Tribal Damage Claims

"Right of Taking Fish"

Stevens Treaties

Culverts Case

Supreme Court Decision

TRIBAL RESOURCE DAMAGE CLAIMS

CULVERTS CASE IMPLICATIONS FOR TRIBAL TRUSTEESHIP AND NATURAL RESOURCE DAMAGE CLAIMS

by Connie Sue Martin, Schwabe Williamson & Wyatt (Seattle, WA)

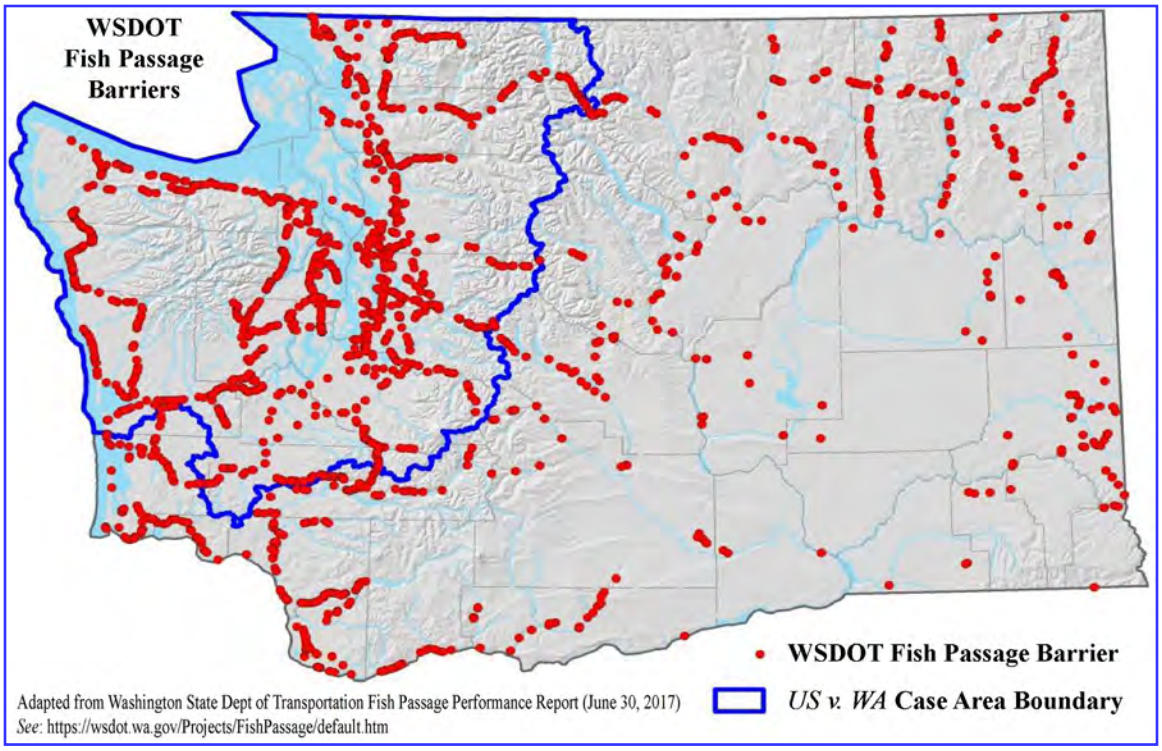
> *"The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all other citizens of the Territory, and of erecting temporary houses for the purpose of curing them, together with the privileges of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter."*
>
> Art. 3, Treaty of Medicine Creek (1854).

Introduction

On June 11, 2018 the United States Supreme Court issued its opinion in the "Culverts case." This opinion was the latest installment in the long-running *U.S. v. Washington* treaty rights litigation that affirmed the rights of tribal signatories to the 1854-1855 Stevens Treaties to take 50% of the harvestable catch of salmon and steelhead in the case area in Washington State. (*See* the August 15, 2018 edition of ***The Water Report* #174** for an excellent summary of the Culverts case, its potential implications, and a short history of tribal treaty fishing rights in Washington by Richard Du Bey, Andrew S. Fuller and Emily Miner).

The Culverts case was an appeal by the State of Washington of an injunction requiring the state to fix almost all of its remaining fish-blocking culverts by 2030, which the state asserted would cost more than $2 billion. A core question posed by the case was whether the treaties guarantee some level of protection of salmon populations or merely promise the tribes an ever-diminishing share of diminishing fish runs — i.e., "the opportunity to 'dip their nets' into empty waters" (reference to a passage from Judge Orrick's decision in *United States v. Washington*, 506 F. Supp. 187, 203 (W.D. Wash. 1980)).

