 1852</td>
<td>Oregon Territorial Legislature</td>
</tr>
<tr>
<td>State of Washington</td>
<td>November 11, 1889</td>
<td>Presidential Proclamation, 26 Stat. 1552</td>
</tr>
<tr>
<td>Enabling Act</td>
<td>February 22, 1889</td>
<td>U.S. Congress 25 Stat. 676</td>
</tr>
<tr>
<td>Washington Const.</td>
<td>October 1, 1889</td>
<td>Washington Constitutional Convention</td>
</tr>
</tbody>
</table>

Art. XXVI, Compact with the United States. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying with the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.
Part 3

History / Stevens Treaties

Governor Isaac Stevens
Stevens Treaties – Intent of the US

- Deescalate conflicts between settlers and Indians
- Limit British economic inroads
- Consolidate Indian social groups/bands into manageable tribal units
- Identify/recognize/empower leaders friendly to US goals
- Establish treaty commitments as soon as possible
- Establish as few reservations as possible
- Encourage/cajole/wait for Indians to assimilate
- Use force/violence/imprisonment when you have to
Stevens Treaties – Territory of Washington

- Treaty of Medicine Creek
  December 26, 1854
- Treaty of Point Elliott
  January 22, 1855
- Treaty of Point No Point
  January 26, 1855
- Treaty of Neah Bay
  January 31, 1855
- Treaty with the Yakama
  June 9, 1855
- Treaty with the Walla Wallas
  June 9, 1855
- Treaty with the Nez Perce
  June 11, 1855
- Treaty of Olympia
  July 1, 1855
- Treaty of Quinault River
  July 1, 1855
- Treaty of Hellgate
  July 16, 1855
- Treaty of the Upper Missouri
  October 17, 1855
“It is however proposed, if practicable to remove all the Indians on the East side of the Sound as far as the Snohomish; as also the S’Klallam to Hood’s Canal, and generally to admit as few Reservations as possible, with a view of finally concentrating them in one.”
King County section of Map of Indian Nations and Tribes of the Territory of Washington commissioned by Isaac Stevens-1857

<table>
<thead>
<tr>
<th>Name and date of treaties</th>
<th>Names of Tribes</th>
<th>Population</th>
<th>Reservations</th>
<th>Tent Encampment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treaty of Medicine Creek</td>
<td>Duwamish, Suquamish, and allied tribes</td>
<td>942</td>
<td>North of the mouth of Nisqually River</td>
<td>Duwamis Point</td>
</tr>
<tr>
<td>Treaty of Point Elliott</td>
<td>Skagit and allied tribes</td>
<td>1900</td>
<td>near Fort Madison</td>
<td>Port Kostap</td>
</tr>
<tr>
<td>Treaty of Point Elliott</td>
<td>Lummi, Nooksack, Samish</td>
<td>1300</td>
<td>S.E. end of Perry's Island</td>
<td>Skagit Heuif W. Isl.</td>
</tr>
<tr>
<td>Treaty of Point noPoint, Jun 25, 1855</td>
<td>Makahs</td>
<td>396</td>
<td>Head of Hood Canal</td>
<td></td>
</tr>
<tr>
<td>Treaty of Neah Bay, Jan 31, 1855</td>
<td>Quinault, Makah, and Elwha Yutes</td>
<td>596</td>
<td>Cape Flattery</td>
<td></td>
</tr>
<tr>
<td>Treaty of Olympia</td>
<td></td>
<td>483</td>
<td>Reservation to be selected by the President</td>
<td></td>
</tr>
</tbody>
</table>
| Tribes with whom treaties have not been made | Lower Chehalis | 211 | S.S. saloon on the Chehalis River | }
| | Upper Chehalis | 116 | Lower Chehalis and Pacific Ocean | }
| | Cowlitz, N. Dalles, and others | 240 | Cowlitz Landing | }
| | Lower Chinooks | 250 | Removed to White Salmon | }
| | Upper Chinooks | 330 | | }
| Number of Indians west of the Cascades Mountains | 1115 | | | }
| Number of Indians east of the Cascades Mountains | | | | }
| Number of Indians west of the Cascades Mountains | 9722 | | | }
| Number of Indians east of the Cascades Mountains | 8507 | | | }
| Total number of Indians west of the Cascades Mountains | 18229 | | | }
| Total number of Indians east of the Cascades Mountains | 1115 | | | }
| Total number of Indians | 19344 | | | }

