

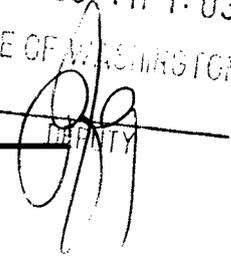
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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

No. 31636-6-II (Consolidated with No. 31646-3-II) BY

  
IDENTITY

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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS JOHN MARTIN TOBIN,

Appellant.

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**BRIEF OF AMICUS CURIAE WASHINGTON STATE  
DEPARTMENT OF NATURAL RESOURCES**

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## I. INTEREST OF AMICI CURIAE

The Washington State Department of Natural Resources' (DNR's) interest in Doug Tobin's appeal flows from three factors:

First, DNR manages most state-owned aquatic lands which include most bedlands and many tidelands in Puget Sound.<sup>1</sup> Second, DNR manages geoduck clam harvests, along with the Washington State Department of Fish and Wildlife ("WDFW"), in coordination with Treaty Indian Tribes.<sup>2</sup> Tobin's appeal makes assertions regarding the nature of treaty rights to harvest geoduck shellfish. Third, DNR, WDFW, and the three Tribes whose treaty-secured right to take fish at usual and accustomed grounds and stations include waters in south Puget Sound, were all named as "victims" in the restitution order regarding Doug Tobin's geoduck theft conviction. CP at 77-78 (restitution order for geoduck).

Tobin's appeal challenges the amount of restitution awarded by the trial court, a matter of obvious concern to the recipient of any restitution

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<sup>1</sup>For DNR's authority to manage state-owned aquatic lands, *see* RCW 79.105.010 (formerly RCW 79.90.450) (attached as Appendix 1); WAC 332-30-100. Please note that aquatic land statutes were recodified in 2005. Laws of 2005, ch. 155. The new codification was recently released in the Internet by the Code Reviser's Office on August 19, 2005, but the printed 2005 RCW Supplements may not be available to the court at the time this brief is reviewed.

<sup>2</sup> *See* RCW 79.135.210 (formerly RCW 79.96.080) (attached as Appendix 2); *United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), 898 F. Supp. 1453 (1995) ("Shellfish Sub-proceeding"), *amended by* 909 F. Supp. 787, *aff'd in part, rev'd in part*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

ordered. Further, his appeal addresses treaty rights and reservation boundaries in a manner that implicates DNR's interest in management of aquatic lands and the management of state and tribal geoduck harvests.

Issues such as the scope of treaty rights to harvest fish and shellfish, tribal reservation boundaries, and the locations of tribal "usual and accustomed grounds and stations,"<sup>3</sup> have been subject to over 35 years of ongoing litigation in *United States v. Washington*, Civil No. 70-9213 (W.D. Wash.). See *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 96 S. Ct. 877, 47 L. Ed. 2d 97 (1976) (The Boldt Decision). The *United States v. Washington* litigation has resulted in dozens of published federal decisions over the years, and the litigation continues today in numerous active "sub-proceedings" in federal district court. See, e.g., *United States v. Washington*, Case No. C2:70-9213, sub-proceeding 89-3 (W.D. Wash.) (shellfish sub-proceeding). Therefore, although Tobin's fourth issue on appeal implicates tribal rights to harvest shellfish, this criminal appeal is not an appropriate forum for resolution of

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<sup>3</sup> The Squaxin Island Tribe, of which Doug Tobin is a member, is a party to the Treaty With Nisquallys (Treaty of Medicine Creek), 10 Stat. 1132 (Dec. 26, 1854). Under Article III of the Treaty, "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory." The Medicine Creek Treaty is one of the treaties at issue in the ongoing federal court litigation in *United States v. Washington*. Tobin has not raised his Tribe's treaty rights as a defense to the state criminal charges.

the treaty issues that would affect the State and a variety of Tribes. Those issues are best resolved in the ongoing federal litigation in *United States v. Washington*.

## II. ARGUMENT

### A. The Court Should Reject Tobin's Fourth Issue on Appeal.

Tobin's fourth assignment of error and corresponding issue on appeal is premised upon the assertion that the trial court awarded all of the restitution to the State. In passing, Tobin asserts that some portion of the award should have been characterized as restitution owed to treaty Tribes. Opening Brief of Appellant at 13-14.

