

9. Tribal Traditional Hunting Areas—Briefing

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## “GREEN SHEET”

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**Meeting dates:** September 11-12, 2009, Commission Meeting

**Agenda item #: 9** Tribal Traditional Hunting Areas

**Staff Contact:** Nate Pamplin, Wildlife Policy Coordinator, IRM

**Presenter(s):** Nate Pamplin, Wildlife Policy Coordinator, IRM

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**Background:**

There are 24 tribes with off-reservation hunting rights in Washington, of which 23 are treaty tribes. The Washington State Supreme Court (Court) held in *State v. Buchanan* (Buchanan) 138 Wn.2d 186 (1999) that the geographical scope of the treaty hunting right includes the lands ceded by the treaty tribes, “and may include other areas if those areas are proven to have been actually used for hunting and occupied by the [tribe] over an extended period of time.” The Court did not provide guidance regarding: the type of evidence required; the process used to evaluate a tribe’s claim; and which entity would review and approve, or deny, the recognition of a tribe’s claim.

The purpose of the procedural guidelines is to outline Washington Department of Fish and Wildlife’s (WDFW) process for responding to a treaty tribe’s assertion that it traditionally hunted an area outside of its treaty ceded area. The guidelines outline a collaborative process for the agency to review anthropological and historical information in the context of the *Buchanan* decision, and may result in a common understanding of a line that will guide future wildlife management discussions and enforcement and prosecution discretion. The guidelines were recently developed because WDFW has been approached by five treaty tribes over the past year asking for recognition of their asserted traditional hunting area by not enforcing state hunting regulations on their members and the WDFW desired to have a consistent, constructive process to guide its efforts in an evaluation.

These procedural guidelines are not intended to result in a final determination of the geographic scope of the treaty hunting right, but are intended to describe a process for the WDFW’s decision of whether or not to enforce state hunting regulations in areas a tribe claimed it traditionally hunted. Key entities that would be consulted in the process would include the asserting tribe, any affected tribes, and county prosecutors.

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**Policy issue(s) you are bringing to the Commission for consideration:**

Briefing on procedural guidelines for evaluating a treaty tribe’s asserted traditional hunting area.

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**Public involvement process used and what you learned:**

Submitted draft procedural guidelines to tribes with off-reservation hunting rights for comment on August 4, 2009 with a request for comments back on August 31, 2009.

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**Action requested:**

Briefing only.

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**Draft motion language:**

N/A

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**Justification for Commission action:**

N/A

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**Communications Plan:**

N/A

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## H

### Briefs and Other Related Documents

Supreme Court of Washington,  
 En Banc.  
 STATE of Washington, Petitioner,  
 v.  
 Donald Ray **BUCHANAN**, Respondent.  
**No. 66054-9.**

Argued Nov. 18, 1998.  
 Decided June 17, 1999.  
 Reconsideration Denied Aug. 3, 1999.  
 As Amended Aug. 12, 1999.

Indian tribe member was charged with possessing two elk out of season and hunting in wildlife area without valid license. The Superior Court, Yakima County, Heather Van Nuys, J., dismissed charges. State appealed. The Court of Appeals affirmed, [87 Wash.App. 189, 941 P.2d 683](#). Granting review, the Supreme Court, [Guy](#), C.J., held that: (1) under **treaty** that secured to Nooksack Indian tribe the right to **hunt** "on open and unclaimed lands," **hunting** right extended to aboriginal **hunting** grounds; (2) dismissal of charge was error in view of trial court's failure to limit geographic scope of tribe's aboriginal **hunting** grounds; (3) defendant was entitled to present evidence that state-owned wildlife area was part of tribe's aboriginal **hunting** grounds; (4) wildlife area where alleged offenses occurred was "open and unclaimed land" within meaning of **treaty**; and (5) admission of State of Washington into the Union "on equal footing" with original states did not abrogate **treaty hunting** rights of Indians living in Washington.

Judgment of Court of Appeals reversed; case remanded for trial.

#### West Headnotes

#### [\[1\] Criminal Law](#) [304\(1\)](#) [110k304\(1\) Most Cited Cases](#)

Supreme Court would decline to take judicial notice, as urged for the first time by state on its appeal from appellate decision affirming dismissal of criminal felony charge, that defendant did not have a right to maintain asserted defense; issue did not present a jurisdictional question. [West's RCWA 2.04.010](#),

[2.08.010](#).

#### [\[2\] Criminal Law](#) [1028](#) [110k1028 Most Cited Cases](#)

#### [\[2\] Criminal Law](#) [1071](#) [110k1071 Most Cited Cases](#)

Supreme Court generally will not consider issues which are not set forth in the petition for review or arguments which are raised for the first time on appeal; however, this rule does not apply when the issue raised affects the right to maintain an action. [RAP 13.7\(b\)](#).

#### [\[3\] Courts](#) [4](#) [106k4 Most Cited Cases](#)

"Jurisdiction" is the power of the court to hear and determine the class of action to which a case belongs.

#### [\[4\] Courts](#) [97\(1\)](#) [106k97\(1\) Most Cited Cases](#)

State was bound, in state criminal prosecution of member of Nooksack Indian Tribe for illegal **hunting** of elk, by unappealed ruling of federal district court in action in which state was a party, that Nooksack Tribe was signatory to **treaty** on which defendant based his defense.

#### [\[5\] Federal Courts](#) [523](#) [170Bk523 Most Cited Cases](#)

Recourse from an erroneous federal court decision is through the federal system.

#### [\[6\] Costs](#) [317](#) [102k317 Most Cited Cases](#)

Supreme Court would decline, on review of order dismissing criminal felony charge against member of Nooksack Indian tribe, to impose sanctions on state for moving court to take judicial notice that it lacked subject matter jurisdiction over defendant's asserted defense or, alternatively, to supplement record with documents showing that defendant's tribe was not signatory to treaty on which he based his defense; while both motions lacked merit, they were brought in good faith.

#### [\[7\] Indians](#) [3\(3\)](#) [209k3\(3\) Most Cited Cases](#)

Like any treaty between the United States and another sovereign nation, a treaty with Indians is the supreme

law of the land and is binding on the State until Congress limits or abrogates the treaty. U.S.C.A. Const. Art. 6, § 2

**[8] Indians** 3(1)

[209k3\(1\) Most Cited Cases](#)

A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereigns.

**[9] Treaties** 3

[385k3 Most Cited Cases](#)

When signatory nations are not at war and neither is the vanquished, it is reasonable to assume the parties bargained at arm's length in negotiating treaty.

**[10] Treaties** 7

[385k7 Most Cited Cases](#)

The goal of treaty interpretation is the same as the goal of contract interpretation, i.e., to determine the intent of the parties, and analysis of the parties' intention begins with the language of the treaty and the context in which the written words are used.

**[11] Indians** 3(3)

[209k3\(3\) Most Cited Cases](#)

A treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

**[12] Indians** 3(3)

[209k3\(3\) Most Cited Cases](#)

Where there is ambiguity in the language of a treaty, it must not be construed to the prejudice of the Indians.

**[13] Indians** 3(3)

[209k3\(3\) Most Cited Cases](#)

In interpreting treaty between United States and an Indian tribe, courts may not ignore treaty language that, viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe's claims.

**[14] Indians** 3(3)

[209k3\(3\) Most Cited Cases](#)

Treaties between United States and Indian tribes must be construed liberally in favor of Indians.

**[15] Indians** 3(3)

[209k3\(3\) Most Cited Cases](#)

"Reservation of rights doctrine" holds that a treaty between the federal government and an Indian tribe is

not a grant of rights to the Indians but, rather, a grant from them; in other words, the Indians ceded certain rights possessed by them at the time of making the treaty but reserved whatever rights were not expressly granted to the United States.

**[16] Indians** 32.6

[209k32.6 Most Cited Cases](#)

**Treaty** that secured to the Nooksack Indian tribe the privilege of **hunting** on "open and unclaimed lands" reserved to the tribe its right to **hunt** on its aboriginal **hunting** grounds, so long as the lands remained open and unclaimed; such lands would certainly include territory ceded to United States but could include other areas if they were proven to have been actually used for **hunting** and occupied by tribe over an extended period of time.

**[17] Indians** 32.6

[209k32.6 Most Cited Cases](#)

Scope of an Indian tribe's off-reservation **hunting** rights is generally found in a tribe's aboriginal use of or title to land and its reservation of the right in a **treaty**, or by agreement, executive order, or statute.

**[18] Indians** 32.6

[209k32.6 Most Cited Cases](#)

Right granted to Indian tribes that were signatories to the Stevens **Treaties**, to **hunt** "on open and unclaimed lands," was, by its terms, of a temporary and self-limiting nature; right was intended to diminish as lands became settled, without the need of congressional action.

**[19] Indians** 32.7

[209k32.7 Most Cited Cases](#)

Dismissal of charge for illegal **hunting** of elk brought against member of Nooksack Indian Tribe, on grounds that defendant was entitled under **treaty** to **hunt** "on open and unclaimed lands," was error, where trial court failed to limit geographic scope of **treaty** to tribe's aboriginal **hunting** grounds.