*All have been assisted during the war. The parties to the treaties of Neah Bay at Olympia, the Lower Chehalis, and the Lower Chinooks, have required but little assistance at the hands of the Department.*
A treaty made under the authority of the United States "shall be the supreme law of the land." *U.S. Constitution*, Article 6, Section 2.

Treaties between the United States and Indian tribes are "not a grant of rights to the Indians, but a grant of rights from them - - a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 372 (1905).


Legal rules regarding interpretation: 1) promote treaty’s central purpose; 2) construe treaties as originally understood by tribal representatives; and 3) resolve ambiguities in favor of Indians. *United States v. Washington* 520 F.2d 658, 659-60 (1975).
Part 4

Ceded Territory / Reserved Territory

Gov. Isaac Stevens’ Notes 12/30/1854
Indian Tribes - Ceded Territory
Indian Tribes – Reserved Territory
Indian Tribes
Snoqualmie Reservation

- Proclaimed by the Secretary of the Interior, October 20, 2006
- 55.840 acres of land
- “[F]or the exclusive use of Indians on that reservation who reside at the reservation by enrollment of tribal membership.” 71 Fed. Reg. 63347
- 24 total parcels of land owned by Snoqualmie Tribe (on & off reservation); 273.2 acres
Complicated History of the Muckleshoot Reservation

- Originally Fort Muckleshoot - abandoned 1857
- Representatives of the White and Green River bands promised a reservation during Point Elliott Treaty negotiations in 1855
- White and Green River bands again promised a reservation at Fox Island Council in 1856
- Fort land became part of Reservation via ratification process for the Medicine Creek Treaty
- Boundary problems and order mislaid
- Borders settled by 1874 but internal land was lost to railroad grants
- Reservation with checkerboard ownership finally established by Executive Order in 1874
Indian Tribes
Muckleshoot Reservation

- 3,910 acres
- “[R]eserved for the present use and occupation of the said tribes and bands the following tracts of land ... [a]ll which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use.” Treaty of Medicine Creek, Article II
- 492± total parcels of land owned by Muckleshoot Tribe and/or its members (on & off reservation); 6,400± total acres
- 730± parcels of forest land also owned by a Muckleshoot Tribal corporation; 43,000± acres
There are three classes of Indian water rights.

- **Reserved water rights (federal)** – when the US sets aside an Indian reservation, it either expressly or impliedly reserves sufficient water to satisfy the purposes of the reservation, with a priority date equal to the date of the reservation. *Winters v. U.S.*, 207 U.S. 564 (1908).

- **Aboriginal water rights (federal)** - separate from and in addition to reserved rights; generally non-consumptive and recognized to protect pre-existing tribal uses such as hunting, fishing and trapping. *Winters* (n. 7) at 576.

- **Appropriative water rights (state)** - obtained by tribes through State permit process.

Tribal water rights may exist on and off of the reservation. *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983).


Neither aboriginal nor reserved water rights can be lost through non-use; inchoate unquantified reserved Indian water rights generally pre-date existing state-based water rights. *Arizona v. California*, 373 U.S. 546, 599-601 (1963).