Tobin's appeal is flawed because it ignores the plain language of the restitution order. The restitution order names DNR, WDFW, and the three south Puget Sound Tribes, as the recipients of restitution. CP at 77-78 (attached as Appendix 3). Therefore, the simplest way to address the concern of Amicus DNR is to reject the fourth issue on appeal because it has no basis in the record. The Tribes are named in the restitution order along with DNR and WDFW. Because the Tribes are named, the Court need not reach Tobin's argument about the nature of the Tribes' entitlement to share in restitution for the poached geoduck. Nor does

Tobin have any standing or interest in any division of restitution between the State and the Tribes.<sup>4</sup>

**B. The Nature of a Treaty Tribe's Right to Restitution Should Not Be Addressed Without a Claim and Briefing by the State and Treaty Tribes.**

The federal court has affirmed that certain Tribes do have a right secured by federal treaty to harvest shellfish at their usual and accustomed fishing places. *See United States v. Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994), 898 F. Supp. 1453 (1995), *amended by* 909 F. Supp. 787, *affirmed in part, reversed in part*, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

The question of how and when this treaty right might support a tribal claim to restitution is an issue over which DNR and a Tribe may disagree. This Court, however, does not have the benefit of full briefing from either the Tribes or DNR over how a treaty right to harvest shellfish relates to restitution payments. More importantly, those parties have shown no interest in litigating that issue as part of Tobin's criminal appeal.<sup>5</sup> In the absence of a claim, and briefing, by the State and the

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<sup>4</sup> To DNR's knowledge, no restitution has yet been paid by Tobin. Given the length of his sentence, and given that Tobin qualified for indigency on his appeal (see superior court order entered June 4, 2004), it seems unlikely that he will be forthcoming with restitution payments. In the event there is any restitution, DNR and the Tribes are competent to resolve disputes regarding allocation of restitution.

<sup>5</sup> The Squaxin Island Tribe submitted an untimely memorandum to the trial judge addressing the issue of treaty rights to harvest shellfish and entitlement to restitution. See footnote 6 for additional discussion of this memorandum. This nine-page

various Tribal governments with treaty rights, this Court should not address this subject. It is not properly raised by Tobin's appeal.

**C. The Boundary of the Squaxin Island Indian Reservation is Not an Issue Properly Before This Court.**

Tobin's appeal also makes the assertion that the State has no right to any geoducks taken within "Squaxin fishing territory." Opening Brief of Appellant at 13. Tobin offers no argument or authority for this statement. He cites only a nine-page memorandum that the Squaxin Island Tribe had tried to submit to the trial court.<sup>6</sup> That memo asserts, without citation to authority, that the Squaxin Island Reservation extends to the mid-point of the adjacent channels around the island, and it asserts that the State has no claim to geoducks within the Reservation. CP at 254.

DNR disagrees with the Squaxin Memo's characterization of reservation boundaries and state aquatic land ownership, but the boundaries of the Squaxin Island Reservation have no bearing on the amount of restitution Tobin has been ordered to pay to both the State and the Tribes. The lack of a fully developed record on this subject, together with the significant implications associated with determining the scope of

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document, however, did not purport to speak for the two dozen Tribes currently recognized as holding treaty rights.

<sup>6</sup> See Opening Brief of Appellant at 13. The Squaxin Island Tribe apparently submitted this memo to the trial court prior to the restitution hearing. The trial court, however, indicated during the restitution hearing that the Squaxin Memo was not timely and not properly before the court. RP 2-3, 5.

any reservation boundaries, cautions against addressing that issue based on a passing statement not briefed below or briefed to this Court.

### III. CONCLUSION

Doug Tobin's appeal ignores the fact that the trial court ordered restitution to be paid to both the State and the Tribes. Because the Tribes are included in the restitution order, the claimed error does not exist. DNR therefore asks that this Court not address the treaty right or reservation boundary issues that are mentioned in passing by Tobin's appeal.

RESPECTFULLY SUBMITTED this 19th day of September,  
2005.

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**RCW 79.105.010**  
**Aquatic lands -- Findings.**

The legislature finds that state-owned aquatic lands are a finite natural resource of great value and an irreplaceable public heritage. The legislature recognizes that the state owns these aquatic lands in fee and has delegated to the department the responsibility to manage these lands for the benefit of the public. The legislature finds that water-dependent industries and activities have played a major role in the history of the state and will continue to be important in the future. The legislature finds that revenues derived from leases of state-owned aquatic lands should be used to enhance opportunities for public recreation, shoreline access, environmental protection, and other public benefits associated with the aquatic lands of the state. The legislature further finds that aquatic lands are faced with conflicting use demands.

