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NO. 1012896

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
ANDREW LARRY SIMMONS and MICHAEL MYRON SIMMONS,
Petitioners.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Two members of the Cowlitz Tribe petition this Court to determine whether they continue to enjoy their former hunting and fishing rights that accompanied aboriginal title to the lands of Southwest Washington, despite their tribe having not signed a treaty with the U.S. Government. While, other than this case, Washington courts have not been asked to make such a determination relative to the Cowlitz Tribe, this question has previously been adjudicated and settled in the federal courts. This Court, like the lower court before it, need only review these federal decisions to see that Petitioners raise issues already fully settled factually and legally, and that this Court need not grant the petition.

The Cowlitz, along with the Chinook, Shoalwater, and Chehalis tribes, engaged in treaty negotiations with Washington's Territorial Governor in the 1850s, but could not reach an agreement. With settlers coming in greater numbers to the Pacific Northwest in the 1850s and 1860s, Congress made

clear its intent to enter into treaties with the northwest tribes to obtain tribal relinquishment of land claims, while also directing the executive branch to survey and sell unoccupied lands. Without a treaty in place, the federal government opened the Cowlitz Tribe's aboriginal lands to settlement.

Nearly 100 years later, the Cowlitz tribe adjudicated the loss of its aboriginal title. The Indian Claims Commission determined that a series of Congressional policies and actions during those initial decades of tribal relations and settlement served to extinguish the aboriginal title of not just the Cowlitz Tribe, but several other tribes in southwest Washington that had not signed treaties. Ultimately, the I.C.C. determined a presidential proclamation in 1863, putting unoccupied lands up for sale, marked the determinate event to end the aboriginal title for these tribes. With that extinguishment went the aboriginal right to hunt and fish on non-reservation lands.

II. RESTATEMENT OF ISSUES ON REVIEW

The federal government extinguished the Cowlitz Tribe's aboriginal title through congressional action and executive orders in the 19th century, opening unoccupied land in southwest Washington to settlement and sale.

The extinguishment of off-reservation aboriginal rights of non-treaty tribes such as the Cowlitz has been extensively litigated and adjudicated in the federal courts, and is a matter of settled law: the Cowlitz do not have off-reservation aboriginal rights as they were extinguished in 1863.

Petitioners have failed to satisfy the requirements of RAP 13.4(b)(1), (3) and (4) for discretionary review by this Court as the decision of the Court of Appeals below, *State v. Simmons,* 2022 WL 3365394, affirming the district court and superior court, does not conflict with a decision of this Court, does not present a *significant* question of law under the state or federal constitutions, but rather a question of *settled law,* and does not involve an issue of substantial *public* interest to be decided by

this Court, as this case only involves the petitioners herein and their convictions, and is settled under federal law.

III. STATEMENT OF CASE

A. Facts of the Case and Procedural Posture

Petitioners Andrew and Michael Simmons, enrolled members of the Cowlitz Tribe, were convicted in Grays Harbor District Court of Unlawful Recreational Fishing in the Second Degree, contrary to RCW 77.15.380(1), RCW 77.32.010(1) & WAC 220-22-030 (no clam license), and Unlawful Recreational Fishing in the First Degree, contrary to RCW 77.15.370(1)(a) (possession of more than twice the limit of clams). These convictions followed trial on stipulated facts held on September 27, 2019.

On April 30, 2017 the Petitioners, father and son, were found on Copalis Beach in Grays Harbor County by a state Fish and Wildlife officer harvesting razor clams with an overlimit number of razor clams in their clam bags. Upon contact, the Petitioners produced Cowlitz Tribal identification and stated

they were participating in a tribal harvest through the Quinault Tribe.[1] The Petitioners did not have state-issued recreational shellfish licenses. The pair were charged in Grays Harbor District Court.

Petitioners moved to dismiss the charges as a matter of law. They argued that they were not subject to state regulations regarding razor clam limits or licensing when at their usual and accustomed fishing locations because, as members of the non-treaty Cowlitz Tribe, they enjoy full aboriginal rights to fish that are not subject to state regulation. Judge Copland, after hearing argument and reviewing *Confederated Tribes of the Chehalis Indian Reservation v. State of Washington,* 96 F.3d 334 (9th Cir. 1996), *cert. denied,* 520 U.S. 1168 (1997), found the case to be dispositive and denied the motion by letter order. A stipulated-facts bench trial followed and the court found both Petitioners guilty.