The Supreme Court's per curiam decision — a 4-4 tie after Justice Kennedy recused himself — meant that the Tribes' and the United States' victory in the court below was affirmed (per curiam decision is an opinion issued in the name of the court rather than specific judges). Consequently, the state must remove, replace, and repair fish passage-impairing culverts under state roads and highways.



Tribal Damage Claims

Habitat Protection

Damage Claims

CERCLA Cleanup Levels

Restoration Liability

Tribal Roles (Trustees)

Natural Resources Definition

Compensatory Damages

Residual Harm

Damages Extent

Opponents asserted that the decision will have broad implications. Eleven other states, Washington cities and counties, and private business, agricultural, and development interests filed amicus briefs in support of the state's position. They argued — among other potentially adverse outcomes — that the decision would confer a "seemingly limitless veto power over any and all activities that impact the salmon supply" in the case area (as the Washington State Association of Counties and Association of Washington Cities asserted in their brief).

While it remains to be seen what, if any, impacts the Culverts case may have on state and local land use regulations, the environmental and natural resource implications of a treaty right to habitat protection are clear. This article discusses the intersection of tribal treaty rights under the Culverts case with tribal natural resource trusteeship and the assertion of tribal natural resource damage claims under the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S. §9601 et. seq. (CERCLA). While natural resource damages may also be recovered under the Oil Pollution Act of 1990, 33 U.S.C. §2701 *et. seq.*, this article focuses exclusively on claims under CERCLA.

Natural Resource Damage Claims: A Primer

Most people have a passing familiarity with CERCLA's remedial side — the power of the US Environmental Protection Agency (EPA) to clean up uncontrolled or abandoned hazardous waste sites or respond to accidents, spills, or other releases of hazardous substances. EPA is empowered to seek out the parties responsible for those releases or hazardous waste sites and compel their cooperation in — and payment for — the cleanup. EPA decides what level of cleanup must be completed to be protective of human health and the environment. "Protective" does not mean "clean" in the sense that the environment is returned to its pre-release conditions.

Restoring the environment to pre-release conditions happens on the restoration side of CERCLA. Section 107(f)(1) of CERCLA, 42 U.S.C. §9607(f)(1), provides that those persons responsible for the release of hazardous substances and liable for cleanup costs are also liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable cost /of assessing such injury, destruction or loss resulting from such a release." Natural resource damage claims are brought by natural resource trustees. EPA is not a natural resource trustee.

Congress expanded the role of Indian Tribes in both the remedial and the restoration sides of CERCLA in the 1986 Superfund Amendments and Reauthorization Act (SARA). Generally, the governing body of an Indian Tribe is to be "afforded substantially the same treatment as a State" with respect to many provisions of CERCLA (42 USC § 9626(a)). Section 107(f)(1) was amended to extend to specifically recognized Indian tribes as natural resource trustees with the authority to recover for injury to natural resources under their trusteeship.

CERCLA broadly defines natural resources as including virtually any identifiable aspect of the natural environment, including:

> [L]and, fish, wildlife biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States..., any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

42 U.S.C. §9601(16).

The damages available under CERCLA's Natural Resource Damage (NRD) provision are intended to be compensatory, not punitive. The public is to be made whole and the responsible party is required to pay only for the damages it caused. CERCLA provides that a tribe may recover damages for harm to natural resources belonging to, managed by, appertaining to, or held in trust for the benefit of the tribe. 42 U.S.C. §9607(f)(1). Indian tribes may recover for harm to natural resources both on- and off-reservation, on lands and waters where tribes have reserved treaty rights to hunt, fish, and gather.

An NRD claim usually seeks to recover for residual harm to natural resources, assessed after any remedial action which EPA (or another authorized agency with cleanup authority) has selected and completed, or after the likely effects of the remedial action on natural resources has been taken into account.

> [C]ustomarily, natural resource damages are viewed as the difference between the natural resource in its pristine condition and the natural resource after the cleanup, together with the lost use value and the costs of assessment. As a residue of the cleanup action, in effect, [damages] are thus not generally settled prior to the cleanup.

In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 712 F. Supp. 1019, 1035 (D. Mass. 1989).