[2005 c 155 § 139; 1984 c 221 § 1. Formerly RCW 79.90.450.]

**RCW 79.135.210****Geoduck harvesting -- Agreements, regulation.**

(1) Except as provided in RCW 79.135.040, geoducks shall be sold as valuable materials under the provisions of \*chapter 79.90 RCW. After confirmation of the sale, the department may enter into an agreement with the purchaser for the harvesting of geoducks. The department may place terms and conditions in the harvesting agreements as the department deems necessary. The department may enforce the provisions of any harvesting agreement by suspending or canceling the harvesting agreement or through any other means contained in the harvesting agreement. Any geoduck harvester may terminate a harvesting agreement entered into pursuant to this subsection if actions of a governmental agency, beyond the control of the harvester, its agents, or its employees, prohibit harvesting, for a period exceeding thirty days during the term of the harvesting agreement, except as provided within the agreement. Upon termination of the agreement by the harvester, the harvester shall be reimbursed by the department for the cost paid to the department on the agreement, less the value of the harvest already accomplished by the harvester under the agreement.

(2) Harvesting agreements under this title for the purpose of harvesting geoducks shall require the harvester and the harvester's agent or representatives to comply with all applicable commercial diving safety standards and regulations promulgated and implemented by the federal occupational safety and health administration established under the federal occupational safety and health act of 1970 as the law exists or as amended (84 Stat. 1590 et seq.; 29 U.S.C. Sec. 651 et seq.). However, for the purposes of this section and RCW 77.60.070, all persons who dive for geoducks are deemed to be employees as defined by the federal occupational safety and health act. All harvesting agreements shall provide that failure to comply with these standards is cause for suspension or cancellation of the harvesting agreement. Further, for the purposes of this subsection if the harvester contracts with another person or entity for the harvesting of geoducks, the harvesting agreement shall not be suspended or canceled if the harvester terminates its business relationship with such an entity until compliance with this subsection is secured.

[2005 c 155 § 708; 2005 c 113 § 3; 2003 c 39 § 43; 1990 c 163 § 4; 1982 1st ex.s. c 21 § 141. Formerly RCW 79.96.080.]

**NOTES:**

**Reviser's note:** \*(1) Chapter 79.90 RCW was recodified and/or repealed in its entirety by 2005 c 155. For disposition of chapter 79.90 RCW, see Supplementary Table of Disposition of Former RCW Sections, this volume.

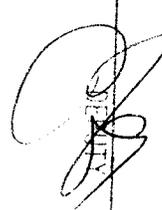
(2) This section was amended by 2005 c 113 § 3 and by 2005 c 155 § 708, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

No. 31636-6-II (Consolidated with No. 31646-3-II)

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
DOUGLAS JOHN MARTIN TOBIN,  
  
Appellant.

**CERTIFICATE OF  
SERVICE**

BY   
STATE OF WASHINGTON  
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FILED  
COURT OF APPEALS

I certify that on September 19, 2005, I caused a true and correct copy of (1) **WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES' MOTION TO FILE AMICUS CURIAE BRIEF – RAP 10.6;** (2) **BRIEF OF AMICUS CURIAE WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES;** and (3) **this CERTIFICATE OF SERVICE** to be served upon the parties herein, in the above-entitled action, as indicated below:

<b>Party</b>	<b>Method of Service</b>
Michelle Luna-Green Deputy Prosecuting Attorney Pierce County Prosecutor's Office 930 Tacoma Ave. S., Room 946 Tacoma, WA 98402  Attorney for Respondent	<input type="checkbox"/> US Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input checked="" type="checkbox"/> ABC/Legal Messenger <input type="checkbox"/> UPS Next Day Air <input type="checkbox"/> By Fax <input type="checkbox"/> Hand delivered by:

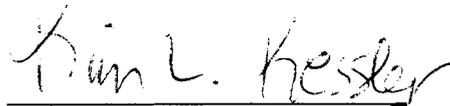
**Party**

**Method of Service**

Mary Kay High Attorney at Law 109 Tacoma Avenue North Tacoma, WA 98405  Attorney for Appellant	<input type="checkbox"/> US Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input checked="" type="checkbox"/> ABC/Legal Messenger <input type="checkbox"/> UPS Next Day Air <input type="checkbox"/> By Fax <input type="checkbox"/> Hand delivered by:
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of September, 2005, at Olympia, Washington.



KIM L. KESSLER  
Legal Assistant