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[1] Notably, the Quinault Indian Nation had not approved a tribal razor clam harvest that day. And even if it had, it would not have extended to members of the separate Cowlitz Tribe.

The Petitioners appealed to the Grays Harbor County Superior Court which affirmed the District Court on the same grounds.

The Petitioners, acting individually and not on behalf of the Cowlitz Tribe, petitioned the Court of Appeals, Division II, for discretionary review, which was granted December 4, 2020. The Court of Appeals affirmed Petitioners' convictions and the Grays Harbor County Superior Court in a published opinion, holding in part:

> Viewing the historical record, including our de novo review of the consequences of the 1863 Lincoln Proclamation and the related congressional action facilitating the sale of the Cowlitz Tribe's land, and consistent with the interpretation made by *Confederated Tribes* and *Plamondon,* [*Confederated Tribes of Chehalis Indian Reservation v. Washington,* 96 F.3d 334 (9th Cir. 1996) and *Plamondon ex rel. Cowlitz Tribe of Indians v. U.S.,* 467 F.2d 935 (Ct. cl. 1972)] the Cowlitz Tribe's off-reservation aboriginal rights to fish have been extinguished. Accordingly, we determine that the superior court did not err in making this same determination.

State v. Simmons, 2022 WL 3365394 at 12.

This petition follows, urging this court to accept review under RAP 13.4(b)(1) (court of appeals decision conflicts with decision of the Supreme Court), (b)(3) (significant question of law under the state or federal constitution) and (b)(4) (case involves issue of substantial public policy that should be decided by the Supreme Court).

B. Background of Cowlitz Tribal Aboriginal Title and Adjudication Thereof

The Cowlitz people are a tribe located in Southwest Washington with historical territory reaching from the lower Cowlitz river basin to the Willapa hills and shores of Willapa Bay. During negotiations with Governor Stevens in 1855, the Cowlitz and other tribes objected to the federal government's position that they would need to move to land reserved for them at the present site of the Quinault reservation. For that, and other reasons, negotiations did not produce a treaty with the Cowlitz and other southwest Washington tribes. At the same time and thereafter, the federal government, through a series of

congressional acts such as the Homestead Act (12 Stat. 392), an Act to Create the Office of Surveyor General of the Public Lands in Oregon (9 Stat 496)[2] and its amendment (10 Stat. 158), as well as forestry policy acts of the 1890s, (e.g. 26 Stat. 1095) directed the President and Executive Branch to dispose of and sell the Cowlitz' aboriginal lands for settlement or to place some in national forest preserves.

Congress created the Indian Claims Commission (ICC) in 1946 to hear and determine all tribal claims against the United States that accrued up to that date, ranging from violations of treaties, government takings without compensation, and violations of the government's trust obligations. In 1951, Simon Plamondon brought a claim on behalf of the Cowlitz Tribe seeking compensation for the government's taking of the tribe's aboriginal title to lands in southwest Washington (at issue was

[2] The act was titled in full "An Act to create the Office of Surveyor General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to the Settlers of the said Public Lands."

only the *date* of extinguishment and the amount of compensation due, not the *fact* of extinguishment).

Following more than a decade of gathering evidence, the ICC determined 18 years later that the Cowlitz Tribe's aboriginal title had been extinguished by a Presidential proclamation on March 20, 1863 (No. 693), directing the sale of surveyed lands in the Washington Territory. The Tribe appealed the ICC decision, asserting the 1863 date was incorrect because the United States had taken the Cowlitz land on a piecemeal basis following the collapse of treaty negotiations with the tribe in 1855, pointing to 1889, 1893, 1897 and 1907 as the dates of federal action to extinguish the tribe's aboriginal title. The U.S. Court of Claims upheld the ICC's determination.