Tribal Damage Claims

Measure of Damages

Remedy Alternatives

The measure of damages is the cost of restoration, rehabilitation, replacement and/or the acquisition of the equivalent of the injured natural resources and the services those resources provide. Damages may also include, at the discretion of the trustee, the compensable value of all or a portion of the services lost to the public for the time period from the discharge or release until the attainment of the restoration, rehabilitation, replacement and/or acquisition of the equivalent of the resources and the return of those services to baseline levels (pre-spill or pre-release).

Thus, to summarize, the measure of damages is the cost of restoration plus the value of lost services provided by the damaged resource, plus the costs of assessment. The goal of restoration is to return the resource to its pre-release or baseline level.

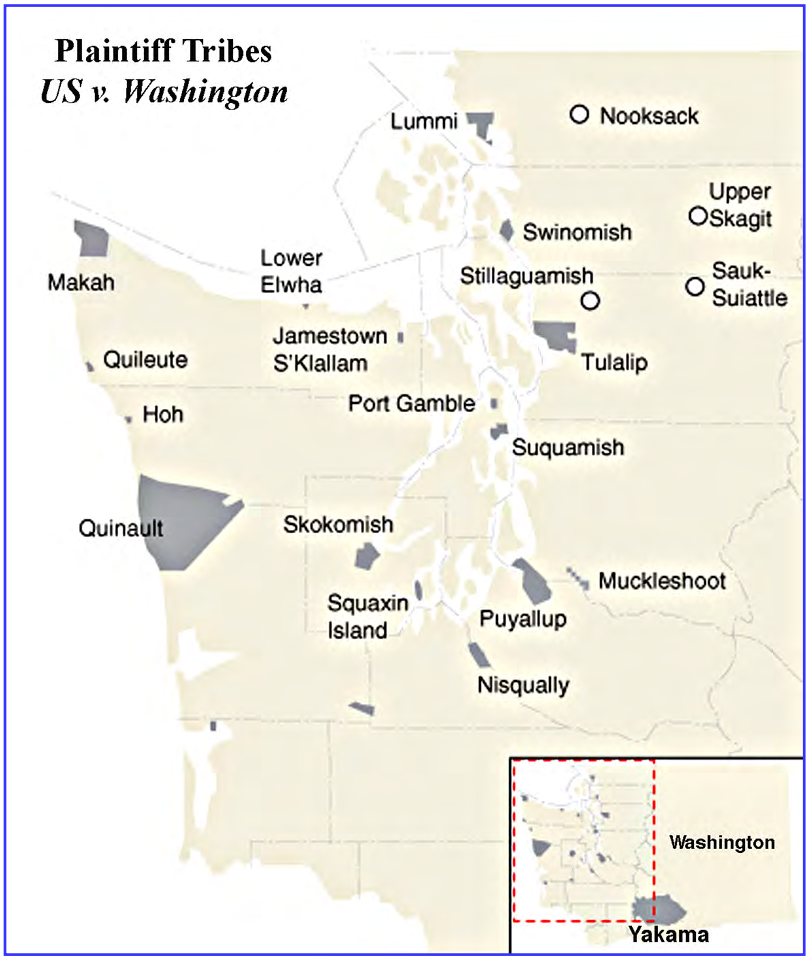
The trustee is required to develop a reasonable number of possible alternatives to remedy the damages. The trustee then chooses the alternative he or she determines is the most appropriate from among the possible alternatives. The alternatives are limited to those actions that restore, rehabilitate, replace, and/or acquire the equivalent of the injured resource and service to no more than their baseline (i.e., the way the resource would have been had the discharge or release never occurred).

One critical aspect of establishing a right to natural resource damages is proving trusteeship over the injured resource. As we approach the intersection between the Culverts case and tribal NRD claims, we must take a short detour to recount some relevant history.

Original Case & Subproceedings

The Culverts Case: Establishing A Treaty Right to Habitat

The original *U.S. v. Washington* case was filed in 1970. Interestingly (and sometimes maddeningly for the occasional newly-appearing attorney), the original case — U.S. District Court for the Western District of Washington Case No. 2:70-cv-09213 — is still active, with more than 21,900 docket entries. When new disputes arise among one or more tribes, between tribes and the state, or between tribes and individual shellfish companies with disputes over tidelands, the matter is filed under the original case number as a new subproceeding. Since the 1974 decision affirming the Tribes' treaty rights to fish, there have been 58 subproceedings. The Culverts case was subproceeding number 01-01, filed in 2001. However, a treaty right to habitat actually had its origin in what is commonly referred to as the "Phase II" litigation (with "Phase I" being the establishment of the treaty right to 50% of the harvestable catch in 506 F.Supp. 187 (W.D. Wash. 1974)).