Stevens Treaty Tribes hold off-reservation instream flow water rights for the “amount of water necessary to maintain anadromous fish life.” *State v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5 (1990), aff'd 121 Wn.2d 257 (1993); see also *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 626 F.2d 95 (9th Cir. 1980); aff'd 763 F.2d 1032, 1035 (9th Cir. 1985).
Duwamish Tribe
Other Local Indian People – Not Federally Recognized
Denial of Duwamish Tribe’s Petition for Federal Recognition

REASONING:
“D’Wamish and other allied tribes’ ... moved to four reservations and the separate tribes and bands eventually consolidated as four reservation tribes that continue today as the Lummi Tribe of the Lummi Reservation, Suquamish Indian Tribe of the Port Madison Reservation, Swinomish Indian Tribal Community, and Tulalip Tribes of Washington. A few Duwamish tribal members moved to the Muckleshoot Reservation after its creation in 1857. The petitioner’s ancestors, primarily Duwamish Indian women who married non-Indian settlers, did not go to the reservations with the treaty tribes. Rather, before and after the treaty, they left the tribes as individuals and families and, by the 1880s, lived dispersed throughout western Washington.” Final Decision on Remand against Federal Acknowledgment of the Duwamish Tribal Organization, 80 Fed. Reg. 39142, July 8, 2015.

RULING:
Interior Board of Indian Appeals denied the Duwamish Tribe’s Petition, finding that the Tribe did not meet the requisite elements for federal recognition as an Indian tribe. The petition is currently pending with the Secretary of the Interior. See Order Affirming Final Determination on Remand and Referring Issues to the Secretary, 66 IBIA 149, April 17, 2019.
Part 5

Fishing Rights / Usual & Accustomed Places
Aboriginal Territory

- Tribes are sovereign nations that pre-existed the United States.
- By entering into treaties with the US, Tribes were not granted rights from the US, but instead reserved pre-existing rights to themselves.
- A Tribe’s right to use land, water, and resources pursuant to a treaty with the US is often measured by the scope of the Tribe’s aboriginal use (subject to reasonable time, place, and manner restrictions).
- A Tribe’s right to use resources includes the right of reasonable access to travel to those resources.
Treaty of Point Elliott, Article V

“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with the citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries on open and unclaimed lands.”

12 Stat. 927, January 22, 1855

Chief Seattle
U.S. v. Washington / Phase I
Fishing Rights

Prior to ceding their territory to the U.S., Indian tribes had an exclusive and unlimited aboriginal right to occupy and use the bed and banks of rivers and to take fish therefrom. In treaty negotiations, Indian tribes retained the portion of this right necessary to continue their traditional fishing activities. United States v. Washington, 384 F.Supp. 312 (W.D. Wash. 1974), aff’d 520 F.2d 676 (9th Cir. 1975), cert denied, 423 U.S. 1086 (1976), substantially aff’d sub nom. Washington v. Washington State Commercial Fishing Vessel Association, 443 U.S. 658 (1979).

Tribal treaty fishing rights include a “fair share” aspect and a “geographic” aspect.

The “fair share” aspect arises from the “in common with” treaty clause. The court held that “the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood - - that is to say a moderate living.” Fishing Vessel, 443 U.S. at 686.

The “geographic” aspect arises from the “usual and accustomed places” treaty clause. The court held that “every fishing location where members of the tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe ... is a usual and accustomed [place].” U.S. v. Washington, 384 F.Supp. at 332.
Tulalip Tribes
Usual and Accustomed Places

Court Decreed U&A
Tribally Identified Watershed of Interest
Catchment Area 10 – Excluding Elliott Bay
Suquamish Tribe
Usual and Accustomed Places

Court Decreed U&A
Tribally Identified Watersheds of Interest
Catchment Area 10 including Outer Elliott Bay
Snoqualmie Tribe
Usual and Accustomed Places

- The US DoI Bureau of Indian Affairs disclaimed taking any action for or against finding that the Snoqualmie Tribe had off-reservation resource rights when it recognized the Snoqualmie Tribe, stating: “Conclusions concerning previous acknowledgment ... are solely for the purposes of a determination of ‘tribal recognition’ and are not intended to reflect conclusions concerning successorship in interest to a particular treaty or other rights.” 62 Fed.Reg. 45864, August 29, 1997.