In 1983, the Chehalis and Shoalwater Bay tribes sought to intervene in the *United States v. Washington* federal litigation that reaffirmed and adjudicated the treaty rights of tribes in Washington to co-manage salmon and other fish, and to continue harvesting up to half of the total fish harvest each

year, in accordance with their various treaties. The State initiated subproceeding 83-3 in 1983 to determine which tribes can take fish from the Chehalis River and the Grays Harbor system. The Chehalis and Shoalwater Bay tribes initiated a separate lawsuit, which merged with subproceeding 83-3, asking the Court to declare that each tribe may fish off its reservation at its usual and accustomed fishing grounds. The tribes argued three distinct and independent legal theories—they retained aboriginal fishing rights by virtue of not ceding them through a treaty; the Executive Orders that established their reservations implied hunting and fishing rights beyond their reservation; and that the off-reservation rights to hunt and fish that the Quinault Indian Nation reserved in the Treaty of Olympia extended to them as the two plaintiff tribes were "affiliated" with the Quinault Indian Nation. The District Court rejected each of these three distinct theories. The tribes appealed to the Ninth Circuit, which upheld the District Court's

decision in *Confederated Tribes of the Chehalis*, *infra*, which is now the focus of this appeal.

IV. ARGUMENT

The question of when Indian rights reserved under federal treaties preempt state law has been exhaustively litigated. “Treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are the supreme law of the land.” *State of Missouri v. Holland*, 252 U.S. 416, 432, 40 S. Ct. 382, 383, 64 L. Ed. 641 (1920). “Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law applicable to all citizens." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L.Ed.2d 114, 119 (1973). This rule provides the framework to analyze a legal argument, such as the Petitioners’, that a tribe has rights that preempt state law.

No treaty or affirmative federal action reserves or grants the Cowlitz tribe off-reservation fishing rights. Instead, Petitioners argue that their aboriginal rights remain in the absence of express Congressional action to extinguish it. Petitioners ignore that multiple Congressional acts, and executive orders pursuant to Congressional authority, actually extinguished the Cowlitz aboriginal title, and with it, use and occupation rights such as hunting and fishing. Petitioners also ignore that federal courts, as discussed below, have already thoroughly considered, adjudicated, and determined the extinguishment of the Cowlitz' aboriginal title in such cases such as *Confederated Tribes*.

A. The Ninth Circuit Rejected the Petitioners' Argument in *Confederated Tribes*, Hence Its Direct Applicability

Federal courts have rejected, at every opportunity, the Petitioners' theory that aboriginal title and hunting and fishing rights continue to exist for the non-treaty tribes of southwest Washington. As it pertains to aboriginal fishing rights by non-

treaty tribes in southwest Washington, the issue has specifically been litigated as part of *United States v. Washington*[3] in subproceeding 83-3. See *United States v. Washington (Shoalwater)*, 18 F. Supp. 3d 1172, 1181-1202 (W.D. Wash. 1991); *affirmed sub. nom. Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (9th Cir. 1996), *cert. denied* 520 U.S. 1168 (1997).[4]

Confederated Tribes upheld the determination that the Chehalis and Shoalwater Bay tribes have no off-reservation rights and therefore could not intervene in the *United States v. Washington* treaty tribal fishing proceeding. The decision bears directly on the question in this matter because, even though the Cowlitz Tribe did not join the subproceeding, the Court

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[3] Following the original *United States v. Washington* decision, known as the Boldt Decision, (384 F. Supp. 312, *aff'd*, 520 F.2d 676 (9th Cir. 1975)), the U.S. District Court for Western Washington retained continuing jurisdiction to hear and decide controversies stemming from treaty fishing rights, including intertribal disputes, allocation, decisions to include hatchery-raised fish in the tribal allocation (506 F. Supp. 187, 191 (1980), *aff'd in part, rev'd in part by* 694 F.2d 1374 (9th Cir. 1983)), and the culverts decision, requiring State of Washington to replace or mitigate for state-owned fish barriers (20 F. Supp. 3d 1000-26 (2013), *aff'd* 853 F.3d 946 (9th Cir. 2017)). *United States v. Washington* remains the exclusive venue for federal adjudication of tribal fishing rights in the Puget Sound and Washington's coastal waters.

