

Singer, Joseph William. "Lone Wolf, or How to Take Property by Calling It a 'Mere Change in the Form of Investment'." *Tulsa Law Review* 38 (2002) 37–48.

United States v. Washington (1974)

United States v. Washington, 384 F. Supp. 312 (1974), is the most important Indian treaty fishing rights case—and the litigation is still ongoing. Federal District Judge George H. Boldt's 1974 decision (called the "Boldt decision") recognized that western Washington treaty tribes have a right to take fish "in common with" non-Indians from off-reservation waters. The U.S. Supreme Court later upheld Judge Boldt's major ruling that Indian tribes have a right to take as much as 50 percent of the harvestable fish in waters off the reservation. The Boldt decision also granted comparable responsibility to both the tribes and the state of Washington for conserving the resource and regulating the anadromous fisheries harvest.

In the 1960s, Indian treaty fishers from the Pacific Northwest region, when exercising their fishing rights both on and off the reservation, faced increasing hostility from non-Indian sport and commercial fishers. Disputes over treaty fishing had broken out in armed conflict, with casualties on all sides. The United States sued in federal court to enjoin the state from interfering with the treaty fishing rights of the western Washington tribes after the state of Washington became more aggressive in investigating and prosecuting treaty fishers acting in violation of the treaties.

The state argued that the treaty rights had been extinguished and that the Indian tribes' political existence had been vanquished by history. Even if the treaty right was still extant, the state argued, the treaty language did not operate to grant off-reservation fishing rights. The United States and the tribes responded with expert testimony that the tribes did still exist as viable political entities and, more important, that the tribal treaty negotiators understood the operative treaty language—the treaty right would remain in the "usual and accustomed places . . . in common with all citizens"—to mean that the Indians could fish in off-reservation waters in common with non-Indians. Judge Boldt's 1974 orders—"Phase I" of *United States v. Washington*—held that the treaty tribes remained viable political entities, in effect granting (or reaffirming) federal recognition to numerous Indian tribes in the region. Judge Boldt agreed that the treaty fishing right extended off the reservation. He held that the "in common" treaty language meant that the tribal fishers and the non-

Indian fishers must share the harvest, granting 50 percent of the harvest to the treaty fishers and 50 percent to the rest.

The Supreme Court affirmed the harvest-sharing holding, by far the most controversial portion of the decision, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*. Given the degree to which the state officers and state courts had ignored federal court orders, the Court's decision made Judge Boldt—and later federal court judges assigned the case—the "Fishmaster" of the treaty fishing right because of what the Supreme Court called the state's "extraordinary machinations in resisting the [Boldt decision]" (*Fishing Vessel*, 696, n. 36).

United States v. Washington subproceedings, filed under the continuing jurisdiction of the federal district court, included disputes between tribes over the extent and territories of the treaty fishing right that continue today. Other subproceedings included the "shellfish case" and the "culverts case." In the shellfish case, the federal courts held that the treaty right included the right to harvest the lucrative shellfish, a critical ruling given that the anadromous fish harvest has been devastated since the late 1970s because of overfishing, pollution, and the destruction of the piscary habitat from the construction of hydropower dams. In the "culverts case," the court held that the state must refrain from constructing or maintaining culverts under state-owned roads in a way that interferes with fish passage. Thousands of culverts are at issue.

The culverts case arises, in part, out of "Phase II" of the *United States v. Washington* litigation, wherein the federal courts held that the treaty right included an undefined right to have the fisheries protected from manmade spoliation. Judge William Orrick wrote that, absent such an implied right, "the right to take fish would be reduced to the right to dip one's nets into the water . . . and bring it out empty" (*Phase II*, 203). Although the Ninth Circuit Court of Appeals reversed much of Judge Orrick's ruling, the spirit of the decision remains the critical force underlying the continuing litigation.

Over time, *United States v. Washington* has spawned increasing cooperation between the treaty tribes and the state. Under the Boldt decision, the tribes and the state share responsibility for regulating the resource.

See also *Fishing, Hunting, and Gathering Rights; Salmon; U.S. Supreme Court and Indian Policy, 1966–1977.*

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United States v. Winans (1905)

On May 15, 1905, the U.S. Supreme Court issued its landmark decision in *United States v. Winans* (198 U.S. 371), a case concerning the treaty fishing rights of the Yakama Nation in south-central Washington state. In an eight-to-one opinion delivered by Justice Joseph McKenna, the Court ruled that fishwheel owners Audubon and Linnaeus Winans could not legally prevent Indians from crossing their land to catch salmon at treaty-reserved sites along the Columbia River.

The decision established two important principles governing Indian treaty interpretation. The first stated that treaties must be construed as the Indians understood them at the time and "as justice and reason demand." The second, known as the reserved rights doctrine, held that treaties are "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." Putting these principles into action, the Court declared that neither private property nor modern technology gave the Winans brothers an exclusive claim to the fishery, and they could not restrict the Indians in their use of traditional locations.

Before closing, however, the Court added a bit of dictum that kept open the door to controversy. At the same time that it affirmed the Indians' right to fish "at all usual and accustomed places," the ruling did not "restrain the state unreasonably, if at all, in the regulation of that right." Consequently, cases involving Northwest Indian fishing rights would return to the Supreme Court six more times during the twentieth century.

See also *Fishing, Hunting, and Gathering Rights; Reserved Rights Doctrine; Salmon; U.S. Supreme Court and Indian Policy, 1871-1934.*

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United States Indian Commission

The short-lived U.S. Indian Commission was a mid-nineteenth-century collection of Protestant ministers, philanthropists, and abolitionists that promoted the fair treatment of American Indians after the Civil War. The group condemned the injustices in carrying out treaties and lack of honest Indian agents.

After reading Lydia Maria Child's antiexpansionist pamphlets, industrialist and abolitionist Peter Cooper, of Cooper Union fame, formed the U.S. Indian Commission in New York in 1868. Members mostly came out of the abolitionist movement and included Henry Ward Beecher and William E. Dodge.

In October 1868 the group appealed to philanthropist organizations and the press to help them promote the fair treatment of American Indians by placing them on reservations and making them citizens of the United States. The commission sent a petition to Congress decrying the treatment of American Indians by the government and white settlers. The petition closed by suggesting the appointment of an independent commission made up of volunteers to help "civilize" the Natives and end corruption in the Office of Indian Affairs. This led to the formation of the Board of Indian Commissioners that became part of President Ulysses S. Grant's peace policy. The U.S. Indian Commission ceased to exist shortly after the creation of the Board of Indian Commissioners.

Outside of mere rhetoric, the commission did negotiate at least one treaty with the Bannocks and Shoshones at Fort Bridger in 1868. In 1869 the commission sent noted artist, abolitionist, and veteran Vincent Colyer to visit the Kiowas, Comanches, Apaches, and Navajos to determine their needs. He eventually would visit thirty-one Western nations and continue his visits as a member of the Board of Indian Commissioners.