Tribal Damage Claims

Habitat Right

On September 26, 1980, Judge William Orrick decided the question of whether the treaty fishing right reserved to tribes a right to have the fishery resource protected from adverse environmental actions or inactions of the state in the affirmative, holding:

> [T]here can be no doubt that one of the paramount purposes of the treaties in question was to reserve to the tribes the right to continue fishing as an economic and cultural way of life. It is equally beyond doubt that the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause.

United States v. Washington, 506 F. Supp. 187, 205 (W.D. Wash. 1980).

Judge Orrick concluded that the duty to refrain from degrading the fish habitat to an extent that would deprive tribes of their moderate living needs is imposed upon the state, the United States, and third parties. *Id.* at 208.

Judgement Reversed

On appeal, the 9th Circuit reversed the declaratory judgment regarding the implied environmental right, finding that it created a rule that was too imprecise to enforce:

Declaratory Relief

> The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case. Legal rules of general applicability are announced when their consequences are known and understood in the case before the court, not when the subject parties and the court giving judgment are left to guess at their meaning. It serves neither the needs of the parties, nor the jurisprudence of the court, nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension. Precise resolution, not general admonition, is the function of declaratory relief. These necessary predicates for a declaratory judgment have not been met with respect to the environmental issue in this case.

United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985).

"Concrete Facts"

In 2001, the treaty Tribes believed they had the "concrete facts" to underlie an environmental right implied in the treaties that the 9th Circuit had held were lacking in the Phase II litigation.

Fish Passage

Simply put, the central facts are these: anadromous fish, such as salmon, hatch and spend their early lives in fresh water, migrate to the ocean to mature, and return to their waters of origin to spawn. Roads often cross streams that salmon and other anadromous fish use for spawning. Road builders construct culverts to allow the streams to flow underneath roads, but many culverts do not allow fish to pass easily. Sometimes they do not allow fish passage at all.

Four state agencies are responsible for building and managing Washington State's roads and the culverts that pass under them: the Washington State Department of Transportation (WSDOT), the Washington State Department of Natural Resources (WSDNR), the Washington State Parks and Recreation Commission (State Parks), and the Washington Department of Fisheries and Wildlife (WDFW). Of these, WSDOT, the agency responsible for Washington's highways, builds and maintains by far the most roads and culverts.

Degradation Impacts

The state has acknowledged that hundreds of culverts under state-owned roads and highways were impassible by fish. These culverts were either not designed or constructed with fish passage in mind or had became blocked over time.

The involved culverts were degrading fish habitat so that adult fish production was reduced, which in turn reduced the number of fish available to be harvested by the Tribes — in violation of the treaties.

Treaty-Based Duty

Twenty-one Washington Tribes, joined by the United States, filed Subproceeding 01-01 and asked the court to find that the state has a treaty-based duty to preserve fish runs and habitat, and to compel the state to repair or replace state-constructed and state–operated culverts that impede salmon migration within five years of the date of judgment. The Culverts case was born.

The Scope of Natural Resource Trusteeship

The statutory provisions in CERCLA recognizing a federally recognized tribe as a trustee with standing to assert NRD claims is just the starting point. It begs the questions of what a tribe is and what natural resources a tribe has trusteeship over.

Tribes & CERCLA

A tribe under CERCLA is "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" — that is, a federally recognized tribe. 42 U.S.C. § 9601(36). State-recognized tribes are not trustees under CERCLA.

Tribal Damage Claims

Co-Trustees

The question of what natural resources a tribe has trusteeship over — resources that belong to, are managed by, controlled by, or appertain to a tribe — is a more difficult question. CERCLA's statutory framework envisions the possibility of co-trusteeship among federal, state and tribal trustees:

> Liability shall be to the United States...*and* to any State...*and* to any Indian Tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe... .