[4] The district court's decision will be referred to as the *Shoalwater* decision, and the Ninth Circuit's decision will be cited as *Confederated Tribes.*

specifically named the Cowlitz Tribe, along with other non-party tribes, as all having their aboriginal rights extinguished due to their similar situation. *Confederated Tribes*, 96 F.3d at 341–42. For this reason, the Grays Harbor District Court, and Grays Harbor Superior Court, correctly read *Confederated Tribes* as pertaining to all the similarly situated tribes of southwest Washington, and concluded that *Confederated Tribes* answered the question presented by the Petitioners in defense of their fishing violations. The trial court found "no meaningful distinction between the Chehalis and Cowlitz tribes for purposes of aboriginal fishing rights." CP 43. The superior court made a near-identical ruling, finding that "*Confederated Tribes* … is controlling and that any aboriginal fishing rights claimed herein were extinguished by an 1863 executive order opening lands for non-Indian settlement." CP 154-55. Indeed, there is no meaningful distinction between the posture of the Chehalis and Shoalwater Bay tribes and the Cowlitz Tribe as it relates to extinguishment of aboriginal rights—the same

executive order that terminated the aboriginal title of the Shoalwater and Chehalis tribes extinguished the aboriginal title of the Cowlitz.

B. Petitioners Fail to Demonstrate that *Confederated Tribes* Does Not Apply to the Cowlitz Tribe.

The Chehalis and Shoalwater tribes argued three distinct alternative theories why they retained off-reservation fishing rights and should be party to *U.S. v. Washington*. Petitioners incorrectly conflate the arguments, asserting that the Grays Harbor County District Court and Superior Court and the Court of Appeals misread *Confederated Tribes* because the case involved a claim by the Chehalis Tribe that they had come to possess fishing rights reserved by the Quinault treaty tribes and that the ruling thus does not apply to the Cowlitz Tribe. Petition for Review, 18. This argument touches on one of the three distinct arguments made and rejected in *Shoalwater* and *Confederated Tribes*—that the plaintiff tribes' off-reservation rights flowed from the treaty with the Quinault. *Shoalwater,* 18

F. Supp. 3d at 1181. The argument was made and rejected completely independent of the argument that the tribes of southwest Washington had full aboriginal rights by virtue of not signing any treaty. Petitioners completely ignore the distinct and separate issues that formed the basis for the decision in *Confederated Tribes* when they argue that "the trust cannon of Indian law did not apply because there were Indian interests of both sides of the argument. That is not the case here." Petition for Review, 22.

As noted by the court of appeals in its decision below:

> *Confederated Tribes* involved several alternative claims by the tribes. *See generally,* 96 F.3d 334. One of these involved a claim by the Chehalis Tribe that they possessed the treaty fishing rights of the Quinault because of their historical connection with the Quinault. *Id.* at 340. Because this claim involved the conflicting interests of two different tribes, the Chehalis and the Quinault, the court reasonably concluded it could not apply the typical canon of tribal preference to that specific claim – which tribe, for example, would receive the preference? *See id.* at 340-41.
>
> However, this argument that created a conflict between the tribes *was only one discrete legal issue*

> in *Confederated Tribes.* As explained above, the case also addressed, as a completely separate issue, the aboriginal rights of the Confederated Tribes. There was no conflict between the plaintiff tribes and the Quinault with regard to the aboriginal rights issue, and on that issue, the court was silent as to any rejection of the canon of tribal preference. *Id.* at 341-42. *Petitioners provide no convincing basis to reject the application of Confederated Tribes to this case.*

Simmons, 2022 WL 3365394 at 12 (emphasis added).

The *Shoalwater* and *Confederated Tribes'* decisions regarding the extinguishment of the Cowlitz Tribes aboriginal title is sound and there is simply no room to read the decisions in the hyper-deferential manner Petitioners suggest so as to arrive at any different result. Petitioners cannot and do not undermine the holding in *Confederated Tribes* as it pertains to aboriginal fishing rights, and fail to show that the trial court misread the *Confederated Tribes* decision, or failed to differentiate between the legal theories. The trial court specified that it found no meaningful difference between the tribes "for purposes of aboriginal fishing rights" (CP 43) and made no

reliance on either of the alternative legal theories with less connection to the Cowlitz Tribe. The district court correctly relied on *Confederated Tribes* in denying the Petitioner's motion to dismiss.

