WASHINGTON SUPREME COURT NO. 101289-6
COURT OF APPEALS NO. 55019-9-II; NO. 55029-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

(Grays Harbor County Superior
Court Nos. 19-1-00802-14; 19-1-00803-14)

ANDREW LARRY SIMMONS and MICHAEL MYRON SIMMONS,

Petitioners (Appellants/Defendants),

v.

STATE OF WASHINGTON

Respondent (Plaintiff).

APPELLANTS SIMMONS' PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT

Ben D. Cushman
Deschutes Law Group, PLLC
1202 State Ave NE
Olympia, WA 98506
360/464-9007
ben@deschuteslawgroup.com

Attorney for Petitioners

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1. Identity of Petitioner

Andrew Simmons and Michael Myron Simmons, Petitioners, ask the Court to accept review of the decision designated in Part 2 of this motion.

2. Decision

On August, 16, 2022, the Court of Appeals, Div. II, published a decision, under unified case numbers 55019-9-II and 55029-6-II, affirming lower court decisions convicting and affirming the conviction of the Petitioners for violating state game law by harvesting shellfish. Petitioners claim that their shellfish harvest was an exercise of traditional subsistence harvesting as practiced by the Cowlitz people since time immemorial and that the harvest was in a usual an accustomed location of such harvesting.

3. Issues Presented for Review

3.1. The decision of the Appellate Court is contrary to Federal Indian Law and the Trust Doctrine as established by the United States Supreme Court.

3.2 The decision of the Appellate Court is contrary to and violates a recent ruling of the Washington Supreme Court recognizing indigenous rights as civil rights entitled to protections under Washington law in addition to the protections provided by Federal Law.

4. Statement of the Case

The Defendants/Appellants, Andrew and Michael Simmons, are enrolled members of the Cowlitz Indian Tribe, a Federally recognized tribe. There is no formal treaty between the Cowlitz Tribe and the United States abrogating any indigenous rights of the Cowlitz People. There is also no Act of Congress that abrogates any indigenous rights of the Cowlitz People. There are two Executive Orders that purport to recognize or abrogate indigenous rights in Southwest Washington, where the Cowlitz People lived, but these Orders were not ratified or authorized by Congress.

The Simmons defendants were cited for unlicensed harvesting of shellfish after they were found with fifty razor

clams, over the daily harvest limit of fifteen clams. The Simmons defendants produced their Tribal identification and asserted their right to harvest shellfish within the traditional area where their tribe had harvested shellfish. At trial, the undisputed evidence, presented through a tribal elder, was that the Simmons defendants had harvested clams in a location where the Cowlitz people have historically and traditionally done so.

Based on a misapplication of an 1865 Executive Order and a misinterpretation of the case *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (1996), the District Court convicted the Defendants of unlawful shellfish harvesting. The Superior Court affirmed the conviction on the grounds that *Confederated Tribes* was binding and dispositive authority, having the effect of abrogating the shellfishing rights of the Cowlitz People and therefore invalidating the right claim raised by the Simmons defendants. The Superior Court did not address the Simmons' argument that they have rights protected by Washington State civil rights law in addition to any Federal rights addressed in

Confederated Tribes. (*Confederated Tribes* did not address any issues of state civil rights.) *State v. Towessnute*, 197 Wn.2d 574, 486 P.3d 111 (2021). Further, the Superior Court uncritically applied *Confederated Tribes* even though it is uncontested that *Confederated Tribes* relied on the effectiveness of an Executive Order, without any applicable treaty or Act of Congress, and even though the United States Supreme Court recently ruled that the rights of indigenous people cannot be abrogated by Executive Order unsupported by Treaty or Act of Congress. *McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (July 9, 2020).

The Court of Appeals repeated the errors of the lower Courts. The Court of Appeals distinguished *State v. Towessnute*, 197 Wn.2d 574, 486 P.3d 111 (2021) on the grounds that the Yakama rights were reserved in a treaty while the Cowlitz have no treaty. However, this is a distinction with no legal force. A right reserved in a treaty is a right the treaty tribe had before the treaty and kept despite giving up other rights in the treaty. That is how reserved rights work. The Court of Appeals also applied

Confederated Tribes despite *Confederated Tribes* being decided under a special exception to the generally applicable Canons of Federal Indian Law, which does not apply in this case. The error made by all the lower courts is a fundamental error in Federal Indian Law about how tribes have and lose rights.