**[20] Indians** 32.7

[209k32.7 Most Cited Cases](#)

Member of Nooksack Indian Tribe who was charged with illegal elk **hunting** was entitled to present evidence that tribe's aboriginal **hunting** grounds included state-managed wildlife area where he was **hunting**, for purposes of establishing defense based on **treaty** securing to his tribe the privilege of **hunting** "on open and unclaimed lands."

**[21] Indians** 32.7

[209k32.7 Most Cited Cases](#)

Requirement that any conservation-based state regulation of Indian **treaty** rights to **hunt** and fish meet "appropriate standards" obligates the state to prove that its regulation is a reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation.

[\[22\] Criminal Law](#)  [1129\(1\)](#)  
[110k1129\(1\) Most Cited Cases](#)

Adverse finding of fact was a verity on state's appeal of order dismissing criminal prosecution, where state assigned no error to that finding.

[\[23\] Indians](#)  [32.6](#)  
[209k32.6 Most Cited Cases](#)

Wildlife area that was owned and managed by state and was open to the public at specified times each year for **hunting**, fishing, and recreational purposes was "open and unclaimed land" within meaning of **treaty** securing to signatory Indian tribes the privilege of **hunting** on open and unclaimed lands.

[\[24\] Indians](#)  [32.6](#)  
[209k32.6 Most Cited Cases](#)

Publicly-owned lands, which are not obviously occupied and which are put to a use which is compatible with **hunting**, are "open and unclaimed lands" under the terms of the Stevens **Treaties** securing to signatory Indian tribes the privilege of **hunting** on open and unclaimed lands.

[\[25\] Indians](#)  [32.6](#)  
[209k32.6 Most Cited Cases](#)

Admission of State of Washington into the Union "on equal footing" with original states did not abrogate **treaty hunting** rights of Indians living in Washington. **\*\*1072 \*191 Christine Gregoire**, Attorney General, **Robert Costello**, Asst., Olympia, Amicus Curiae on behalf of Washington State Department of Fish & Wildlife.

[Joseph Coniff, Jr.](#), Olympia, Amicus Curiae on behalf of Modern Firearm Hunters of Washington.

Ralph Johnson, Seattle, Amicus Curiae on behalf of Professor Ralph Johnson.

[Kevin R. Lyon](#), [Ronald J. Whitener](#), Olympia, Amicus Curiae on behalf of Squaxin Island Tribe.

Mason D. Morissett, Seattle, Amicus Curiae on behalf of Tulalip Tribes.

[Bill Tobin](#), Vashon, Amicus Curiae on behalf of Nisqually Indian Tribe.

[Phillip E. Katzen](#), [Allen H. Sanders](#), Seattle, Amicus Curiae on behalf of Sauk-Suiattle Tribe.

Eisenhower, Carlson, Newlands, Reha, Henriott & Quinn, Kathryn Nelson, Tacoma, Amicus Curiae on behalf of Skokomish Tribe.

[Debra S. O'Gara](#), Tacoma, Amicus Curiae on behalf of Puyallup Tribe.

Mathews, Garlington-Mathews & Chesnin, [Harold Chesnin](#), Seattle, Amicus Curiae on behalf of Upper Skagit Tribe.

Raas, Johnson & Stuen, [Daniel A. Raas](#), Bellingham, Amicus Curiae on behalf of Lummi Tribe.

Alix Foster, [Allan E. Olson](#), LaConner, Amicus Curiae on behalf of Swinomish Indian Tribal Community.

John C. Sledd, Bremerton, Amicus Curiae on behalf of Suquamish Tribe.

Elizabeth Nason, Toppenish, Amicus Curiae on behalf of Bands of Yakima Indian Nation.

Jeffrey J. Bode, Bellingham, Amicus Curiae on behalf of Nooksack Tribe.

Robert L. Otsea, Jr., Seattle, Alan Stay, Auburn, Amicus Curiae on behalf of Muckleshoot Indian Tribe.

[Jeffrey Sullivan](#), Yakima County Prosecutor, [Kenneth L. Ramm](#), Deputy, [Lauri Boyd](#), Deputy, Yakima, for Petitioner.

**\*\*1073** Law Offices of David S. Vogel, [David Vogel](#), Seattle, for Respondent.

[GUY](#), C.J.

This is a criminal prosecution for illegal hunting of elk in the State-owned Oak Creek Wildlife Area. The defendant, a member of the Nooksack Indian Tribe, claims he has a **treaty** right to **hunt** elk in the Oak Creek Area, and that this right may not be restricted by state **hunting** regulations. The issues presented are (1) whether **\*192** the geographic scope of the tribe's **treaty** right to **hunt** on open and unclaimed lands includes the Oak Creek Wildlife Area, (2) whether the

Oak Creek Wildlife Area is open and unclaimed land, and (3) whether the tribe's **treaty** right to **hunt** outside the reservation was abrogated by Washington's admission to the Union "on equal footing" with the original states.

We reverse the dismissal of the criminal action and remand for trial. We hold that, on remand, the defendant may raise a **treaty** right to **hunt** as a defense to the criminal charges and may offer evidence in support of his position that the Oak Creek Wildlife Area is within the aboriginal **hunting** grounds of the Nooksack Tribe. We also hold that under the facts presented in this case, the Oak Creek Wildlife Area is "open and unclaimed" land within the meaning of the Nooksack's treaty. We decline, in this case, to reconsider prior case law on whether the equal footing doctrine applies to impliedly abrogate Indian treaty rights in Washington.

#### FACTS

On January 6, 1995, defendant Donald **Buchanan** was stopped by Department of Fish and Wildlife enforcement officers while **Buchanan** was hunting in the Oak Creek Wildlife Area, land which is owned and managed by the State of Washington. The defendant was in possession of two recently killed five-point, branch-antlered bull elks. At the time he was stopped, the defendant's Washington state hunting license had been revoked, and the Washington elk hunting season was closed.

The Oak Creek Wildlife Area, which is near Yakima, is open to the public at specified times each year for hunting, fishing and recreational purposes. During the fall and winter of 1994-95, state regulations permitted elk hunting in the Oak Creek Wildlife Area only from November 5 through 13, 1994. The number of branch-antlered elk that could be killed also was regulated during the hunting **\*193** season, and only young "spike bulls" could be killed without a special permit. The purposes of the restrictions on elk hunting in the Oak Creek Wildlife Area are to maintain and manage the existing elk population. However, there is not an immediate threat to elk, as a species, in the Oak Creek Wildlife Area.

Defendant **Buchanan** is a resident of Kent, Washington, and a member of the Nooksack Indian Tribe. At the time he was stopped by Wildlife enforcement officers, he possessed both a Nooksack Tribe identification card and hunting tags issued by the Tribe. The Nooksack Tribe's reservation is located in Whatcom County, near Deming. The lands ceded to the United States by the Nooksack Tribe

under the provisions of the Treaty of Point Elliott, [\[FN1\]](#) which is the treaty involved here, are bordered on the east by the summit of the Cascade range. The Oak Creek Wildlife Area is east of the territory ceded to the United States by the Nooksacks.

[FN1.](#) Treaty Between the United States and the Dwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927.

Defendant **Buchanan** was charged with two felony counts of possessing big game during a closed season, former [RCW 77.16.020\(1\)\(E\)](#), former [RCW 77.21.010\(1\)](#) (second or subsequent violation), and with one misdemeanor count of hunting while license is revoked. Former [RCW 77.21.060\(2\)](#). [\[FN2\]](#)

[FN2.](#) Former [RCW 77.16.020\(1\)](#) provided in pertinent part: "It is unlawful to hunt, fish, possess, or control a species of game bird, game animal, or game fish during the closed season for that species." Laws of 1987, ch. 506, § 59. Former [RCW 77.21.010\(1\)](#) provided that a subsequent violation of the hunting laws must be prosecuted and punished as a Class C felony. Laws of 1988, ch. 265, § 3. Former [RCW 77.21.060\(2\)](#) provided, in pertinent part, that it was "unlawful for a person to conduct an activity requiring a wildlife license, tag, or stamp for which they have had a license forfeiture[.]" Laws of 1989, ch. 314, § 6. In 1998 the Legislature revised and recodified the criminal laws governing the taking of fish and wildlife. Laws of 1998, ch. 190. The prohibitions and penalties have not changed. See [RCW 77.15.410](#) (unlawful hunting of big game); [RCW 77.15.670](#) (unlawful hunting while hunting privileges revoked).

**\*\*1074** Defendant **Buchanan** moved to dismiss the charges on the ground that State **hunting** regulations do not apply to **\*194 hunters**, like **Buchanan**, who are members of Indian tribes that have a **treaty** right to **hunt** on open and unclaimed lands. He claims the only regulations that govern his hunting on open and unclaimed lands are those of the Nooksack Indian Tribe.