42 U.S.C. § 9607(f)(1) (emphasis added).

Courts interpreting CERCLA have reached the same conclusion. For example, a District Court in Colorado held that the United States and Colorado were co-trustees for the natural resources affected by the Rocky Mountain Arsenal near Denver, Colorado. *U.S. v. Shell Oil Co.*, 605 F. Supp. 1064, 1080 (D. Colo. 1985). Similarly, in the NRD litigation surrounding the Bunker Hill superfund site, the Idaho District Court held that more than one trustee could manage, control, or hold in trust a given natural resource. *U.S. v. ASARCO, Inc.* 471 F. Supp. 2d. 1063, 1068 (D. Idaho 2005) (*Coeur D'Alene II*).

Perils of Co-Trusteeship

The first Bunker Hill decision also demonstrated some of the perils of co-trusteeship. The trustees at the Bunker Hill site were federal agencies, the State of Idaho, and the Coeur d'Alene Indian Tribe. The state settled out its NRD claims against the responsible parties early. When the Tribe and the federal agencies sought to prosecute their NRD claims, the responsible parties argued that their NRD liability had been resolved by their settlement with the state and the other trustees' claims were barred.

Claims Limitation

The court allowed the tribal and federal trustees to proceed to trial, but held that where two or more trustees claim an interest in a resource, their right to recovery would have to be proved by each at trial. *Coeur d'Alene Tribe v. ASARCO, Inc.*, 280 F. Supp. 1094 (D. Idaho 2003) (*Coeur D'Alene I*). Because the state had settled out, the federal and tribal trustees could not recover for injury to resources owned or controlled by the state, thereby limiting — potentially very significantly — the amount of the federal and tribal NRD claims. The court also defined the scope of natural resource trusteeship. In order to assert an NRD claim, each trustee had to demonstrate that it exercises hands-on, day-to-day management authority over a given resource. "Mere statutory authority" would be insufficient to establish a trustee relationship, because power that is not exercised is not management or control. *Coeur D'Alene I* at 1115-1116.

Trusteeship Scope

Two years later, the Idaho District Court reversed itself sua sponte (on its own motion), holding that the language of the statute dictates that a co-trustee acting individually or collectively with the other co-trustees could proceed against the responsible party for the full amount of the damage, less any amount that has already been paid as a result of a settlement to another trustee by a responsible party. *U.S. v. ASARCO, Inc.* 471 F. Supp. 2d. 1063, 1068 (D. Idaho 2005) (*Coeur D'Alene II*). The Idaho District Court further held that if there is later disagreement between the co-trustees, that disagreement would have to be resolved by successive litigation between them. *Id.* at 1068.

Segregating Damages

Another peril of co-trusteeship was demonstrated by the 10th Circuit Court of Appeals in the *State of Oklahoma v. Tyson Foods, Inc.*, 619 F.3d 1223 (10th Cir. 2010) (*Tyson Foods*). Oklahoma sued Tyson over its annual disposal of hundreds of thousands of tons of poultry waste in the Illinois River Watershed. The state sought damages for pollution to the watershed as a whole, even though both the state and the Cherokee Nation claim interests in natural resources in the watershed. The state made no effort to differentiate, segregate, or exclude damages for injury to tribal lands and water rights. The court held that the state lacked standing to assert an NRD claim for injury to resources it does not own or hold in trust — and dismissed the case.

Differentiated Overlapping Interests

In another case from Oklahoma, the Quawpaw Tribe successfully asserted NRD claims for injury to terrestrial and aquatic resources at the Tar Creek superfund site. The defendants moved to dismiss, arguing that failure to join the State of Oklahoma required dismissal under the *Tyson Foods* precedent because of the state's overlapping interest in aquatic or land-based wildlife or waterways running through tribal land. In response, the Tribe amended its claim to seek relief only for NRD for injury to plant life on tribal lands. The Oklahoma District Court held that the Tribe had resolved the *Tyson Foods* problem because the state had no interest in plant life or habitat on tribal lands and thus was not a required party. *Quapaw Tribe v. Blue Tee Corp.*, 2010 U.S. Dist. LEXIS 86064 (N.D. Okla. Aug. 20, 2010).

CONCLUSION

IMPLICATIONS OF THE CULVERTS CASE ON NRD CLAIMS

Trustee Scope

Demonstrating trusteeship over natural resources is a necessary element in a natural resource damage claim. As noted above, a trustee need not own the resource in order to assert its interests as a trustee. Rather, recovery may be had for injury to natural resources "belonging to, managed by, controlled by, or appertaining to" federal, state, and tribal trustees, or resources held in trust for the benefit of the tribal trustee.