- Federal agencies recognize that ancestors of present-day Snoqualmie Tribal members signed the Treaty of Point Elliott, but have not issued any contemporary recognition of Snoqualmie Tribe off-reservation fishing, hunting, and/or gathering rights.

- Federal courts have not granted the Snoqualmie Tribe any federally adjudicated fishing rights pursuant to the *U.S. v. Washington* litigation. The court found that “[t]he usual and accustomed fresh water fishing places of the Snoqualmie, Snohomish, and Skykomish tribes are for present purposes the usual and accustomed fishing places of the Tulalip Tribes ... . The Snohomish River system including tributaries and fresh water lakes and the Snoqualmie and Skykomish River systems.” *Court Orders of July 16 and September 10, 1975.*
Muckleshoot Tribe
Usual and Accustomed Places

Court Decreed U&A
Tribally Identified Watersheds of Interest
Catchment Area 10 – Inner Elliott Bay only
Puyallup Tribe
Usual and Accustomed Places

Court Decreed U&A
Tribally Identified Watershed of Interest
Puget Sound Catchment Area 11
U.S. v. Washington / Phase II
Hatcheries & Habitat Protection Rights

- Court interpreted the meaning of 1855 treaty language in the presence of modern technology and land use


- “[I]mplicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation.” Id. at 203
  - 9th Circuit Court of Appeals initially affirms in 1983, then vacates ruling due to lack of “actual case or controversy” in 1986
  - Tribes accept vacated ruling, and stand down for 15 years

- Tribes assert claim for replacement of all fish blocking culverts owned by WashDoT in 2001; prevail in 2007; receive injunction against WashDot in 2013; US Supreme Court affirmed 9th Circuit in 2018
U.S. v. Washington / Phase II Culvert Case - Contemporary

- 2001 Culvert Case – Trial in federal District Court (Judge Martinez)
  - U.S. and 21 Indian tribes
  - State of Washington

- 2007 Martinez Ruling – WSDot violating Indian tribal treaty rights (i.e. liability)

- 2013 Martinez Injunction – WSDot must remedy environmental harm
  - 3,710 culverts; 1,977 of which block ≥ 200 meters of migratory fish habitat
  - WSDot must remedy: 1,283 high priority culverts within 17 years; and 694 low priority culverts at end of their useful life
  - Reaffirms that Tribes retain a right to protect off-reservation migratory fish habitat

- 2016 9th Circuit Appellate Panel Decision – affirms Martinez ruling & injunction

- 2016 WA Petition for Rehearing - Panel and En Banc rehearings requested by State

- 2017 WA Petition for Review by U.S. Supreme Court - granted

- 2018 Supreme Court issues per curiam opinion - affirms 9th Circuit opinion below
  - U.S and 23 Indian tribes + WA State state & local officials + law professors
  - Washington + 11 states + WA Assoc. of Counties + 6 NGOs

Judge Ricardo Martinez

Estimated Cost = $350M±/yr for 17 years

Amount Appropriated = $63M±/yr for 2019-2020
U.S. v. Washington – Phase II
Habitat Protection - Related Cases

- **Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.** 626 F.2d 95 (9th Cir. 1980) *aff’d* 763 F.2d 1032 (9th Cir. 1985)
  - The Yakama Tribe’s treaty right includes a right to salmon-protective instream flows (Court cryptically noted that it was not addressing any treaty right to habitat protection).

  - 1983 Elliott Bay Marina (EBM) proposed & permit application submitted; to US Army Corps of Engineers (Corps); MIT & SIT filed suit over issuance of the Corps’ permit; negotiations ensue; 1988 Corps reinstated permit with conditions; MIT and SIT amended suit and sought injunction prohibiting issuance of permit and subsequent construction of marina.
  - Construction would occupy the EBM site and affect the Tribes’ usual and accustomed fishing areas in Elliott Bay and thus would interfere with their treaty right to fish.
  - The Treaty fishing right is a property right which may not be taken without an Act of Congress, thus Corps must procure Tribal concurrence on permits implicating Treaty rights.