C. The Federal Government Extinguished the Cowlitz Aboriginal Title, and With It, Hunting and Fishing Rights

No treaty between the Cowlitz Tribe and the United States reserves any indigenous rights of the Cowlitz People. Therefore, any rights still enjoyed by the tribe or tribal members must be tied to the existence of aboriginal title. "Aboriginal title refers to the right of the original inhabitants of the United States to use and occupy their aboriginal territory." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 75 S.Ct. 313, 317, 99 L.Ed. 314 (1955). Indian title based on aboriginal possession is a permissive right of occupancy. *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 (9th Cir. 1981) (citing *Tee-Hit-Ton Indians*, 348 U.S. at 279). That aboriginal title can be extinguished, as it "exists at

the pleasure of the United States, and may be extinguished by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy or otherwise." *United States v. Santa Fe Pacific R.R. Co.,* 314 U.S. 339, 347, 62 S.Ct. 248, 252, 86 L.Ed. 260 (1941). The power of Congress in this regard is supreme and the manner, method, and time of such extinguishment raise political issues. *Id.*

Extinguishment of aboriginal title invariably terminates corresponding use and occupancy rights, including hunting and fishing rights, except where a treaty, statute or executive order expressly or impliedly reserves such rights. *Western Shoshone National Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 74 (1992); *United States v. Dann*, 873 F.2d 1189 (9th Cir.), cert. denied, 493 U.S. 890 (1989); *see also United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), cert. denied, 449 U.S. 905 (1980) (aboriginal hunting and fishing rights are "mere

incidents of Indian title, not rights separate from Indian title").

D. The Cowlitz Tribe Adjudicated the Extinguishment of Its Aboriginal Title before the Indian Claims Commission.

Congress passed the Indian Claims Commission Act in 1946, establishing the Indian Claims Commission (ICC) to settle claims against the U.S. Government including whether aboriginal titles and corresponding rights had been extinguished without fair compensation. 25 U.S.C. § 70a (suppl. 2 1958). Congress deliberately used broad terminology in the Act in order to permit tribes to bring all potential historical claims and to thereby prevent them from returning to Congress to lobby for further redress. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Engineers*, 570 F.3d 327, 331 (D.C. Cir. 2009).

In *Molini*, the Court relied on payment of an ICC claim by Congress as "ratification" of the claim that aboriginal title had been taken and extinguished. *Molini*, 951 F.2d at 203; *U.S. v. Gemmill,* 535 F.2d 1145, 1147 (9th Cir. 1976) ("[A]ny

ambiguity about extinguishment that may have remained after the establishment of the forest reserves, has been decisively resolved by congressional payment of compensation to the Pit River Indians for these lands."); *In Re Wilson,* 634 P.2d 363, 368, 177 Cal. Rptr. 336 (1981) (ICC finding and settlement resolved extinguishment of Pit River Indian title).

The question of whether the Cowlitz Tribe's aboriginal title had been extinguished, and if so when, reached the ICC in the late 1960s. The ICC looked at several factors, including several acts of Congress that had the effect of extinguishing the tribe's aboriginal title, discussed further below. Ultimately, the ICC determined a Presidential Proclamation on March 20, 1863, ordering unoccupied public land in the Washington Territory to be sold, operated as the key federal action to deprive the tribe of its aboriginal title to that land. 25 Ind. Cl. Comm. 442, 443 (1971).[5]

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[5] The ICC first ruled that 1855, when treaty negotiations ended, marked the end of aboriginal title, but on reconsideration adjusted its finding to 1863 and the date of the Presidential Proclamation.

1. The Indian Claims Commission identified Congressional intent and executive actions extinguishing aboriginal title in southwest Washington

Specifically, the ICC pointed to the June 5, 1850, Act Authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, for the Extinguishment of their Claims to Lands lying west of the Cascade Mountains (9 Stat. 437), stating that all aboriginal claims to land of all tribes west of the Cascade Mountains should be extinguished by treaty, and the September 27, 1850, "Act to Create the Office of Surveyor General of the Public Lands in Oregon, and to Provide for the Survey, and to Make Donations to the Settlers of the said Public Lands" (9 Stat. 496), wherein Congress created in the executive branch the Office of Surveyor General of Oregon Territory and directed the office to survey the lands located west of the Cascade Mountains. 25 Ind. Cl. Comm. at 449. On February 14, 1853, Congress amended that act, declaring that by April of 1855, all the lands west of the Cascades were to become subject

to public sale, and directing the President to order such disposal and sale. 10 Stat. 158.

"Rather than negotiating treaties with these tribes, Congress now intended that their aboriginal title be extinguished by their removal from their lands." 25 Ind. Cl. Comm. at 450-51.