The trial court granted the motion to dismiss the charges, ruling: (1) the language of the **Treaty** of Point Elliott does not restrict **hunting** to open and unclaimed lands within the area ceded by the Indians

to the United States, but instead gives tribal members a right to **hunt** anywhere in the "Territory of Washington"; (2) the term "open and unclaimed lands" includes public lands, such as the Oak Creek Wildlife Area, which are put to uses compatible with an Indian **hunting** privilege; and (3) although Indian **hunting** privileges may be limited if necessary for conservation, the State, in this case, failed to demonstrate that application of State **hunting** regulations to **treaty** tribe **hunters** is necessary for conservation.

On appeal, the State challenged the trial court's conclusions and, additionally, argued that the Treaty of Point Elliott was abrogated by Congress when Washington was admitted to the Union on equal footing with the original states. The Court of Appeals affirmed and declined to consider the equal footing argument, as that issue was not presented to the trial court and was not asserted to be of constitutional magnitude. [State v. Buchanan, 87 Wash.App. 189, 196, 941 P.2d 683 \(1997\), review granted, 134 Wash.2d 1012, 958 P.2d 316 \(1998\)](#). This court granted the State's petition for review.

Several **treaty** tribes, including the Nooksack Tribe, have filed an amicus brief providing an overview of tribal management of off-reservation **hunting** by tribal members, a description of cooperative agreements governing wildlife management between tribes and between various tribes and the State, and further setting forth the tribes' position \*195 on the meaning of "open and unclaimed" lands. [\[FN3\]](#) Professor Ralph Johnson of the University of Washington School of Law has filed an amicus brief on the proper interpretation of the treaty language "open and unclaimed" lands. An amicus brief has been filed by the Department of Fish and Wildlife on the issues of the geographical scope of the treaty right involved and on the designation of the Oak Creek Wildlife Area as open and unclaimed lands during the winter months. Modern Firearm Hunters of Washington has filed an amicus brief in support of the State's equal footing argument.

[FN3](#). The tribes joining in the amicus brief are the Squaxin Island Tribe, Tulalip Tribes, Nisqually Indian Tribe, Port Gamble, Jamestown and Lower Elwha Bands of S'Klallam for the Skokomish Tribe, Puyallup Tribe, Upper Skagit Tribe, Sauk-Suiattle Tribe, Stillaguamish Tribes, Swinomish Indian Tribal Community, Suquamish Tribe, Yakama Indian Nation, Lummi Tribe, Nooksack Tribe, and Muckleshoot Indian

Tribe.

Prior to oral argument in this court, the State filed a motion captioned, "Request for Judicial Notice or to Supplement the Record Under [RAP 9.11](#)." In its motion the State argues that defendant **Buchanan** should not be permitted to raise the defense that he has a **treaty** right to **hunt** because the Nooksack Tribe was not a signatory to the **Treaty** of Point Elliott. Defendant **Buchanan** responded to the motion and, additionally, moved for sanctions against the State, arguing the motion was frivolous and made for purposes of delay. Both motions were passed to the merits.

#### ISSUES

1. What is the geographic scope of the Nooksack Indian Tribe's **treaty hunting** right?
2. Is the State-owned Oak Creek Wildlife Area "open and unclaimed lands" within the meaning of the Treaty of Point Elliott?
3. Were those provisions of the **Treaty** of Point Elliott which conflict with the State's right to regulate off-reservation **hunting** abrogated \*\*1075 by Congress when Washington \*196 was admitted to the Union upon "equal footing" with the original states?

#### DISCUSSION

We begin by denying both the State's motion for judicial notice or to supplement the record and the defendant's motion for sanctions.

[\[1\]](#) In its motion, the State first argues that this court should take judicial notice that the court lacks "subject matter jurisdiction" over defendant **Buchanan's** defense because the Nooksack Tribe was not a signatory to the **Treaty** of Point Elliott and **Buchanan**, therefore, has no **treaty hunting** rights.

[\[2\]](#) The State's motion raises a new issue--that is, whether defendant **Buchanan** failed to prove a necessary element (the existence of a treaty) of his defense. The court generally will not consider issues which are not set forth in the petition for review, [RAP 13.7\(b\)](#), nor arguments raised for the first time on appeal. See, e.g., [Hansen v. Friend, 118 Wash.2d 476, 485, 824 P.2d 483 \(1992\)](#). However, this rule does not apply when the issue raised affects the right to maintain an action. [Jones v. Stebbins, 122 Wash.2d 471, 479, 860 P.2d 1009 \(1993\)](#). In this case, the State claims that defendant **Buchanan** does not have a right to maintain his defense and, therefore, the court should take judicial notice that it is without jurisdiction to

consider it.

[3] The issue raised by the State does not present a jurisdictional question. Jurisdiction is the power of the court to hear and determine the class of action to which a case belongs. State v. Werner, 129 Wash.2d 485, 493, 918 P.2d 916 (1996); Bour v. Johnson, 80 Wash.App. 643, 647, 910 P.2d 548 (1996). This is a criminal felony action brought by the State. The trial court had authority to determine the legal and factual issues involved. RCW 2.08.010; Werner, 129 Wash.2d at 493, 918 P.2d 916. This court has the power to determine the appeal. RCW 2.04.010.

[4] Alternatively, the State asks to supplement the \*197 record with documents showing that the Nooksack Indian Tribe has previously taken the position that it was not a party to the treaty. This issue was resolved in 1978 in an action in which the State of Washington was a defendant, and in which the trial court ruled that the Nooksack Indian Tribe was included in the Treaty of Point Elliott. United States v. Washington, 459 F.Supp. 1020, 1040-41 (W.D.Wash.1978) (posttrial substantive orders following the initial Boldt decision [FN4]), *aff'd*, 645 F.2d 749 (9th Cir.1981) (the appeal does not challenge the trial court's ruling relating to the Nooksack's status as a treaty tribe).

FN4. The first of the so-called "Boldt decisions" is set forth in United States v. Washington, 384 F.Supp. 312 (W.D.Wash.1974). The underlying litigation and the Boldt decision orders have been the subject of numerous actions in both Washington and federal courts. Puget Sound Gillnetters Ass'n v. Moos, 92 Wash.2d 939, 603 P.2d 819 (1979), traces the history of the litigation through 1979.

[5] The State argues that this court need not consider the federal court decision because it is "a lower federal court case which is non-binding precedent on this court." Request for Judicial Notice at 6. However, the State was a party to the federal court case and is bound by its ruling. Puget Sound Gillnetters Ass'n v. Moos, 92 Wash.2d 939, 953, 603 P.2d 819 (1979) (all parties, and all those who are in privity with parties, must comply with the federal court orders entered in United States v. Washington). See also Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wash.2d 255, 262, 956 P.2d 312 (1998) (the doctrine of collateral estoppel prevents relitigation of an issue, in state court, after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case in

federal court). The State claims the federal trial court's decision on the issue is erroneous, but it did not appeal the trial court's findings and conclusion with respect to the Nooksack Tribe. Recourse from an erroneous federal court decision is through the federal system. Puget Sound Gillnetters, 92 Wash.2d at 952, 603 P.2d 819. Accordingly, we deny the motion to supplement.

\*\*1076 [6] Although we deny the State's motion, we decline to \*198 impose sanctions against it. We are satisfied that the motion was filed in good faith.

We turn now to the substantive issues in this appeal.

Defendant **Buchanan's** defense to the criminal charges brought against him is that he is not subject to State **hunting** laws because he has a **treaty** right to **hunt** on any open and unclaimed lands in "Washington Territory," and that this **treaty** right is superior to the right of the State to regulate **hunting**.

The State makes essentially three arguments. First, it argues that any **treaty hunting** right that exists in the Nooksack Tribe should be interpreted to permit **hunting** only on open and unclaimed land within the area ceded to the United States by the tribe, or upon land which the tribe has traditionally **hunted**. Second, the State argues that even if the **treaty** affords a right to **hunt** outside the ceded area, the Oak Creek Wildlife Area is not "open and unclaimed" land. Finally, it urges this court to hold that no **treaty** right to **hunt** or fish in violation of State regulations survived Washington's admission to the Union on "equal footing" with the original states.

Our initial inquiry is to determine the geographic scope of the Nooksack Tribe's **treaty hunting** right.

In 1854 and 1855 Isaac Stevens, who was the first Governor and Superintendent of Indian Affairs for Washington Territory, negotiated several treaties between the United States and the various tribes and bands of Indians who lived in the Territory. [FN5] See generally United States v. Washington, 384 F.Supp. 312, 353-57 (W.D.Wash.1974); Seufert Bros. Co. v. United States, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555 (1919).

FN5. In addition to what is now Washington State, Washington Territory included parts of Idaho and Montana. See Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34

IDAHO L. REV. 435, 436-37 (1998).

At the time the treaties were negotiated, approximately three-fourths of Western Washington's 10,000 or so inhabitants were Indians. \*199 Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (hereafter *Fishing Vessel*). The natural resources appeared to the parties to be inexhaustible. Fishing Vessel, 443 U.S. at 669, 99 S.Ct. 3055.