5. Argument

The Appellate Court decision, confirming the conviction of the Simmons Defendants for unlawful shellfish harvesting, is error under both state and Federal law. It conflicts with fundamental principles of Indian Rights under both early and recent decisions of the United States Supreme Court. Further, it is serious error that impairs the core rights of indigenous people throughout Washington (or, read as narrowly as possible, Southwest Washington). Finally, it disregards the recent actions of the Washington State Supreme Court to recognize and respect Tribal rights and reset the fraught history of the relations of the State of Washington and the various Indian tribes within its

borders. Therefore, review is appropriate and should be accepted under RAP 13.4(b)(1), (3), and (4).

5.1 The Issues Raised Present Important State-Wide Issues of Law that Substantially Impair the Rights of Indigenous People.

Hunting and fishing (including shellfish gathering) rights are core rights of indigenous people. They involve activities central to the life ways of indigenous people and to indigenous cultures. The Cowlitz Tribe are Coastal Salish people (also called the "Salmon People of the Northwest") whose way of life centers on hunting, shellfish gathering, and fishing.

Federal law recognizes that indigenous people have hunting, gathering, and fishing rights and that those rights are so central that they are always among the reserved rights maintained by such people, even when other rights are abrogated by treaty. Hunting rights extend to a right to hunt, without being subject to state hunting laws, in all "open and unclaimed lands" (generally – public lands, which is approximately 43% of the land in Washington state, totaling approximately 19.8 million acres).

Fishing rights, including shellfish harvesting rights, are not limited to public lands, but are limited to the "usual and accustomed places" of the Tribe asserting the right. Shellfish gathering rights have been treated as fishing rights on this approach. *United States v. Washington II*, 873 F.Supp. 1422, 1441 (W.D.Wash.1994), aff'd 157 F.3d 630, 643 (9th Cir. *1998*), cert, denied, 119 S. Ct. 1376 (1999).

As a practical matter, every shellfish beach and all fish-bearing, navigable waters in and near the coast of Washington State is the usual and accustomed place for some fishing or shellfishing activity of a Washington tribe. The ruling in this case invalidates these core rights of the Cowlitz Tribe and its members, including the Petitioners. In reaching that ruling, the Appeals Court ignored more recent United States Supreme Court authority and further waved-away recent Washington Supreme Court authority that provided for state civil rights basis for indigenous rights different supplemental to any rights under Federal Law.

5.2 Canons of Federal Indian Law.

American Indian Tribes, and their enrolled members, have a special legal status in American law. This special status applies particularly to the application of state law to enrolled tribal members. There are two over-arching principles: (1) the plenary power of Congress (and only Congress, to the exclusion of the Executive Branch of government or state governments) under the "Indian Commerce Clause" (Art. 1, Sec. 8, Clause 3) of the U.S. Constitution, and (2) the default "trust obligations" of the U.S. Government owed to Indians and Indian Tribes. The District and Superior Courts' failures to apply these black-letter legal principles resulted in its erroneous conviction of the Simmons defendants.

The ultimate foundation of American Indian law is the "Marshall Trilogy" of cases – *Johnson v. M'Intosh,* 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia,* 30 U.S. (5. Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Chief Justice Marshall's opinions in those cases

declared critical and longstanding rules that determine the relationship between the Federal government, states, and Indian Tribes. More critically, the Trilogy provided a legal framework for analyzing and interpreting the law with regard to Indians and Indian Tribes. The Court failed to apply this framework, and that failure is clear error.

Johnson announced the "Doctrine of Discovery" as the foundation for land titles in the United States. *M'Intosh*, *Id*., at 574. The *Marshall* Court held that Indian Tribes did not own the land in fee title. Rather, the European nations and their American successors acquired fee simple title in the land by virtue of discovering the land. However, the Court announced that Indian Tribes did have the right of possession and use and that this right could be extinguished *only by the Federal government through purchase or conquest. M'Intosh* at *574.* While this, at first glance, seems like a sweeping divestiture of Indian rights, it is actually a limited and circumspect one. Unless there is a Federal statute, enacted by Congress under the Indian Commerce Clause,

Indians and Indian Tribes are presumed to retain their rights, including the right to use and occupy land, except when they directly conflict with the enumerated powers of the Federal government.

> *Tribal powers are not implicitly divested by virtue of the Tribes' dependent status.* This Court has found such a divestiture in cases where the exercise of tribal sovereignty *would be inconsistent with the overriding interests of the National Government,* as when the Tribes seek to engage in foreign relations, alienate their lands to non-Indians without Federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) (emphasis added).