The Commission chose the Presidential Proclamation on March 20, 1863, where President Lincoln announced the public sale by the Land Office of the surveyed public lands of the Washington Territory, as the effective date of extinguishment:

> Although neither the change in congressional intent alone nor the establishment of the Chehalis Reservation were sufficient to extinguish Cowlitz Title, when to these was added the public offering for sale of Cowlitz land by the defendant as evidenced by the Presidential Proclamation of March 20, 1863, an extinguishment of title did take place. In offering the Cowlitz lands for sale, [the United States] was taking an action which indicated that it no longer considered that Indian title existed on the land.

Id. at 450.

2. The Cowlitz Indian Claims Commission decision is sound—it has been challenged, upheld, and cited in subsequent federal decisions

The Cowlitz Tribe appealed the Indian Claims Commission's decision to the U.S. Court of Claims; ultimately, the Court upheld the decision of the ICC. *Plamondon ex rel. Cowlitz Tribe of Indians v. U.S.*, 467 F.2d 935 (Ct. Cl. 1972). The Cowlitz Tribe made the same arguments Petitioners make in this matter—no treaty was ever made with the Cowlitz, there was no removal of the tribe from its ancestral home, the Cowlitz never accepted a reservation from the United States, and the 1863 order was ineffective to extinguish aboriginal rights. The reviewing court determined "We need not decide whether taken singly, the change in congressional intent, the establishment of the Chehalis Reservation, or the Presidential Proclamation of March 20, 1863, would be sufficient to extinguish Cowlitz title. We agree with the Commission that all three together are clearly sufficient." *Id.* at 937. The next year, the ICC entered judgment

in favor of the Cowlitz for $1,550,000. 30 Ind. Cl. Comm. 129, 143 (April 12, 1973).

E. Petitioners Misapply Existing Law

Petitioners rely on *State v. Coffee* for the proposition that rights of non-treaty tribes are co-extensive with the rights reserved in treaties by treaty tribes. But that reliance is misplaced, as *Coffee* expressly states the aboriginal title of the Kootenai was extinguished; the decision pertains to hunting rights retained in a treaty the tribe did not sign where the land at issue was ceded to the government. *State v. Coffee*, 97 Idaho 905, 909-913, 556 P.2d 1185, 1189 (1976). In the case at hand, Petitioners cannot point to any treaty by any tribe that might possibly reserve hunting rights in southwest Washington because the aboriginal lands of the Cowlitz Tribe and others were not ceded to the U.S. Government by any tribe, but were taken through the direct acts and intentions of Congress and the federal government in the 1850s and 1860s to open the land for

sale. See *United States v. Santa Fe Pacific R.R. Co.,* 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941).

The only way *Coffee* helps the present inquiry at all is as a further example that courts rely upon the rulings of the ICC, such as the decision determination that the aboriginal title of the Idaho Kootenai tribe had been extinguished when other tribes ceded their land. The *Coffee* court said "We have examined the analysis of the Commission and we are in agreement with its conclusion." *Id.*

Petitioners argue that *McGirt v. Oklaho*ma, ___ U.S. ___, 140 S.Ct. 2452, 207 L.Ed.2d 985 (July 9, 2020) has unequivocally stated that the Indian Commerce Clause authority lies entirely with Congress and in conflict with executive branch authority. This is simply a misreading and stretching of *McGirt* beyond the ruling or issues presented to the U.S. Supreme Court. The *McGirt* Court specifically addressed the creation of reservations, and of the federal government's violation of promises made to tribes through

treaties and acts of Congress. *McGirt* never once mentions aboriginal rights.

As the Cowlitz do not have a treaty with the United States and the land where Petitioners harvested shellfish was never part of a Cowlitz reservation, *McGirt* is simply not applicable.