In the treaties, the Indians relinquished their interest in most of the Territory in exchange for monetary payments. Additionally, certain relatively small parcels of land were reserved for the exclusive use of particular tribes or bands, and the Indians were afforded other guarantees, such as certain rights of fishing and hunting. Fishing Vessel, 443 U.S. at 662, 99 S.Ct. 3055.

The Treaty of Point Elliott was made in January 1855 and ratified March 8, 1859. As noted above, the Nooksack Indian Tribe was judicially determined to be a party to the treaty in United States v. Washington, 459 F.Supp. 1020. The first article of the treaty includes a description of lands ceded to the United States by the Indians. The treaty provides, in article 1, that the "said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at [the inlets and bays of western Washington Territory] to the summit of the Cascade range of mountains." Treaty of Point Elliott at 927.

Article 5 of the **treaty** provides:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of **hunting** and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Treaty of Point Elliott at 928.

This paragraph was substantially the same in all of the \*200 Stevens Treaties, [FN6] and its \*\*1077 language has been the subject of extensive litigation in both state and federal court during much of the last century. See, e.g., United States v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); Seufert Bros., 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555; Tulee v.

Washington, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); State v. Towessnute, 89 Wash. 478, 154 P. 805 (1916); State v. Wallahee, 143 Wash. 117, 255 P. 94 (1927); State v. McCoy, 63 Wash.2d 421, 387 P.2d 942 (1963); State v. Chambers, 81 Wash.2d 929, 506 P.2d 311 (1973); State v. Petit, 88 Wash.2d 267, 558 P.2d 796 (1977); State v. Miller, 102 Wash.2d 678, 689 P.2d 81 (1984); Atwood v. Shanks, 91 Wash.App. 404, 958 P.2d 332 (1998); United States v. Alaska Packers' Ass'n, 79 F. 152 (N.D.Wash.1897); United States v. Hicks, 587 F.Supp. 1162 (W.D.Wash.1984); United States v. Washington, 384 F.Supp. 312; United States v. Washington, 157 F.3d 630 (9th Cir.1998); State v. Arthur, 74 Idaho 251, 261 P.2d 135 (1953). See also Wilkinson, *supra*, at 447-48; Dana Johnson, *Native American Treaty Rights to Scarce Natural Resources*, 43 U.C.L.A. L. REV. 547, 552 (1995); Bradley I. Nye, *Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest*, 67 WASH. L. REV. 175 (1992); Laurie Reynolds, \*201 *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C.L. REV. 743 (1984).

FN6. In some of the treaties the language with respect to shellfish is omitted. See, e.g., Treaty Between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, June 9, 1855, art. I, 12 Stat. 945, 946 [hereinafter Treaty Between the Walla-Wallas]; Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, art. III, para. 2, 12 Stat. 951, 953 [hereinafter Treaty Between the Yakamas]; Treaty Between the United States and the Nez Percé Indians, June 11, 1855, art. III, para. 2, 12 Stat. 957, 958 [hereinafter Treaty Between the Nez Percé]; Treaty Between the United States and the Flathead, Kootenay and Upper Pend d'Oreilles Indians, July 16, 1855, art. III, para. 2, 12 Stat. 975, 976 [hereinafter Treaty Between the Flatheads]. In some the privilege to hunt and gather roots and berries also includes the right to pasture cattle and horses on open and unclaimed land. See, e.g., Treaty Between the Walla-Wallas, 12 Stat. at 946; Treaty Between the Yakamas, 12 Stat. at 953; Treaty Between the Nez Percé, 12 Stat. at 958; Treaty Between the United States and the Qui-nai-elt and Quil-leh-ute Indians, Jan. 25, 1856, art. III, 12 Stat. 971, 972; Treaty Between the

Flatheads, 12 Stat. at 976. The Treaty between the United States and the Makah Tribe also secures to the tribe the right of whaling or sealing at usual and accustomed grounds. Treaty Between the United States and the Makah Tribe of Indians, Jan. 31, 1855, art. IV, 12 Stat. 939, 940.

These authorities and others provide a framework for judicial examination of the treaty language involved here.

[7] Like any treaty between the United States and another sovereign nation, a treaty with Indians is the supreme law of the land and is binding on the State until Congress limits or abrogates the treaty. U.S. Const. art. VI; [Antoine v. Washington](#), 420 U.S. 194, 201, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); [State v. McCormack](#), 117 Wash.2d 141, 143, 812 P.2d 483 (1991).

[8][9] A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereigns. [Fishing Vessel](#), 443 U.S. at 675, 99 S.Ct. 3055; [State v. Courville](#), 36 Wash.App. 615, 619, 676 P.2d 1011 (1983). When the signatory nations are not at war and neither is the vanquished, it is reasonable to assume the parties bargained at arm's length. [Fishing Vessel](#), 443 U.S. at 675, 99 S.Ct. 3055. In discussing the negotiations involved in another Stevens Treaty, that with the Nez Perce, Professor Wilkinson states:

[T]he stereotype of Indian leaders at treaty talks as being passive and overmatched intellectually is wrong.

The negotiators for the Nez Perce, and for the other tribes as well, had a complete understanding of the situation. The white people wanted their land, and had the population and technology to take it. The tribes, on the other hand, had considerable leverage: in time they would lose a military campaign, but they could exact great costs in terms of human life and monetary expenditures to fight a war on the fragile, far edge of American territory.

The calculus was about power, and the tribes could make the calculations as well as the white people. The tribal negotiators were sophisticated and they used **\*\*1078** every technique and device available to them.... They made their arguments precisely and ably.

Wilkinson, *supra*, at 438 (footnotes omitted).

[10][11] The goal of treaty interpretation is the same as **\*202** the goal of contract interpretation--to determine the intent of the parties. [Fishing Vessel](#),

[443 U.S. at 675, 99 S.Ct. 3055](#); [United States v. Washington](#), 157 F.3d at 642. The analysis of the parties' intention begins with the language of the treaty and the context in which the written words are used. [United States v. Washington](#), 157 F.3d at 642. In interpreting a treaty between the United States and an Indian tribe, the treaty must " 'be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.' " [Fishing Vessel](#), 443 U.S. at 676, 99 S.Ct. 3055 (quoting [Jones v. Meehan](#), 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49 (1899)); [Miller](#), 102 Wash.2d at 683, 689 P.2d 81.

[12][13][14] Where there is ambiguity in the language of a treaty, it must not be construed to the prejudice of the Indians. [Minnesota v. Mille Lacs Band of Chippewa Indians](#), 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999); [Antoine](#), 420 U.S. at 199, 95 S.Ct. 944; [Miller](#), 102 Wash.2d at 683, 689 P.2d 81. However, courts may not ignore treaty language that, viewed in its historical context and given a fair appraisal, clearly runs counter to the tribe's claims. [Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe](#), 473 U.S. 753, 774, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985); [Department of Ecology v. Yakima Reservation Irrigation Dist.](#), 121 Wash.2d 257, 277, 850 P.2d 1306 (1993). Additionally, treaties must be construed liberally in favor of Indians. [Ecology](#), 121 Wash.2d at 277, 850 P.2d 1306; [State v. Price](#), 87 Wash.App. 424, 429, 942 P.2d 377 (1997).

[15] A key principle of treaty interpretation is known as the "reservation of rights doctrine." First announced in [United States v. Winans](#), 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089, a case involving interpretation of a Stevens Treaty made with the Yakama Indians, [FN7] the reservation of rights doctrine holds that a treaty between the federal government and an Indian tribe **\*203** is not a grant of rights to the Indians but, rather, a grant from them. In other words, the Indians ceded certain rights possessed by them at the time of making the treaty but reserved whatever rights were not expressly granted to the [United States](#). [Winans](#), 198 U.S. at 381, 25 S.Ct. 662. See also [Seufert Bros.](#), 249 U.S. at 199, 39 S.Ct. 203; [Fishing Vessel](#), 443 U.S. at 679-81, 99 S.Ct. 3055; [Wilkinson](#), *supra*, at 454-55.

[FN7]. In 1994, the Yakima Indian Nation adopted the spelling of Yakama. See [State v. Price](#), 87 Wash.App. 424, 425 n. 1, 942 P.2d 377 (1997). This spelling is used throughout this opinion when referring to the Yakama Nation, except where the spelling "Yakima"

appears in the title of an article or case.

Under the reservation of rights doctrine, tribal members have possessed certain rights, such as hunting and fishing rights, from time immemorial. A treaty between a tribe and the United States documents a grant of some rights from the tribe to the federal government. However, those rights not expressly ceded in the treaty, as well as those expressly reserved, remain with the tribe. *Johnson, supra*, at 553.

The reservation of rights doctrine has consistently been applied to the fishing and **hunting** provisions of the Stevens **Treaties**. See, e.g., [Fishing Vessel](#), 443 U.S. at 679-81, 99 S.Ct. 3055; [Seufert Bros.](#), 249 U.S. at 196, 39 S.Ct. 203.

The **treaty** language at issue here is the following:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians ... together with the privilege of **hunting** ... on open and unclaimed lands.