This conclusion is reinforced by the second of the Marshall Trilogy cases – *Cherokee Nation, supra. Cherokee Nation* held that Indian Tribes were not "foreign nations." Rather, while Indian Tribes retained aspects of nationality, they were a unique category of state called "domestic dependent nations." The conclusion is that Indian Tribes are "dependent" on the

United States, creating a special trust relationship between the United States and the Indian Tribes within its borders. Subject only to statutes passed by Congress under its Indian Commerce Clause plenary power, all laws and regulations that affect or could affect Indians and Indian Tribes must be interpreted through this lens of trustee/beneficiary status. Specifically, all Executive Orders must be interpreted as actions of a trustee serving the interests of a beneficiary and all state law must be interpreted as subordinate both to Federal law and to this Federal/Tribal relationship. Further, States do not have the power to abrogate indigenous rights at all.

That final implication was elaborated in the final case in the Trilogy, Justice Marshall ruled that that the laws of the State of Georgia do not extend into Indian Country where they conflict with indigenous rights. *Worcester, supra,* laid the framework for analyzing disputes involving Indian Tribes by looking first to Indian treaties and then Acts of Congress. Further, this framework implies that Indians and Indian Tribes have pre-

existing rights, and, through treaties, may alienate some rights while reserving others. The most obvious of these reserved rights is the right to land – called a "Reservation" – which is land reserved to the Indian Tribe when it gives up its other land within its historical range. However, hunting, fishing, and other rights are also part of the "use rights" of Indians and Indian Tribes and are reserved by them unless expressly relinquished by a Treaty or taken by an Act of Congress.

Based on the Marshall Trilogy, all claims of Tribal Rights must be analyzed through a prescribed legal framework, and it is error for a court (as here) to depart from that framework. First, Indians had unrestricted use and occupancy rights and reserve those rights unless divested of them by Act of Congress. *M'Intosh, supra,* at 574. Second, Federal authority in the field of Indian affairs is both exclusive (Federal Constitutional Supremacy) and plenary (Indian Commerce Clause, when exercised by Congress). *Worcester, supra* at 561. Third, Indian Tribes are nations and otherwise retain their sovereign

authority and rights (including use and occupancy rights to land and resources). *Cherokee Nation, supra,* at 15-20.

Further, any such loss of indigenous rights is limited by the Federal Government's trust obligations. (See, for example, *United States v. Kagama*, 118 US. 375 at 384 (1886).) This rule has two corollaries. First, executive orders, and any other law or regulation, other than an Act of Congress under the Indian Commerce Clause, must be interpreted as the Indians would have understood it and with the recognition that the Indians are presumed to be the beneficiaries of such actions by the government. *Cherokee Nation, supra,* at 17-18. This means that any law allegedly abrogating Indian rights must do so explicitly. There is no tacit abrogation by general law. Second, Tribes are not granted rights by treaty. Rather, they reserve some rights by treaty and give up other rights through treaty. Therefore, absent an Act of Congress, a tribe without a treaty has all the rights that could have been reserved by it through a treaty.

(See, for example, *United States v. Idaho*, 533 U.S. 262 (2001).) In this case, the Court of Appeals itself points out that the treaty negotiation with the Cowlitz, although it did not result in a treaty, was conducted on the basis of the recognition of Cowlitz territorial, hunting, gathering, and fishing rights, which were never removed by Act of Congress or Treaty. (Decision at p.2.) However, as a right the Cowlitz brought into treaty-making, that could be reserved by treaty, the Cowlitz retain this right after treaty-making failed to produce a treaty.

> Indian reserved rights are founded on the occupancy and use of the land prior to its being part of the United States. That is, indigenous people had an established way of life and have the right to maintain those life-ways on and within their traditional lands (and not just on the lands reserved within the boundaries of an established reservation). It is well-established that hunting or fishing was an integral part of the Indian way of life. Thus, hunting and fishing rights are presumed to be reserved

rights that. persist unless surrendered by treaty or divested by Act of Congress, neither of which has happened.

For example, in *Pioneer Packing* Co. *v. Winslow,* 159 Wash. 655, 294 P. 557 (1930), the Court held that Indians own reservation fish "by the same title and in the same right as they owned them prior to the time of the making of the treaty." Further, treaties provide for retention by the Indians of hunting and fishing rights, both on and off the reservation, indicating that hunting and fishing rights are a part of the aboriginal title which may be ceded by treaty or reserved by the Indians. Once established, an extinguishment of Indian rights "cannot be lightly implied." *United States v. Santa Fe Pac.* R. Co., 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941).