- **State v. Acquavella, Yakima County Superior Court No. 77-2-01484-5 (1990), *aff’d* 121 Wn.2d 257 (1993)
  - Stevens Treaty Tribes hold off-reservation instream flow water rights for the “amount of water necessary to maintain anadromous fish life.”

  - Since mid-1980’s, Northwest Sea Farms (NwSF) developing a fish farm for the production of net-pen salmon in the waters of Puget Sound (Rosario Strait) with anchorage footprint of 11.36 acres and surface footprint of 1.41 acres.
  - In 1992, Corps denied NwSF’s application for a required permit under § 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (1986) based upon a finding that the project would be against the public interest because it would conflict with the Lummi Nation’s fishing rights at one of Lummi’s usual and accustomed fishing places under the Treaty of Point Elliott.
  - The Corps’ conclusion was based upon two findings: (1) members of the Lummi fish the proposed site of the project on a “more than extraordinary basis”; and (2) the project would deny members of the Lummi access to the site. *Id.*
  - Accordingly, the Corps ruled that, under the relevant legal precedent, the permit should be denied as infringing upon the Lummi’s treaty rights and the Federal District Court affirmed the Corps administrative ruling.
U.S. v. Washington - Shellfish

  - “Fish” means finfish and shellfish
  - Tribes’ right of access subject to reasonable time, place, and manner restrictions
  - Tribes’ right of harvest = up to half of shellfish except for those beds staked and cultivated by individuals

- **Consent Decree 1994**
  - Public health: Tribes participate in National Shellfish Sanitation Program and the Interstate Shellfish Sanitation Conference and abide by rules and regulations promulgated thereby
  - Sustainability: Tribal harvest can not exceed half of harvestable shellfish subject to court-ordered seasonal limits and in conjunction with State and Tribal regulations

- **Commercial Harvest Settlement Agreement 1999**:  
  - The tribes will forgo their treaty right to harvest from commercial growers’ beds.
  - Growers will provide, over 10 years, $500,000 worth of shellfish enhancement on public tidelands of the state’s choosing.
  - A $33 million trust is established for the 17 treaty tribes to acquire and enhance other tidelands to which they will have exclusive access.
“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with the citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries on open and unclaimed lands.”

12 Stat. 927, January 22, 1855
Scope of Hunting & Gathering Right

- **Legal**
  - No legal distinction between a “right” and a “privilege” in this context
  - Admission of state on equal footing does not terminate tribal hunting rights; *Herrera v. Wyoming* (SCoTUS 2019)

- **Species**
  - Any subject to general tribal and/or state hunting and gathering regulations
  - Any traditional first foods

- **Harvest Numbers**
  - Subject to regulations that are reasonable and necessary for conservation purposes
  - Tribal hunters harvest approximately 1.7% of deer (495:29,154) and 5.0% of elk (365:7,236) in Washington State (WDFW *circa* 2012)

- **Locations**
  - The scope of “open & unclaimed lands” is interpreted broadly and is not limited to ceded territory or “usual and accustomed places”; *State v. Buchanan* (Ct. App. WA 1997)
  - National Parks, although generally considered “open and unclaimed”, are not subject to treaty hunting privilege when conservation regulations prohibit hunting/gathering for purpose of preserving endangered species; *U.S. v. Hicks* (W. D. WA 1984)
  - Privately owned lands are not “open and unclaimed”; *State v. Chambers* (WA SCt)
Part 7

Recent Litigation & Appeal
Federal Courts

- **Sharp v. Murphy** (SCotUS): whether 1866 territorial boundaries of the Muscogee Reservation in Oklahoma still constitute an Indian reservation for purposes of criminal jurisdiction over an Indian who is a member of the Muscogee Nation. [see The Atlantic, November 20, 2018; Who Owns Oklahoma?]