Tribal Damage Claims

Resource Ownership v. Trusteeship

Indeed, although natural resource trustees routinely seek to recover NRD for injuries to wild fish, birds, or animals within their borders, they do not own those resources. The United States Supreme Court (Supreme Court) has long recognized that "[n]either the State nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture." *Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 284, 97 S. Ct. 1740, 1751, 52 L. Ed. 2d 304 (1977) (citations omitted).

Tribal trustees may claim trusteeship over a wide range of resources under the "appertaining to" language of CERCLA. According to Black's Law Dictionary, "appertaining" means "connected with in use or occupancy" and "to appertain" is "to belong to; have relation to; to be appurtenant to." Black's also tells us that a thing is "appurtenant" when it stands in relation to something and is necessarily connected with the use and enjoyment of that something. "A thing is...appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water-course...across the land of another."

Tribes as Co-Managers

The Supreme Court recognizes tribes as co-managers of natural resources both with states and with the federal government in its treaty-making role. "[A]n Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the state...Indian treaty rights can coexist with state management of natural resources. Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204, 119 S. Ct. 1187, 1204, 143 L.Ed.2d 270, 296 (1999) (upholding off-reservation reserved rights of Milles Lac Band of Chippewa Indians); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 61 L. Ed. 2d 823, 99 S. Ct. 3055 (1979) (affirming off-reservation reserved rights of fisheries of numerous tribes located in Washington state); *Kimball v. Callahan*, 590 F.2d 768 (9th Cir. 1979) (recognizing off-reservation reserved rights of the Klamath Tribes); *see also Antoine v. Washington*, 420 U.S. 194, 43 L. Ed. 2d 129, 95 S. Ct. 944 (1975).

Off-Reservation Rights

Tribal Rights

Tribal trusteeship can arise from treaties or Executive Orders by the President. Tribal trusteeship applies to both *on-reservation* resources (including reserved water rights) and to *off-reservation* resources where tribes exercise hunting, fishing, and gathering rights. In the Culverts case, the 9th Circuit found that the state's barrier culverts within the case area block approximately 1,000 linear miles of streams suitable for salmon habitat (almost five million square meters). It further found that if those culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year and would be available to the Tribes for harvest. *United States v. Washington*, 853 F.3d at 966.

"Appertaining To"

One implication of the Culverts case is that, arguably, all of that approximately 1,000 linear miles of streams suitable for salmon habitat are natural resources appertaining to the Tribes' treaty-protected resource, over which a Tribe could assert trusteeship for purposes of a natural resource damage claim.

Hunting Right Unsettled

What's more, in addition to the well-established fishing right, the Stevens Treaties also reserved in the Tribes the right to hunt as well as to gather roots and berries on "open and unclaimed lands." The issue of the Stevens Treaties hunting right is generally considered to not yet be settled at the federal level, although the Washington State Supreme Court has held that the "open and unclaimed" land language of the treaties (in that case, the Treaty of Point Elliott) applied only to land within a Tribe's "ceded" areas under the treaties, or other "traditional" areas. *State v. Buchanan*, 138 Wash.2d 186, 978 P.2d 1070 (1999), *cert. denied*, 528 U.S. 1154 (2000).

The geographic scope of the Stevens Treaties hunting right is not clear. Most Tribes maintain that because the treaties contain no geographic limit, there is none. There is support for this assertion in *United States v. Michigan*, a case adjudicating the treaty rights of Michigan tribes to fish in waters of the Great Lakes. *See* 471 F. Supp. 192 (W.D. Mich. 1979); *see also*, *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32, 63 S. Ct. 672, 87 L. Ed. 877 (1943).

Culvert Case Precedent

Even without a formal adjudication of the geographic scope of the treaty hunting right, the Culverts case still may provide a basis for demonstrating trusteeship over a resource for purposes of tribal NRD claims.

For Additional Information:
Connie Sue Martin, Schwabe Williamson & Wyatt, 206/ 407-1556 or CSMartin@SCHWABE.com

Connie Sue Martin, a member of Schwabe Williamson and Wyatt's Natural Resources Industry Group, is an environmental and natural resources lawyer and leads the firm's Indian law practice. She was counsel of record for the Nooksack Indian Tribe in the Culverts case, which was argued before the United States Supreme Court on April 18, 2018.