The most definitive treatment of this subject is in the seminal case *State v. Coffee*, 97 Id. 1185, 556 P.2d 905 (1976). The rights involved in that case are almost exactly analogous to

the rights involved in this case – although the result of the cases are different as a result of differences in facts of the cases. In *Coffee*, an enrolled member of the Kootenai tribe was convicted of unlicensed killing of deer when she hunted on private land in Idaho. Like the Cowlitz Tribe, the Kootenai Tribe was a recognized Indian Tribe but did not have a formal treaty with the United States. Like the Cowlitz Tribe, the Kootenai Tribe were subsequently assigned to a treaty group. Indian treaty-making in Idaho and Washington occurred at the same historical moment – and used the same treaty template. That template reserved Indian hunting rights to "open and unclaimed land" and fishing rights (including shell-fishing) to "usual and accustomed places." In *Coffee*, *Id*., the Court ruled that the reserved rights of non-treaty tribes, such as the Cowlitz and Kootenai, is co-extensive with the rights reserved in treaties by treaty tribes. The reasoning is that, because treaty tribes had those pre-existing rights to reserve and, by reserving them, did not give them up, a non-treaty tribe must also retain those rights. Coffee was convicted because, although

she had a reserved right to hunt on "open and unclaimed lands" without a license or other special grant from the State of Idaho, she had hunted on private, regulated lands, where there was no reserved right to hunt. If she had hunted on public lands – open and unclaimed lands – she would have been within her rights and the conviction would have been overturned.

The Boldt Decision established Indian reserved rights to fish in their usual and accustomed places. *United States v. Washington I*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975). This has since been clarified to include the reserved right to harvest shellfish in all usual and accustomed places, including (unlike hunting rights) on private lands, excluding only cultivated, artificial shellfish farms. *United States v. Washington II*, 873 F.Supp. 1422, 1441 (W.D.Wash.1994), aff'd 157 F.3d 630, 643 (9th Cir. *1998*), cert, denied, 119 S. Ct. 1376 (1999). Therefore, just as Coffee would not have been subject to conviction for hunting a deer if she had done so on open and unclaimed lands, the Simmons defendants should not

be subject to conviction for harvesting shellfish in one of the usual and accustomed places for shellfish harvesting by the Cowlitz Tribe.

5.3 The Court of Appeals Decision is Erroneous under Federal Indian Law.

The ruling here rests on misreading of *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (1996). *Confederated Tribes of Chehalis v. Washington* is not solid ground for any ruling in this case, given both the procedural posture and reasoning in the decision and subsequent rulings of the United States and Washington Supreme Courts.

First, the ruling is contrary to the internal logic of *Confederated Tribes, Id. Confederated Tribes*. Unlike the current case, in which members of the Cowlitz Tribe were asserting their own reserved fishing rights, *Confederated Tribes* involved a claim by the Chehalis Tribe that they had come to possess fishing rights reserved by the Quinault treaty tribes in the Quinault treaty even though the Chehalis were not signatories to that treaty.

Like the Cowlitz, the Chehalis were removed from their ancestral lands in Southwest Washington and settled on the Quinault reservation – later receiving allotments on that reservation. Recently, repatriation of the tribes of Southwest Washington has begun, with the tribes receiving reservation lands in Southwest Washington and returning home from the Quinault reservation. While settled on the Quinault reservation, the tribes of Southwest Washington received enrollment documents from the reservation where they lived and continued to practice hunting, gathering, and fishing practices, although the location of those practices were in northwest Washington near the reservation to which they had been removed. The current case involves exchange of one injustice for another (stripping the tribes of Southwest Washington of their culturally-important hunting, gathering, and fishing rights, as an unintended consequence of repatriating them to their homeland). Neither injustice is necessary and both are contrary to applicable law.

The critical and misapplied issue in *Confederated Tribes* was that the Chehalis asserted the rights reserved by the Quinault treaty tribes despite the objection of the Quinault treaty tribes, who intervened as parties in the *Confederated Tribes*. This was understandable because the Chehalis had exercised those rights for more than a century – but, as a matter of history and law, those rights were Quinault rights and not Chehalis rights. Fishing and shellfishing rights are defined by the "usual and accustomed places" for fishing by any given tribe, with the relevant time being before the expansion of the borders of the United States to encompass the tribal lands.