This court has interpreted the words "privilege" and "right," as used in the treaty, to be synonymous. [Miller](#), 102 Wash.2d at 683, 689 P.2d 81. The United States Supreme Court has interpreted the treaty language "securing" or "secured" rights to be synonymous with "reserving" rights previously exercised. **\*\*1079** [Fishing Vessel](#), 443 U.S. at 678, 99 S.Ct. 3055.

[\[16\]](#) The State argues that the **hunting** right reserved by the **treaty** was limited to the right previously exercised--that is to the ceded lands or to lands upon which the Nooksack Tribe traditionally **hunted**. We agree.

[\[17\]](#) The scope of a tribe's off-reservation **hunting** rights is **\*204** generally found in an Indian tribe's aboriginal use of or title to land and its reservation of the right in a **treaty**, or by agreement, executive order or statute. See generally FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 41- 46 (Rennard Strickland & Charles F. Wilkinson eds., 1982). Mr. Nye explains the origin of the right as follows:

Though **hunting** rights can arise from various sources, most existing off-reservation **hunting** rights in the Pacific Northwest were reserved by tribes in **treaties** signed with the federal government between 1853 and 1871. Treaties were the primary means by which the federal government sought to provide for the orderly westward expansion of non-native society. In the typical

treaty, the signatory Indians relinquished their rights to aboriginal lands in exchange for money and confinement to a reservation with distinct boundaries.

The reservation system, in addition to minimizing confrontations between encroaching settlers and the resident Indians, was also intended to transform Indians into "a pastoral and civilized people." As a result, game populations were not one of the primary factors considered in the federal government's choice of reservation lands, and many tribes were removed to reservations located far from their traditional hunting grounds. In response to a strong desire on the part of tribes to retain access to these areas, **treaties** with Northwest Indians provided for ... "the privilege of **hunting** ... on open and unclaimed lands[.]" In essence, these **treaty** provisions preserved a portion of the aboriginal rights exercised by the signatory tribes.

Nye, *supra*, at 177-78 (footnotes omitted). See also Reynolds, *supra*, at 752 (because the tribes could have reserved their aboriginal **hunting** and fishing rights only on lands which they actually **hunted** and fished at the time of the **treaty**, the primary inquiry must determine whether the area allegedly protected by the **treaty** formed part of the tribe's aboriginal territory).

To determine the existence of original Indian title to land, and the right to hunt and fish following from that title, courts have generally required a showing of actual use and occupancy **\*205** over an extended period of time. In [Mitchel v. United States](#) [34 U.S. (9 Pet.) 711, 9 L.Ed. 283 (1835)] the United States Supreme Court said:

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.

In claims against the United States based upon original title, a requirement of exclusive use and occupancy has been satisfied by a showing that two or more tribes jointly or amicably **hunted** in the same area to the exclusion of others....

The existence of aboriginal **hunting** and fishing rights, however, does not necessarily turn upon the existence of original title to lands and is not dependent upon recognition in a **treaty** or act of Congress. Aboriginal rights remain in the Indians unless granted to the United States by treaty, abandoned, or extinguished by statute. When a treaty has been signed, aboriginal use may still be

important to determine the extent of the rights reserved under the treaty.  
COHEN, *supra*, at 442-43 (footnotes omitted).

There is no evidence in the record on appeal to support a finding that the Nooksack Tribe actually occupied or used, over an extended period of time, the Oak Creek \*\*1080 Wildlife Area for hunting. The only area which the record shows the Tribe clearly used for **hunting** lies within the lands ceded to the United States in the **treaty**.

Defendant **Buchanan** argues that the Tribe's right to hunt does not depend on proof of aboriginal title or preexisting hunting practices and grounds. Instead, he claims the **hunting** right is based not on aboriginal title but on the **treaty**. In support of this argument, **Buchanan** points to fishing rights cases which interpret the phrase "usual and accustomed grounds and stations." These cases, he argues demonstrate that the **treaty** right to **hunt** or fish \*206 does not depend on aboriginal title or use. **Buchanan** additionally argues that the **treaty** fishing right is a limited one that permits fishing only at the usual and accustomed places, but that the **hunting** right is limited only to "open and unclaimed lands."

The treaty fishing right which was reserved by the Indians in the Stevens Treaties has been interpreted to provide a broad right to treaty tribes to fish outside of their ceded lands in all usual and accustomed fishing areas, without regard to whether these areas were part of the usual habitat of the tribe and without regard to whether there had been consistent and exclusive use of the areas. *United States v. Washington*, 384 F.Supp. at 332; *Fishing Vessel*, 443 U.S. at 666, 99 S.Ct. 3055. The treaty fishing right has been interpreted as insuring tribes a right to a fixed percentage of the number of harvestable fish, *United States v. Washington*, 384 F.Supp. at 343, and, further, interpreting the right as a permanent one, unless abrogated by Congress. *United States v. Washington*, 384 F.Supp. at 331-32.

[18] In contrast, the **treaty hunting** right, by its terms, is of a temporary and self-limiting nature. The right was intended to diminish as lands became settled, without the need of congressional action. See, e.g., *Hicks*, 587 F.Supp. at 1165. The **treaty hunting** clause contained in the Stevens **Treaties** has not received the extent of analysis to which the fishing clause has been subjected and, although *State v. Chambers*, 81 Wash.2d 929, 506 P.2d 311, noted that the defendant, a Yakama tribal member, killed a deer on privately-owned property at least 40 miles from the

nearest territory ceded to the United States by the Yakamas in their **treaty**, the issue now before us has not previously been squarely addressed by this court. See also *Hicks*, 587 F.Supp. at 1164.

The Supreme Courts of Idaho and Montana, interpreting Stevens **Treaties**, have held the **treaty** right is a reserved right "to **hunt** upon open and unclaimed land ... at any time of the year in any of the lands ceded to the federal government though such lands are outside the boundary of their reservation." *Arthur*, 74 Idaho at 265, 261 P.2d 135; see also \*207 *State v. Coffee*, 97 Idaho 905, 556 P.2d 1185 (1976); *State v. Stasso*, 172 Mont. 242, 563 P.2d 562 (1977) (relying on the Idaho cases).

Mr. Nye provides the following analysis:

**Treaty** clauses reserving Indian rights to **hunt** on "open and unclaimed lands" ... do not expressly limit these rights to ceded lands. However, **treaties** were reservations of aboriginal rights, and both the signatory tribes and the federal **treaty** negotiators understood that rights of access would be limited to traditional **hunting** grounds which remained "open and unclaimed" or "unoccupied."

... If the principles of **treaty** construction are strictly followed ... the right should be limited to the aboriginal **hunting** grounds of the signatory Indians. This line of demarcation should be based not on the treaty descriptions, but on other evidence which better captures the understanding of the Indians upon entering the treaty. Any line drawn must necessarily be approximate, and the principles of treaty interpretation require that any ambiguous questions be resolved in favor of the Indians.

Nye, *supra*, at 190-91 (footnotes omitted).

[19][20] The geographic scope of the **hunting** right cannot be resolved from the language of the **treaty** alone. We hold that application of the reservation of rights doctrine is the more legally sound approach to interpreting the **hunting** rights provision of the **Treaty** of Point Elliott. Under such an analysis, open and unclaimed lands within \*\*1081 the aboriginal **hunting** grounds of the Nooksack Tribe are reserved under the **treaty** for **hunting** by tribal members, so long as the lands remain open and unclaimed. The geographic area available for **hunting** would certainly include the territory ceded to the United States and described in article I of the **Treaty** of Point Elliott, and may include other areas if those areas are proven to have been actually used for **hunting** and occupied by the Nooksack Tribe over an extended period of time. Because the trial court did not so limit the geographic scope of the Nooksack's treaty, we reverse the

dismissal of the charges against defendant **Buchanan**. \*208 However, we hold that, on remand, the defendant should have the opportunity to prove that the Nooksack Tribe's aboriginal hunting grounds include the land within the Oak Creek Wildlife Area.

We next consider whether the Oak Creek Wildlife Area is "open and unclaimed land" under the meaning of the Treaty of Point Elliott.

[21] Under article 5 of the **treaty**, the Nooksack Tribe has a right to **hunt** on open and unclaimed lands. The United States Supreme Court has held that the **treaty** right to **hunt**, like the **treaty** right to fish, may only be regulated by the state "in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Antoine*, 420 U.S. at 207, 95 S.Ct. 944 (citing *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968)). The "appropriate standards" requirement obligates the state to prove that its regulation is a "reasonable and necessary conservation measure, and that its application to the Indians is necessary in the interest of conservation." *Antoine*, 420 U.S. at 207, 95 S.Ct. 944 (citation omitted). See also *Miller*, 102 Wash.2d at 688 n. 5, 689 P.2d 81 ("We do not read *Antoine* as giving Indians the exclusive right to hunt, but rather as ensuring that their right to hunt is not impaired for purposes other than those of conservation.")