Similarly, Petitioners' suggestion that Washington Supreme Court's 2020 *Towessnute* Order (Order Recalling Mandate, No. 13 083-3, July 10, 2020, order to publish April 26, 2021) supports the expansion of aboriginal rights or creates a new lens with which to view treaty or aboriginal rights is misplaced (*Towessnute* is apparently the Supreme Court case Petitioners claim the decision below conflicts with for purposes of RAP 13.4(b)(1)). Petitioners argue that the *Towessnute* Order "included State civil right and due process considerations in its ruling and did not merely limit its ruling to the strict and rigid confines of Federal Indian Law." Petition for Review, 27. There is no reference in the *Towessnute* Order to state civil

rights or due process law. The Court's order in 2020 corrected a historic wrong based on three epic failings 104 years earlier—a disrespect for federal treaties as the supreme law of the land; failure to honor the treaty language that would later be definitively interpreted by the Boldt Decision; and, repudiation of ignorant, condescending, and racist language used in the original 1916 *Towessnute* opinion. The *Towessnute* Order did not create new jurisprudence—it simply addressed prior poor jurisprudence connected to federal treaty rights, not aboriginal rights. As noted by the court of appeals in its decision below:

> The court determined that the decision against the tribal member was an example of racial injustice as well as a result of a fundamental misunderstanding of the nature of treaties and the concept of tribal sovereignty.
>
> We agree that much of the historical mistreatment of indigenous peoples in this country has been a product of racial prejudice. But nothing in the *Towessnute* decision permits us to change the outcome here. *Towessnute* involved a member of the Yakama tribe charged with fishing crimes despite the fact that the Yakama tribe had off-reservation rights to fish *by virtue of their treaty.* Here, there was no treaty, and as explained above,

> the off-reservation rights of the Cowlitz Tribe to fish have been extinguished. Accordingly, we determine this argument fails.

Simmons, 2022 WL 3365394 at 13 (citations omitted; emphasis in the original).

V. CONCLUSION

Petitioners, Cowlitz tribal members, do not enjoy off-reservation fishing rights because such aboriginal rights have not been reserved through any treaty or any federal action. The aboriginal fishing rights of the tribe and the Petitioners existed as use and occupancy rights tied to the tribe's aboriginal title to lands in southwest Washington. The federal government extinguished that aboriginal title in 1863 when the unoccupied lands of southwest Washington were designated for sale by executive order.

The Ninth Circuit relied on this basic fact, that aboriginal title held by the Cowlitz, Chehalis, Shoalwater, and several other tribes in southwest Washington was extinguished in the 1860s, when it ruled in *Confederated Tribes* that these tribes

had no off-reservation fishing rights. The Grays Harbor District Court properly considered that ruling and applied the law and facts to the Petitioner's case, denying their defense and finding them guilty of unlawful recreational fishing.

The thorough record of the adjudication establishes that, contrary to the argument of the Petitioners, the aboriginal right to fish off-reservation simply does not exist for members of the Cowlitz Tribe.

The decision below does not conflict with any previous decision of this Court. RAP 13.4(b)(1). The petition does not present a *significant* question of law under the state or federal constitutions under RAP 13.4(b)(3) given the extensive litigation and adjudication settling this issue in the federal courts. Nor does the petition present an issue of *substantial public interest* that should be decided by *this* Court. RAP 13.4(b)(4). The Cowlitz Tribe has never been a party to this case and is not seeking review; this case involves and affects only the petitioners as individual defendants. Issues such as

these – aboriginal and off-reservation fishing rights, are more properly dealt with by the federal courts, which have viewed this issue as settled. The United States Supreme Court denied certiorari in *Confederated Tribes.* 520 U.S. 1168 (1997). In *Snoqualmie Indian Tribe v. Washington,* 8 F.4th 853 (9th Cir. 2021), *cert. denied sub nom., Samish Indian Nation v. Washington,* __U.S.__, 212 L. Ed. 2d 327, 142 S. Ct. 1371 (2022), the court dismissed a claim of aboriginal hunting rights on *res judicata* grounds as aboriginal fishing rights were previously determined not to exist as the tribe was a non-treating tribe.

As a published decision, the decision of the court of appeals below stands as binding legal authority in the State of Washington.

The Petition for Review should be denied.

This document contains 4985 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 12th day of October, 2022.

Respectfully Submitted,

NORMA J. TILLOTSON
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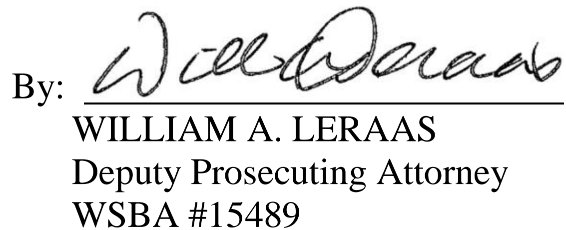
By: 

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