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A 164-year old treaty. Native American fishing rights. Dwindling migratory salmon stocks. Twenty-first century road and highway engineering practices. Environmental justice. Federalism principles.

These are the essential elements of what is perhaps the most interesting and potentially consequential environmental law-related case on the U.S. Supreme Court's current docket. *Washington v. United States*, 17-269, is a last-minute addition to the Supreme Court's 2017-18 term, with the justices having granted certiorari this past January. The court has scheduled oral arguments in the case for April 18.

Fundamentally, the *Washington* case raises key questions about the scope of fishing rights the government granted to Native American tribes in western Washington state. Are those rights limited to whatever fish happen to exist in state waterways at any particular time, as state officials argue? Or do these tribal rights extend to modernizing and remediating bridges that have in recent years played a key role in decimating fish stocks in those waterways? Underlying issues involve the federal-state relationship and basic questions of environmental justice.

The current legal dispute finds its origins in a series of 19th century treaties between the federal government and Indian tribes inhabiting the Pacific Northwest. In exchange for relinquishing their claims to large amounts of lands in northwestern Washington including the Puget Sound watershed, the tribes were guaranteed a broad right to on- and off-reservation fishing. The "fishing clause" contained in the 1854-55 "Stevens Treaties" (named for then-Governor of Washington Territory and Superintendent of Indian Affairs Isaac Stevens, who led the government's negotiations with the tribes) guaranteed the tribes "the right of taking fish, at all usual and accustomed grounds and stations ... in common with all citizens of the Territory."

Following the pattern of most 19th century Indian treaties, the Stevens Treaties turned out badly for the western Washington tribes. They dutifully relocated to reservations a fraction of the size of their traditional homelands. But the fishing rights they'd negotiated and considered so important were quickly trampled -- both by white homesteaders who relocated in the territory and frequently denied Native Americans access to the waters of northwest Washington (often via threats and overt violence) and by white commercial fisherman who by the end of the 19th century were catching enormous quantities of salmon in the region, leaving precious little salmon for tribal members using their more traditional fishing methods.

This state of affairs prompted numerous political and legal conflicts in the late 19th and 20th centuries, including two cases ultimately decided by the U.S. Supreme Court -- both in the tribes' favor. In several instances, those fishing conflicts pitted the tribes and federal government against Washington state, which until the 1970s overtly and repeatedly acted to frustrate the tribes' exercise of their on- and off-reservation fishing rights. (Washington state was admitted to the union in 1889.)

The United States, on its own behalf and as trustees for the Pacific Northwest tribes, sued Washington

state in federal court in 1970 to address the state-federal/tribal political conflicts and enforce the Stevens Treaties' fishing clause. By that time, however, the single greatest threat to the tribes' fishing rights had become modern technology -- specifically, the extensive system of road culverts that the state and its political subdivisions had built to divert rivers and streams to flow underneath the state's extensive road and highway system. It's essentially undisputed that Washington's road culvert system substantially impedes the migration of anadromous salmon upstream and downstream; that, in turn, has led to the substantial diminution of salmon populations in western Washington, to the detriment of Native American and white fishers alike. (It's also undisputed that the technology exists by which road builders can avoid this result by building culverts that allow unobstructed fish passage.)

In an earlier phase of this longstanding litigation, the district court held -- and the Supreme Court ultimately confirmed -- that under the Stevens Treaties the tribes have the right to up to 50 percent of the harvestable fish in the affected region of Washington.

The latest chapter in this legal saga began in 2001, when the tribes and the federal government jointly asked the district court "to enforce a duty upon the State of Washington to refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced." Washington's response to the claim was straightforward: "there is no treaty-based right or duty of fish habitat protection" as asserted by the government and tribes.

The district judge ruled in favor of the tribes and U.S., concluding that the fishing clause of the Stevens Treaties imposes a duty on Washington state to refrain from building or operating culverts under state roads that hinder fish passage and thereby substantially diminish the number of fish that would otherwise be available for tribal harvest. Thereafter, the district court held a trial to determine the appropriate relief, eventually issuing a detailed injunction requiring state officials to inventory all state-owned barrier culverts; take immediate steps to retrofit some of the most damaging culverts; and require the remainder to be retrofitted at the end of their useful lives.

The 9th U.S. Circuit Court of Appeals affirmed in a lengthy, unanimous decision authored by Judge William Fletcher, perhaps that court's most respected voice on environmental and natural resources legal issues. The Court of Appeals ruled that by building and maintaining a system of barrier culverts, "Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties." Rejecting Washington state's argument that the government's treaty obligations do not extend to fisheries habitat protection, Judge Fletcher wrote: "The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise."

Hopefully, the Supreme Court will affirm the lower courts' rulings finding Washington state in violation of the tribes' treaty-based fishing rights.

In its successful petition for certiorari, Washington state argues that its obligations under the Stevens Treaties do not extend to guaranteeing fish-friendly culverts and road projects; that the federal government is equitably estopped from arguing to the contrary by virtue of having approved some of the offending culverts; and that the injunctive relief granted by the lower courts offends federalism principles and imposes an undue financial burden on the state.

Two significant points are noteworthy as the Supreme Court justices hear oral arguments in this case. First, the court clerk recently issued a notice indicating that Justice Anthony Kennedy only belatedly discovered that he'd participated in an earlier phase of this litigation while sitting on the 9th Circuit. As a result, he has -- following Supreme Court custom -- recused himself from the court's consideration of the

Washington case. (That would be even more noteworthy if this were a "normal" Supreme Court case in which Justice Kennedy's vote would likely be decisive; but Native American law cases generally don't track the justices' normal progressive/conservative voting patterns.)

Second -- and contrary to its position in other environmental law cases the federal government is currently litigating -- the Trump administration has maintained the strong advocacy on behalf of the tribes' fishing rights under the Stevens Treaties that was a hallmark of the federal government's advocacy in Washington under previous Republican and Democratic administrations. President Donald Trump and Attorney General Jeff Sessions deserve credit for that.

Looking ahead, the federal government and the tribes have the better of the argument in *Washington*. Hopefully, the Supreme Court will affirm the lower courts' rulings finding Washington state in violation of the tribes' treaty-based fishing rights. Since time immemorial and to this day, Indian tribes in the Pacific Northwest have depended on salmon not just for their own consumption and to sell commercially, but also as an important part of their religious and cultural practices. And the 9th Circuit is quite correct in concluding that Washington state's legal argument -- that constructing environmentally damaging infrastructure responsible for devastating fisheries on which the tribes depend somehow does not contravene longstanding obligations under the Stevens Treaties -- is a cynical and atomistic position indeed.

At bottom, *Washington v. United States* is a case about environmental justice, and the legal and moral obligation of government to live up to the spirit and letter of its duty to Native American tribes under longstanding treaties. For centuries, government has failed to do so. Let's hope that the Supreme Court's decision in *Washington* follows a different, more just path.

The justices will issue their decision in the *Washington* case by the end of June.