[22] The trial court entered a finding of fact stating that the State had not produced any evidence that the **treaty** tribe **hunters** were capable of having a significant impact on the elk population in the Oak Creek area or in the State of Washington and, further, that the State had failed to sustain its burden of proving that the application of its regulations to Nooksack Indians or to Point Elliott **Treaty hunters** is necessary for conservation. The State did not assign error to this finding and, therefore, it is a verity on appeal. *State v. Smith*, 130 Wash.2d 215, 223, 922 P.2d 811 (1996); *State v. Echeverria*, 85 Wash.App. 777, 783, 934 P.2d 1214 (1997). The question of whether the State's regulations, which closed the hunting season, restricted the taking \*209 of antlered elk and established a winter feeding station, are necessary conservation measures is not properly before the court.

We limit our inquiry to whether the Oak Creek Wildlife Area is open and unclaimed land within the meaning of the Treaty of Point Elliott.

This court has previously interpreted the meaning of

"open and unclaimed lands" as that term is used in Stevens Treaties in two decisions. Under both decisions, publicly-owned lands are considered "open and unclaimed." In *Miller*, 102 Wash.2d at 680 n. 2, 689 P.2d 81, the court held that national forest land is "open and unclaimed" land within the meaning of the treaty. In *Chambers*, 81 Wash.2d at 934, 506 P.2d 311, this court approved a jury instruction defining "open and unclaimed lands" as "lands which are not in private ownership." These decisions are consistent with those of other jurisdictions interpreting Stevens Treaties. See *Stasso*, 172 Mont. at 248, 563 P.2d 562 (national forest service lands that have not been patented to a private person are open and unclaimed lands within the meaning of a Stevens Treaty); *Arthur*, 74 Idaho at 261, 261 P.2d 135 (the term "open and unclaimed" land as used in a Stevens Treaty was intended to include and embrace such lands as were not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership and may include national forest reserve lands); *Coffee*, 97 Idaho 905, 556 P.2d 1185 (privately-owned land is not open and unclaimed within the meaning of a Stevens Treaty); \*\*1082 *Confederated Tribes of Umatilla Indian Reservation v. Maison*, 262 F.Supp. 871 (D.Ore. 1966) (national forests lands considered open and unclaimed under the terms of a Stevens Treaty), *aff'd sub nom. Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013 (9th Cir.1967). See also *Hicks*, 587 F.Supp. at 1165 (trial court opined that the construction of "open and unclaimed lands" that best accommodates Indian hunting as settlement occurs and matures is that "open and unclaimed lands" include public lands put to uses consistent with an Indian hunting privilege).

\*210 The State, relying on *Hicks*, argues that once the hunting regulations with respect to elk went into effect, the use of the Oak Creek Wildlife Area for hunting was not a compatible use and, therefore, the lands were not open and unclaimed. Our acceptance of this argument would permit the State to avoid its burden of proving that regulations imposed on Indian **treaty hunters** are necessary for conservation purposes. See *Miller*, 102 Wash.2d at 688, 689 P.2d 81. The State has designated the Oak Creek Wildlife Area for use for hunting, fishing and recreation. Limits on these activities in the Oak Creek Wildlife Area are by State regulation. The regulations must comply with standards developed by this court and the United States Supreme Court, and be necessary for conservation if the regulations are restrictive of treaty rights. The trial court's unchallenged finding in this case is that the State has not met its burden in this

regard. [\[FN8\]](#)

[FN8](#). Amicus Department of Fish and Wildlife additionally argues that the status of the land changes as regulations of the State change to close, control, restrict or otherwise put land to uses inconsistent with hunting. In essence, the Department argues that the land is open and unclaimed for elk hunting during the State's elk hunting season, but changes its status when State regulation closes the season in that particular area. This argument ignores established law governing when a State, by **hunting** regulations, can restrict **treaty** rights. See [Antoine v. Washington](#), 420 U.S. 194, 206, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); [State v. McCormack](#), 117 Wash.2d 141, 143, 812 P.2d 483 (1991).

The State also relies on [State v. Cutler](#), 109 Idaho 448, 708 P.2d 853 (1985), to support its argument that lands which are located in a State-owned wildlife area which is operated as a wintering range for elk and deer are not "open and unclaimed." The **treaty** interpreted in *Cutler* was not a Stevens **Treaty** and the pertinent language of the **treaty** provided the Indians had the right to **hunt** on "unoccupied lands of the United States." The *Cutler* court held that the state wildlife area, which was converted from a privately-owned ranch, was "occupied" by the State of Idaho and that sufficient indicia of occupancy existed (fences, signs, cattle guards, cultivated fields, machinery, roads, campgrounds and buildings) to put the Indian hunters on notice that the land was not "unoccupied lands of \*211 the United States." [Cutler](#), 109 Idaho at 454, 708 P.2d 853. The State offered no evidence in this case that would bring it within the rationale of *Cutler*.

[\[23\]\[24\]](#) From the rulings in the various cases which discuss the issue, and in light of the **treaty** language, we discern that a general statement of the rule is that publicly-owned lands, which are not obviously occupied and which are put to a use which is compatible with **hunting**, are "open and unclaimed lands" under the terms of the Stevens **Treaties**. **Treaty hunters** have a right to **hunt** on such lands, unrestricted by State regulation, unless the regulations are necessary for conservation purposes. [Miller](#), 102 Wash.2d 678, 689 P.2d 81. In this case, the Oak Creek Wildlife Area is publicly owned, is obviously unoccupied, and its purposes are compatible with and, in fact, include hunting. The trial court and Court of Appeals correctly determined that the Oak Creek Wildlife Area is open and unclaimed land.

[\[25\]](#) Finally, the State urges this court to hold that the federal statute creating the State of Washington and admitting the state "into the Union on an equal footing with the original States," Act of February 22, 1889, 25 Stat. 676, 678, impliedly abrogated the **treaty hunting** rights of Indians living in Washington.

In support of its argument the State primarily relies on [Ward v. Race Horse](#), 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896), a case in which the Supreme Court held that Congress, in admitting Wyoming to the Union on equal footing with the original states, effectively abrogated the Indian **treaty hunting** \*\*1083 rights of certain **treaty** Indians in Wyoming. See also [Crow Tribe of Indians v. Repsis](#), 73 F.3d 982 (10th Cir.1995) (applying *Race Horse* to another treaty applicable to tribes residing within the [State of Wyoming](#)); [McCoy](#), 63 Wash.2d 421, 387 P.2d 942 (where this court held the treaty fishing rights of Indians who were parties to the Treaty of Point Elliott were impliedly abrogated by Washington's admission to the Union).

After oral argument in this case, the United States Supreme Court effectively overruled *Race Horse* in \*212 [Minnesota v. Mille Lacs](#), 119 S.Ct. at 1211 (Rehnquist, C.J., dissenting) (noting the majority's "apparent overruling sub silentio" of *Race Horse*). The Supreme Court rejected use of the equal footing language to find an abrogation of Indian treaty rights, holding "treaty rights are not impliedly terminated upon statehood." [Mille Lacs](#), 526 U.S. at ----, 119 S.Ct. at 1190.

This decision is consistent with the decisions over the past 100 years, since *Race Horse* was decided, in which the Supreme Court has clarified and refined the law governing interpretation and abrogation of Indian **treaty hunting** and fishing rights. In contrast to the language in *Race Horse*, where the Court discussed the treaty's "grant" of rights to the Indians, the Supreme Court now views the grant as one from the Indians, with a reservation of rights not granted. [Winans](#), 198 U.S. at 381, 25 S.Ct. 662; [Fishing Vessel](#), 443 U.S. at 680, 99 S.Ct. 3055. The Court has further stated that although Congress has the sole power to eliminate a treaty right, [South Dakota v. Yankton Sioux Tribe](#), 522 U.S. 329, 118 S.Ct. 789, 798, 139 L.Ed.2d 773 (1998), its intention to abrogate Indian treaty rights must be clear and plain. [United States v. Dion](#), 476 U.S. 734, 738, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986). Absent explicit statutory language, the Court is "extremely reluctant" to find congressional abrogation of treaty rights. [Fishing Vessel](#), 443 U.S. at 690, 99 S.Ct. 3055. It therefore

will not construe statutes as abrogating a treaty right in a backhanded way but will require "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." [Dion, 476 U.S. at 739-40, 106 S.Ct. 2216.](#)

Furthermore, the Supreme Court has undermined the premise upon which *Race Horse* was decided by holding that "treaty rights to hunt, fish ... are not irreconcilable with a State's sovereignty over the natural resources in the State." [Mille Lacs, 526 U.S. at ---, 119 S.Ct. at 1204.](#) Washington's enabling act, 25 Stat. 676 (1889), differs from the statute admitting Wyoming to the Union, in that the statute admitting \*213 Washington reserves from Washington the right to control lands owned or held by any Indian or Indian tribe. 25 Stat. 676-77 (1889). This clause makes it clear that Congress had the Indians' treaty rights in mind when it created the State of Washington, but did not go on to expressly abrogate the treaty hunting rights. Under *Dion* and *Mille Lacs*, we are unable to hold that, in the enabling act, Congress impliedly abrogated Indian treaty rights. [Fishing Vessel, 443 U.S. at 690, 99 S.Ct. 3055.](#)

Reversed.