Because the *Confederated Tribes* case involved a dispute between tribes, with one tribe asserting rights of another, over the objection of the other tribe, the normal canons of Federal Indian law did not apply. The critical passage in the *Confederated Tribes* case is:

> The rules of construction, however, are of no help to the Tribes in their claim to Quinault fishing rights because of the countervailing interests of the Quinaults. The government owes the same

> trust duty to all tribes, including the Quinault. See *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.) (government has same fiduciary relationship with the Northern Cheyenne Tribe as it does with the Crow Tribe), cert. denied, *Crow Tribe of Indians v. EPA*, 454 U.S. 1081 (1981). We cannot apply the canons of construction for the benefit of the Tribes if such application would adversely affect Quinault interests. See *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1986) ("No trust relation exists which can be discharged to the plaintiff here at the expense of other Indians.").

Confederated Tribes, supra, at 340.

Here, the lower courts have uncritically applied what they misunderstood to be the outcome of the *Confederated Tribes* case (a complete divesture of indigenous rights in Southwest Washington despite the absence of any treaty or Act of Congress having that effect). This was error. First, unlike the Chehalis Tribe, the Defendants are asserting rights of the Cowlitz Tribe, which have never been taken away, rather than rights claimed by assumption from the Quinault Tribe. The Defendants are claiming the right to gather shellfish in the Cowlitz's usual and accustomed places (and where the Quinault

treaty tribes did not, as those locations are far to the south of their traditional lands). Therefore, there is no countervailing interest of another tribe implicated in this case. No other tribe has intervened to oppose the Simmons Defendants' exercise of their Tribe's reserved shellfish gathering rights.

The keystone of the *Confederated Tribes* case was that the trust canon of Indian law did not apply because there were Indian interests on both sides of the argument. That is not the case here. Therefore, the Canons apply and require reversal of the conviction of these Defendants.

Further, in *Confederated Tribes*, the Court expressly re-affirmed the limitation on executive orders as applied to indigenous rights.

> Courts have uniformly held that treaties, statutes and executive orders must be liberally construed in favor of establishing Indian rights. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985); *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995), cert. denied, 116 S. Ct. 2546 (1996). Any ambiguities in construction must be resolved in favor of the Indians. *Parravano*, 70 F.3d at 544. These rules of construction "are

> rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985).

Confederated Tribes at 340.

The United States Supreme Court has taken this principle even further in its recent decision in *McGirt v. Oklahoma*, 591 U.S. ____, 140 S. Ct. 2452 (July 9, 2020). *McGirt* unequivocally states that the Indian Commerce Clause of the U.S. Constitution provides that only Congress has the power to abrogate Indian reserved rights and that any action by a state or by the Executive Branch of government, unless it is grounded on an Act of Congress or Treaty or taken for the benefit of Indian People under the Federal trust obligation, is *ultra vires.*

It is undisputed here that there is no Treaty or Act of Congress abrogating any rights of the Cowlitz Tribe. Therefore, applying the Canons of Indian Law reaffirmed in *McGirt, Id.*, the Defendants had the right to harvest shellfish in the Cowlitz's usual and accustomed place for such harvesting. The only evidence of this was the testimony of tribal elder Robin Torner,

which establishes the historic harvest and harvest location, and which was not controverted by the Prosecution at trial. Therefore, the Appellate Court's reliance on and use of *Confederated Tribes, supra,* is not only a misinterpretation of that case, it is a misinterpretation that violates both the letter and the spirit of Federal Indian law.

All the lower courts have applied Executive Order 1865 as having the power to abrogate tribal rights in Southwest Washington despite the lack of any treaties or Acts of Congress having that effect. Under the Canons of Federal Indian Law, the courts must interpret the 1865 Executive Order through the President's trust obligations. The lower courts failed to liberally construe that Order in favor of a broad recognition and protection of Tribal rights. In fact, by misapplying *Confederated Tribes, supra,* the lower courts hold that the 1865 Executive Order operates to extinguish otherwise preserved rights.

The President does not have the plenary power to extinguish Indian rights. Only Congress can, and there is no

applicable Act of Congress that has extinguished the reserved hunting, gathering, and fishing rights of the Cowlitz people. Lacking plenary power, the President is obligated to act as a trustee for the benefit of the Indian Tribes and in a manner that preserves their rights (including the shellfishing rights asserted here). If there is a possible interpretation of the 1865 Executive Order that comports with this obligation, that interpretation controls. If there is no such interpretation, then the Executive Order is *ultra vires* and invalid. In either case, there is no lawful and proper interpretation of the Executive Orders that could divest the defendants of their rights to harvest shellfish.

