

Tribal Claims and Interests in Natural Resource Damages: Implications of the Culvert Case

KEY CASES

United States v. Washington, 853 F.3d 946 (9th Cir. 2017) (state violates Stevens treaties by owning culverts that restrict fish passage under state roads; tribes have a treaty right to be supplied with enough salmon to allow them to earn a moderate living from fishing and state-owned culverts interfere with that right), *reh'g en banc denied*, ___ F.3d ___, 2017 WL 2193387 (9th Cir. 2017)

United States v. Washington, 694 F.2d 1374 (9th Cir. 1982) (Stevens treaties do not establish an environmental servitude; treaties do not guarantee the tribes a moderate living from fishing), *vacated*, 759 F.2d 1353 (9th Cir. 1985) (*en banc*).

United States v. Winans, 198 U.S. 371 (1905) (Yakama Nation has a servitude/easement in off-reservation treaty usual and accustomed fishing places)

Whitefoot v. United States, 293 F.2d 658 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) (describing U.S. compensation to the Yakama Nation for usual and accustomed fishing places inundated by The Dalles Dam; individual tribal members do not have a personal property interest in usual and accustomed places)

Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994) (because Tribe has no property interest in the fish runs in the Snake River, there is no legal basis for a damages remedy for harm to fish runs caused by private electric utility's dam)

Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005) (*en banc*), *cert. denied*, 546 U.S. 1090 (2006) (no language in tribe's treaty with the United States supports an implied right of action against municipal electric utility, a non-party to the treaty, for damages for harm to fish runs caused by utility's hydropower project; dissent recognizes that tribe's claim is akin to a servitude or property right for which there could be a damages remedy against a non-party)

Klamath Tribes of Oregon v. PacifiCorp, 2005 WL 1661821 (D. Or. 2005), *aff'd*, 268 Fed. Appx. 575 (9th Cir. 2008), *cert. denied*, 555 U.S. 821 (2008) (tribe's treaty with the United States did not support an implied right of action against private electric utility for damages for harm to on-reservation fishery caused by utility's dams; tribe lacked a legal basis for a damages claim based on common law trespass because there was no allegation of interference with property interests in land)