[DURHAM](#), [SMITH](#), [JOHNSON](#), [MADSEN](#), [ALEXANDER](#), [TALMADGE](#), [SANDERS](#), JJ., and [DOLLIVER](#), J.P.T., concur.

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## DRAFT

# WDFW Procedural Guidelines for Responding to Assertions of Tribal Traditional Hunting Areas *Draft Version: July 6, 2009*

## INTRODUCTION

There are 24 tribes with off-reservation hunting rights in Washington, of which 23 are treaty tribes (see Appendix A). The Washington state Supreme Court held in *State v. Buchanan* 138 Wn.2d 186 (1999) that the geographical scope of the treaty hunting right includes the lands ceded by the treaty tribes, “and may include other areas if those areas are proven to have been actually used for hunting and occupied by the [tribe] over an extended period of time” (hereafter to referred to as the “*Buchanan test*”). The Court did not provide guidance regarding: the type of evidence required; the process used to evaluate a tribe’s claim; and which entity would review and approve, or deny, the recognition of a tribe’s claim.

The purpose of this document is to outline the Washington Department of Fish and Wildlife (WDFW) process for responding to a treaty tribe’s assertion that it traditionally hunted an area outside of its treaty ceded area. The guidelines outline a collaborative process to review anthropological and historical information in the context of the *Buchanan test*, and may result in a common understanding for a line that will guide future wildlife management discussions and enforcement and prosecution discretion. This process is not intended to result in a final determination of the geographic scope of the treaty right to hunt, nor limit any party’s position in a future determination of the geographic scope of the treaty hunting right.

WDFW needs a process that describes how to review and evaluate a tribe’s traditional hunting area assertion and what enforcement posture to take in light of that assertion and the *Buchanan test*. The recognition of these areas is important to: 1) maintain a cooperative working relationship with the tribes and determine which tribes to work with regarding cooperative wildlife management; 2) to provide clear direction to enforcement officers concerning where tribal members must comply with state licenses and regulations; 3) be consistent with a State Supreme Court ruling; and 4) avoid unnecessary or contentious litigation with unpredictable outcomes. From a treaty tribe’s perspective, it is important that the State recognize areas the tribe claims its members have hunted since “time immemorial.”

Reviewing and acknowledging tribal traditional hunting areas that extend outside of a ceded area will be challenging for WDFW. The tribes may feel that engaging in a process with the state is not necessary because hunting is a right reserved in a treaty with the United States. Some tribes have indicated that they may not want their treaty right linked to management agreements that could be subject to future changes in politics or in state or local leadership. Some tribes may believe their own treaty rights are infringed upon by

decisions to allow other tribes to hunt beyond their ceded area. Also, this issue will likely be contentious with state constituents who may not be familiar with the complexities of off-reservation treaty hunting rights. Therefore, this document outlines a process: to be consistent with the direction provided by the State Supreme Court in *Buchanan*; to be responsive to a tribe's assertion that it traditionally hunted outside of its treaty ceded area; to ensure proper government-to-government consultation with affected tribes and county prosecutors; and to describe a consistent, constructive and defensible process for WDFW's decision of whether or not to enforce state hunting regulations in areas a tribe claims it traditionally hunted.

## **BACKGROUND**

In the 1850s, the United States wanted to ensure that land was available to the increasing number of settlers in Washington. Isaac Stevens, the first Governor and Superintendent of Indian Affairs of the Washington Territory, was authorized by the United States to negotiate with Washington tribes for the peaceful settlement of their traditional lands.

Stevens ultimately negotiated eight treaties with tribes in what would become the State of Washington. The treaties established reservations for the exclusive use of the tribes. In addition, the tribes reserved their right to continue traditional activities on lands beyond these reserved areas. The "Stevens Treaties" all contain substantially similar language reserving the right to hunt, fish, and conduct other traditional activities on lands off of the reservations:

The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with the citizens of the territory...together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands.

The express language of the Stevens Treaties limits the geographic scope of the tribal fishing right to a tribe's "usual and accustomed" areas. In contrast, the treaty language does not expressly limit the geographic scope of the hunting right. Thus, the question has arisen of whether the parties to the treaties intended to have a geographic limit to a tribe's hunting right—and if so, what is the limit.

There is no federal court ruling applicable in Washington that interprets the geographic scope of the treaty hunting right. The Washington State Supreme Court ruled in 1999 in *State v. Buchanan* that a tribe's treaty hunting right extends to the areas ceded to the United States by that tribe, and "may include other areas if those areas are proven to have been actually used for hunting and occupied by the [tribe] over an extended period of time."

Following the *Buchanan* decision, WDFW produced a map delineating the ceded areas boundaries (Figure 1). WDFW sent the map to the tribes for comment in August 1999. The tribes responded and clarified a few technical items, but it also became apparent that the state and the tribes signatory to the Treaty of Medicine Creek had differing

interpretations of the geographic extent of the treaty language. In December 2000, WDFW, the Muckleshoot Indian Tribe, the Nisqually Tribe, the Puyallup Tribe, and the Squaxin Island Tribe, and the Thurston, Mason, Lewis, Pierce, and Grays Harbor county prosecutors entered into an agreement outlining a process for determining the location of the southern boundary of the ceded lands. The agreement called for the joint selection of two mediators. The parties were given the opportunity to submit evidentiary materials and briefings.

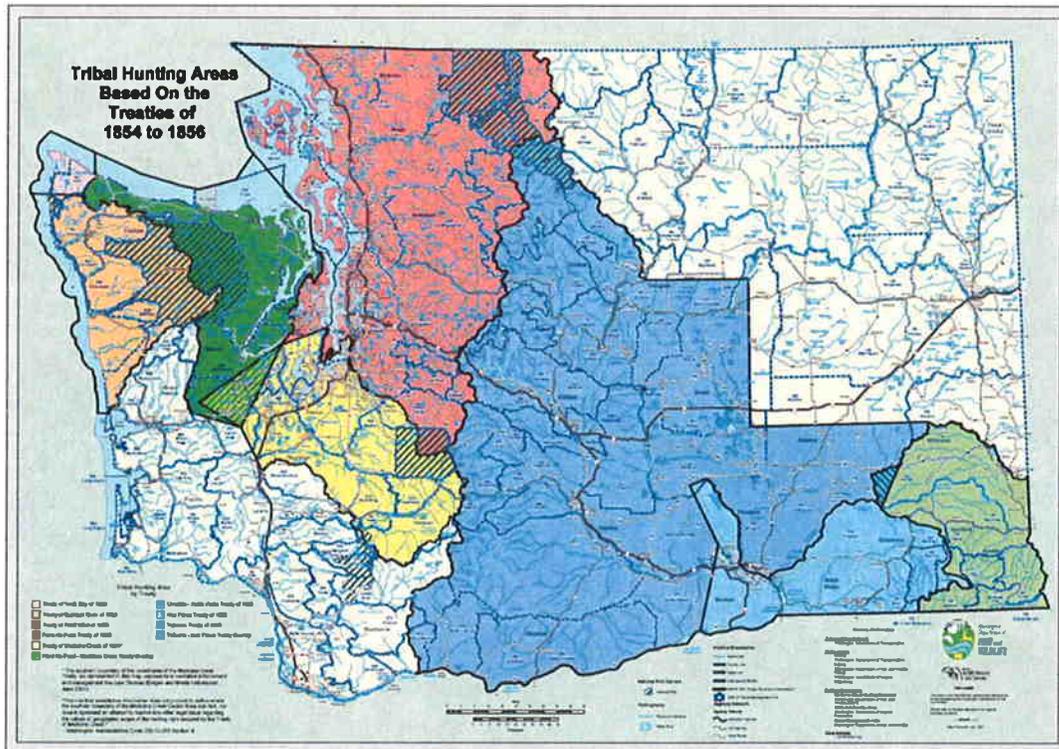


Figure 1: Areas ceded to the federal government described in the Stevens Treaties of the 1850s.

**The parties agreed that the tribes and WDFW would propose the facilitator's determination** as a regulation to their respective legislative bodies. The Fish and Wildlife Commission ultimately adopted a rule indicating that the facilitator's line would be used to guide enforcement staff in the field (WAC 232-12-253). The rule does not purport to set forth the boundary of the ceded area as described in the treaty, since the state does not have the authority to make determinations regarding those boundaries. However, because the parties agreed to use the line to guide management efforts, the line has functioned as an effective substitute for an authoritative court determination of the ceded area boundary since early 2002.

WDFW has responded to the traditional hunting area discussions with treaty tribes on a case-by-case basis since the *Buchanan* decision. Two examples include the Quinault Indian Nation (QIN) and the Makah Tribe. WDFW had a Memorandum of Understanding (MOU) for several years with QIN for them to hunt in two Game Management Units (GMU) that were bisected by the treaty ceded area boundary and one GMU that was outside of the ceded area boundary in its entirety. WDFW had based the decision roughly on QIN's usual and accustomed fishing area. In 2007, QIN requested that WDFW recognize the tribe's assertion to a traditional hunting area that included much of southwest Washington. In 2007 and 2008, WDFW and QIN did not have an MOU for geographic area, and discussions are still on-going. WDFW offered interim enforcement guidance regarding QIN hunting area for the 2008 hunting season.