5.4 The Court of Appeals Decision is Probable Error under State Civil Rights Law.

On July 10, 2020, the day after the issuance of the *McGirt* decision, the Washington State Supreme Court issued an equally relevant and dispositive Order vacating the decision *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916), (a decision which upheld the conviction of a Yakama tribal member for fishing with a gaff hook in a usual and accustomed fishing location of

the Yakama People). (*State v. Towessnute*, 197 Wn. 2d 574, 486 P.3d 111 (2021).) The conviction of Mr. Towessnute vacated by the Washington Supreme Court is exactly parallel to the convictions upheld in this case. That the Washington Supreme Court felt it was worthwhile to reach back more than a hundred years to undo an unjust conviction of an Indian for fishing underscores the importance the issues raised in this case, which repeats that same injustice today.

There are two critical observations to be made from the decision represented by that order. First, the Washington Supreme Court noted that the key question was whether the fishing (or shellfish harvesting) was at a "usual and accustomed place." If so, it is legal. However, there is an even more important point to be drawn from Order 13083-3. It appears to declare a new (indeed a novel) stage of State and Tribe relations as sovereigns that share space by recognizing and protecting indigenous rights under State law in addition and supplementation to Federal law.

In its Order, the Washington Supreme Court 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. In making this ruling in this way, the Washington Supreme Court pronounced legal principles, applicable in Washington State, that protect the rights of Tribes and members of Tribes in Washington. Further, these State civil rights protections are broader and more protective than the protections offered by Federal Indian Law.

Just as the State can be more protective, but not less protective, of Federally guaranteed general civil rights, Washington State can be more respectful, but not less respectful, of Tribal rights and sovereignty than Federal Law requires. The Supreme Court appears to have stated a policy of being more protective and respectful of Tribal Rights than required by Federal Law.

The Court of Appeals dismissed the ruling in *Towessnute* based on the distinction between the Yakama rights as rights

reserved in a treaty and the Cowlitz rights as rights not reserved in a treaty. However, with regard to the question of whether a tribe and its members have rights, that is a distinction without a difference. A tribe has rights based on its historic and ancestral use an occupancy of land. It can lose rights by entering a treaty. It cannot gain rights by entering a treaty. If, as here, a tribe had rights that could have been reserved in a treaty, then, absent an Act of Congress taking those rights away, it retains those rights if it never enters a treaty.

6. Conclusion

The Court of Appeals erred in failing to reverse the conviction of the Simmons Defendants. The Washington Supreme Court should accept review and ultimately reverse those unsafe and unjust convictions.

Pursuant to RAP 18.17(b), I certify that the text of this brief, not including appendices, signature block, or certificate of service, contains 4752 words, and does not exceed the maximum of 5,000 words for Motions for Discretionary Review as required under RAP 18.17(c)(11).

SUBMITTED this 14th day of September, 2022.

DESCHUTES LAW GROUP, PLLC

By _____
Ben D. Cushman, WSBA #26358
Attorney for Petitioners Simmons

CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be e-filed with this Court, and e-served upon the Respondent's attorneys.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 14th day of September 2022, in Olympia, Washington.

/s/ Doreen Milward

Attorneys for Respondent State of Washington

William A. Leraas, WSBA #15489
Deputy Prosecuting Attorney
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, WA 98563
wleraas@co.grays-harbor.wa.us

Norma J. Tillotson
Grays Harbor County Prosecutor's Office
Grays Harbor County Courthouse
102 West Broadway, Room 102
Montesano, WA 98563
ntillotson@co.grays-harbor.wa.us
appeals@co.grays-harbor.wa.us

APPENDIX

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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ANDREW LARRY SIMMONS, Petitioner, v. STATE OF WASHINGTON, Respondent.	No. 55019-9-II
MICHAEL MYRON SIMMONS, Petitioner, v. STATE OF WASHINGTON, Respondent.	No. 55029-6-II PUBLISHED OPINION

PRICE — Andrew and Michael Simmons appeal from their convictions of first and second degree unlawful recreational fishing. As members of the Cowlitz Indian Tribe, they argue they have off-reservation aboriginal rights to fish that have not been extinguished. We disagree with their arguments and affirm their convictions.