- **McGirt v. Oklahoma** (SCotUS): whether 1866 territorial boundaries of the Muscogee Reservation in Oklahoma still constitute an Indian reservation for purposes of criminal jurisdiction over an Indian who is a member of the Seminole Nation. [see The New York Times, December 13, 2019; Supreme Court to Rule on Whether Much of Oklahoma Is an Indian Reservation]

- **Skokomish Indian Tribe v. Forsman** (9th Cir.): Skokomish Tribe failed to join indispensable tribes into its claim seeking to establish the boundary for Skokomish Tribe’s “open and unclaimed” lands for treaty guaranteed hunting and gathering.

- **U.S. v. Washington:** Subproceeding #670-9213 (9th Cir.), Muckleshoot Tribe asserts uncertainty re: location of U&A places for Tribe’s marine fishing rights; Subproceeding #C-709213RSM (W. Dist. WA), Stillaguamish Tribe seeks to establish marine U&U places; Subproceeding #19-01RSM (W. Dist. WA), Swinomish Tribe challenges Lummi Tribe’s crab fishing activities E. of Whidbey Island.

- **Tulalip Tribes v. Washington** (9th Cir.): scope of state jurisdiction for retail sales taxes at Quil Ceda Village, a tribally owned shopping center including 150 non-Indian businesses located on 2,163 acres of reservation land ($415M retail sales; $38.8M total tax revenue; $8.9M county tax revenue).


- **Crow Tribe v. United States** (Dist. MT): petition against delisting of GYA grizzly bear from ESA based on (1) agency guidance re: best available science; (2) Administrative Procedures Act; (3) Religious Freedom Restoration Act; and (4) U.S. Const., 1st Amd.
Part 8

International Recognition of Tribal Rights
States shall provide **effective mechanisms for prevention** of, and **redress** for: Any action which has the aim or effect of dispossessing them of their lands, territories or resources. Article 8, 2. (b)

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the **free, prior and informed consent** of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. Article 10

Indigenous peoples have the **right to participate in decision-making in matters** which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. Article 18

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them. Article 19

Declarations are **not legally binding**. The US has signed but **not ratified** the declaration.
Part 9

Tribal Support Organizations & Tribal News Sources
Tribal Support Organizations

- National Congress of American Indian (NCAI)
  - https://nwifc.org/

- Affiliated Tribes of Northwest Indians (ATNI)
  - https://www.atnitribes.org

- Native American Rights Fund (NARF)
  - https://www.narf.org/

- Northwest Indian Fisheries Commission (NWIFC)
  - https://nwifc.org/

- Salmon Defense
  - http://salmondefense.org/

- United Indians of All Tribes Foundation
  - http://www.unitedindians.org/

- Seattle Indian Center
  - http://seattleindian.org/
Tribal News Sources

- Indian Country Today: https://indiancountrymedianetwork.com/today/
- Native News Online: https://nativenewsonline.net/
- Indian Country News: https://www.indiancountrynews.com/
- Turtle Talk (Indian Country legal issues): https://turtletalk.blog/
- Native American Rights Fund Indian Law News: https://www.narf.org/nill/bulletins/
- NW Treaty Tribes Website: https://nwtreatytribes.org/
- Snoqualmie Tribe News: http://www.snoqualmietribe.us/news
- Suquamish Tribe News: https://suquamish.nsn.us/home/government/newsletter/
- Tulalip Tribe News: https://www.tulalipnews.com/wp/
- Puyallup Tribe News: http://www.puyallup-tribe.com/
<table>
<thead>
<tr>
<th>Date</th>
<th>Day</th>
<th>Event</th>
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<td>Mon-Thu</td>
<td>ATNI Winter Convention</td>
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<td>Fri-Sun</td>
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<td>Indian Relay Races</td>
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<td>7/17-7/19</td>
<td>Fri-Sun</td>
<td>Seafair Indian Days Powwow</td>
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Part 10

Closing
Questions
Discussion
Thank You

King County Dept. of Natural Resources and Parks
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