In 2005 and 2006, WDFW and the Makah Tribe entered into an MOU for the tribe to hunt in GMUs that roughly matched the tribe's usual and accustomed fishing area. In 2005 and 2006, the tribe had opened a GMU outside of the agreement area and in the spring of 2007, WDFW also received an objection from a neighboring tribe, and thus did not renew the agreement in 2007. In early 2008, the Makah Tribe provided WDFW and the Clallam County prosecutor's office evidence that they felt supported their position to open traditional hunting areas outside of the ceded area. WDFW requested that the tribe conduct an outreach effort to the other treaty tribes that the Makah's claimed traditional area would overlap and requested that the Makah Tribe meet with other treaty tribes. The Quileute Tribe requested a meeting with WDFW to present their review of the Makah Tribe's evidence. WDFW met with the Makah Tribe again to present a possible area that WDFW would feel comfortable recognizing, based on the information that the tribe provided. The meeting was left that WDFW would develop a process to evaluate a tribe's claim and we discussed interim enforcement guidance for the 2008 hunting season.

Five tribes contacted WDFW in 2008 requesting that WDFW recognize their asserted traditional hunting areas: Makah for GMUs 602, 603, and 607; Muckleshoot for GMUs 336, 346, and 356; Quinault for GMUs 638, 642, and 648; Sauk-Suiattle for GMUs 203, 218, 231, 242, 244, 245, 249, and 335; and Suquamish for GMUs 621, 624, and 627.

In 2008, WDFW Enforcement program updated the Enforcement Program Regulation 5.95 regarding tribal hunting. The regulation included a flowchart of information to be gathered to determine whether or not a contacted tribal hunter was hunting consistent with the treaty hunting right or if they should be hunting consistent with state licenses and regulations. The flowchart asks officers to determine, among many other things, whether or not the tribal member is a member of a tribe with off-reservation hunting rights and whether or not the tribal member was hunting within that tribe's ceded area or within an area that the Department recognizes as being part of that tribe's traditional hunting area (through an agreement).

## **PROCEDURE FOR RESPONDING TO AN ASSERTION OF A TRADITIONAL HUNTING AREA**

### Process Description:

- There are three possible triggers that would initiate a process to review a tribe's assertion of a traditional hunting area: 1) a tribe requests a meeting with WDFW to discuss traditional hunting areas, either before or after the tribe opens the area to hunting; 2) a tribe opens an area that is outside the treaty area to hunting and the WDFW learns of the action; or 3) WDFW Enforcement contacts a tribal member hunting outside of the tribe's ceded area.
- WDFW would notify affected county prosecutor(s) of the tribe's assertion and seek confirmation that the prosecutor(s) support WDFW's proposed evaluation process.
- WDFW would request a meeting with the tribe to describe the evaluation process, including the county prosecutor(s)' role, and to determine the scope of the area the tribe asserts it traditionally hunted. WDFW would request that the tribe provide documentation supporting the tribe's assertion
- The second meeting between WDFW and the tribe would consist of an oral overview of the type of evidence the tribe has to support its assertion, and would allow WDFW to make an initial evaluation to determine if there is enough evidence to proceed further and engage other affected tribes and county prosecutors.
- WDFW would also ask the tribe to meet with other affected tribes in the area the tribe asserts it traditionally hunted and to document their response. Refusal of an affected tribe to meet with either the tribe asserting evidence or with WDFW will not prevent the process from continuing.
- Tribe submits written documentation supporting its assertion (described in more detail in the section titled, "Traditional Hunting Area Documentation"). WDFW staff would review documentation and share with affected county prosecutors.
- If an affected tribe opposes another tribe's asserted traditional hunting area, WDFW would consult with the affected tribe to see if it has documentation that shows that the tribe asserting a traditional hunting area does not meet the *Buchanan* test. Before deciding its position, WDFW would the notify the affected tribe and provide at least 30 calendar days to respond with written documentation, or submit a request for additional time, ordinarily not longer than 45 days, to prepare their documentation. Ideally, an affected tribe would document its position through a council resolution or letter so that all parties involved understood if the affected tribe were supportive, neutral, or opposed to the asserted traditional hunting area.
- WDFW and county prosecutors would then meet to determine, in light of the Buchanan test, if there is sufficient information to develop a management and enforcement boundary (i.e., to delineate an area outside a tribe's ceded area, where the state would not take an enforcement action against tribal members hunting on "open and unclaimed lands"). This overall evaluation process would likely take considerably longer if the tribes submit contradictory documentation or otherwise disagree.

In making this determination, WDFW and the prosecutors would consider the allocation and prioritization of available, but often limited, enforcement and prosecutorial resources.

- It is important that the enforcement area boundary created be as clear as possible, with borders following distinguishable features such as existing GMU boundaries, roads, rivers or other obvious landmarks.
- WDFW would notify the tribe seeking recognition of a traditional hunting area and other affected tribes and county prosecutors of any management/enforcement line. The letter would state WDFW's present intention not to cite tribal hunters hunting on "open and unclaimed lands" within the described enforcement boundary, but would include the following reservations: that WDFW is not waiving state authority; that WDFW is not making a determination of the geographic scope of the off-reservation treaty hunting right; that WDFW would notify the tribe should its position change in future due to new evidence or for other reasons; and that WDFW requests the tribe seeking recognition of their traditional hunting area to adopt similar hunting regulations regarding opening hunting areas within the ceded area and the derived enforcement/management line.
- WDFW would ensure internal communication of the enforcement boundary to Wildlife and Enforcement Program staff. WDFW's final decision would be recorded in a memo to the file regarding the enforcement boundary, the steps taken to reach that conclusion, and a summary of supporting evidence that the decision was based upon.
- WDFW would refer tribes with inter-tribal disputes to seek resolution elsewhere.

WDFW staff engaged in traditional hunting area evaluation:

Agency staff engaged in process:

- Wildlife Policy Coordinator, IRM
- Regional Director of area(s) in question
- Enforcement Captain of area(s) in question
- Assistant Attorney General, AGO

Other agency staff informed and involved as needed:

- Director's Office
- Chief and Deputy Chief, Enforcement Program
- Assistant Director, IRM
- Regional Wildlife Program Manager in area(s) in question, to address any resource management issue.
- Regional staff within tribe's ceded area because of working relationship with WDFW.

**TRADITIONAL HUNTING AREA DOCUMENTATION**

Documentation supporting or refuting a tribe's claim to a traditional hunting area should be in light of the Buchanan test requiring that the area be proven to have been actually used for hunting and occupied by the tribe over an extended period of time. Below is a list of some of the type of evidence and documentation that should be considered in the evaluation of a tribe's claim to a traditional hunting area:

- Ethnographic information—may provide some of the best evidence available for geographic distribution at treaty times
- Elder testimony
- Anthropological evidence—village sites, camps, artifacts, etc. that can be assigned to the tribe seeking recognition that the area was used for hunting
- Linguistic evidence—in particular, names of places within that tribe's language or events that occurred in certain areas
- Other tribes' recognition of a tribe's use of the area
- *US v Washington*—while this case established U&As for salmon fishing, the Finding of Facts may include other cultural information and should consider both tribal and state evidence (was there State evidence for anthropological evidence submitted?)
- Journals of settlers/explorers
- 19<sup>th</sup> Century Maps and Surveys
- Indian Claims Commission

Appendix A: Treaty tribes with off-reservation hunting rights in Washington.

*Treaties between the United States of America and Northwest Indian Tribes*

<b>Treaty</b>	<b>Indian Tribes</b>	<b>Location and Date</b>
Treaty with the Yakamas	Yakama confederated tribes and bands	Camp Stevens, Walla Walla Valley June 9, 1855
Treaty with the Walla Wallas	Walla Walla, Cayuse and Umatilla tribes and bands	Camp Stevens, Walla Walla Valley June 9, 1855
Treaty of Olympia	Quinault, Hoh, and Quileute	Qui-nai-elt River January 25, 1856
Treaty of Point No Point	Jamestown S'Klallam, Port Gamble S'Klallam, Lower Elwha, Skokomish	Point No Point, Suquamish Head January 26, 1855
Treaty of Point Elliott	Lummi, Nooksack, Stillaguamish, Swinomish, Upper Skagit, Suquamish, Sauk Suiattle, Tulalip, and Muckleshoot	Point Elliott January 22, 1855
Treaty with the Nez Percés	Nez Perce Tribe	Camp Stevens, Walla Walla Valley June 11, 1855
Treaty of Neah Bay	Makah	Neah Bay January 31, 1855
Treaty of Medicine Creek	Nisqually, Puyallup, Squaxin Island, Muckleshoot	Medicine Creek December 26, 1854