FACTS

I. HISTORICAL BACKGROUND[1]

The Chinook Nation, Confederated Tribes of the Chehalis Reservation, and Cowlitz Indian Tribe lived in Southwest Washington for centuries before the arrival of predominantly white encroaching settlers. They were considered Native Americans whose livelihood depended on fish and seafood. The Cowlitz Tribe fished all along the southern Washington coastline at times extending up into British Columbia.[2]

In 1855, Governor Stevens of Washington Territory held a treaty council at the Chehalis River. Members of local tribes, including Chehalis, Chinook, and Cowlitz Tribes, attended. Governor Stevens proposed a treaty whereby all tribes of the region would be removed to a reservation in the Quinault Indian Nation's territory. Article III of the proposed treaty guaranteed signing tribes "the right of taking fish at all usual and accustomed grounds and stations." *Confederated Tribes of Chehalis Indian Rsrv. v. Washington*, 96 F.3d 334, 338 (9th Cir. 1996). Article VI allowed the President of the United States to consolidate the signing tribes with other "friendly tribes and bands." *Id.*

Several of the tribes, including the Cowlitz Tribe, refused to sign a treaty because they were dissatisfied with the proposed terms, including the location of their reservations. "Governor Stevens intended to renew treaty negotiations with the non-signing tribes, but his attention was

[1] Unless otherwise noted, the information in this section is from *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996).

[2] Clerk's Papers at 129-31. The record is unclear as to the extent to which the Cowlitz Tribe fished these areas to the exclusion of other Native American tribes.

diverted by other events, including the Civil War and the outbreak of an Indian War." *Confederated Tribes*, 96 F.3d at 338.[3] No treaty was ever reached with the Cowlitz Tribe.

Initially, Congress intended that aboriginal title in land west of the Cascades would be extinguished by treaty. *Plamondon v. United States*, 25 Ind. Cl. Comm'n 442, 450 (1971).[4] However, that intent shifted over time. In 1853, Congress declared that in 1855, all lands west of the Cascades would be subject to public sale. *Id.*

> It is clear that Congress anticipated that Indian title would be extinguished by 1855, because offering lands for public sale is totally inconsistent with the continued existence of Indian title in that land. Treaties were entered into with most of the tribes west of the Cascades in 1854 and 1855.

Id. But the Cowlitz Tribe remained without a treaty.

In 1860, the U.S. attempted to establish a reservation for the Cowlitz Tribe at the fork of the Blackwater and Chehalis Rivers, but the Cowlitz Tribe refused to move onto it. *Id.* at 450-51. In 1861, Congress appropriated money to remove the non-treaty tribes located in the Oregon and Washington Territories, among those the Cowlitz Tribe. *Id.*

Consistent with this congressional intent to offer these lands for sale, in 1863, President Lincoln, through a proclamation (1863 Lincoln Proclamation), opened for public sale land in the Washington Territory, including the Cowlitz Tribe's land. *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 75 F. Supp. 3d 387, 394 (D.C. 2014); *Plamondon*, 25 Ind. Cl. Comm'n at 450-51. Following this displacement, the Quinault Reservation was expanded in 1873 through

[3] We use the term "Indian" where it is part of statutory language or case law, but otherwise use the term "Native American."

[4] https://cdm17279.contentdm.oclc.org/digital/collection/p17279coll10/id/1976/rec/1.

an executive order with the intent of settling additional non-treaty tribes, including the Cowlitz Tribe, on the reservation. The Cowlitz Tribe subsequently received the opportunity for an allotment on the Quinault Reservation. But the Cowlitz Tribe apparently never agreed to be resettled as a group on the Quinault Reservation.[5]

II. CHARGES AND TRIAL

Andrew and Michael Simmons (Petitioners), members of the Cowlitz Tribe, were harvesting clams along the Washington coast without a license in an area where the Cowlitz Tribe historically had gathered clams. An officer from the Department of Fish and Wildlife approached Petitioners and found them to be in possession of 89 razor clams, in excess of the daily individual limit of 15. Petitioners admitted that they did not have a license to gather clams but claimed that, as members of the Cowlitz Tribe who lived on the Quinault Reservation, they were allowed to exercise the Quinault Tribe's treaty rights to gather clams. Petitioners were cited for unlicensed harvesting and for harvesting in excess of the daily limit.

The State charged Petitioners with first and second degree unlawful recreational fishing. Although Petitioners admitted that they were harvesting clams without a license, they moved to dismiss the charges, arguing that, as members of the non-treaty Cowlitz Tribe, they had unextinguished off-reservation aboriginal rights to fish that the State could not regulate. The county district court rejected the argument that Petitioners still retained aboriginal rights to fish, ruling that the United States Court of Appeals for the Ninth Circuit's decision in *Confederated*

[5] Historically never having its own reservation, the Cowlitz Tribe began the process in 2002 of applying to the federal government for an "initial reservation" under federal law in Clark County. *Jewell*, 75 F. Supp. 3d at 394.

Tribes was controlling on the issue. Following a stipulated facts bench trial, the district court convicted Petitioners of both crimes.

Petitioners appealed, and the superior court affirmed their convictions. Like the lower court, the superior court determined that, consistent with *Confederated Tribes*, Petitioners had no tribal rights to harvest shellfish because the 1863 Lincoln Proclamation effectively extinguished the aboriginal rights of the Cowlitz Tribe, including any aboriginal rights to fish.

Petitioners appeal.

ANALYSIS

I. ABORIGINAL OFF-RESERVATION FISHING RIGHTS

Petitioners argue that, as members of the Cowlitz Tribe, they have off-reservation aboriginal rights to fish and these rights continue to exist absent express action by Congress extinguishing them. The State maintains that these aboriginal rights were extinguished by the 1863 Lincoln Proclamation and related congressional authorizations that put unoccupied lands up for sale.[6] We agree with the State and hold that the Cowlitz Tribe's off-reservation aboriginal rights to fish have been extinguished.

A. LEGAL PRINCIPLES

" 'Absent express federal law to the contrary, Indians going beyond the reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.' " *United States v. Washington*, 520 F.2d 676, 684 (9th Cir. 1975)

[6] Petitioners argue that their aboriginal rights, as originally possessed, have not been effectively extinguished. Petitioners do not contend they possess treaty rights, and they do not argue that their aboriginal rights have been reserved by an overt act of the federal government. Accordingly, this opinion is limited in scope to addressing Petitioners' specific aboriginal rights argument.

(quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 114 (1973)).

Native Americans may also possess aboriginal title:

> Aboriginal title, or original Indian title, refers to American Indian land occupancy rights premised on exclusive use and occupancy of a particular territory at the time of first European contact, and to an entitlement arising subsequent to such contact under the governing European's sovereign's laws, which are derived largely from international law concepts that prevailed before the American Revolution.

Pueblo of Jemez v. United States, 350 F. Supp. 3d 1052, 1093 (N.M. 2018). These rights include the right to fish in places where a tribe has historically done so.[7] *Confederated Tribes*, 96 F.3d at 341. "Aboriginal title refers to the right of the original inhabitants of the United States to use and occupy their aboriginal territory." *Id.*

Aboriginal title is extinguishable through multiple means. *See id.* The federal government, as sovereign, has inherent power to take the land of Native Americans and extinguish their aboriginal rights. *Id.* As Justice Marshall stated, "the exclusive right of the United States to extinguish [Native American] title, and to grant the soil, has never . . . been doubted." *Johnson v. M'Intosh*, 21 U.S. 543, 586, 5 L. Ed. 681 (1823). Aboriginal title exists at the federal government's pleasure 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 . . . .' " *Confederated Tribes*, 96 F.3d at 341 (quoting *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347, 62 S. Ct. 248, 86 L. Ed. 260 (1941)).

[7] Aboriginal rights also generally require exclusivity of use by the tribe asserting the rights. *See Pueblo*, 350 F. Supp. 3d at 1097-1101. Because neither party discusses whether the Cowlitz Tribe's historical fishing patterns satisfy this requirement for the area in which Petitioners were cited for unlawful fishing, we do not further address it.

Although aboriginal title is extinguishable in several ways, Congress still has the exclusive power to extinguish aboriginal title, and its intent to do so must be " 'plain and unambiguous . . . .' " *Pueblo*, 350 F. Supp. 3d at 1093 (quoting *Santa Fe*, 314 U.S. at 346). "Congress' intent to extinguish aboriginal title must express on the face of the legislative act or treaty authorizing extinguishment, or be clear from the surrounding circumstances." *Id.* at 1104.

Even though extinguishment must be tied to congressional action, "several federal courts have held that [c]ongressional acts in anticipation of settlement and public use, and actual settlement, by non-Indians are factors that may affect extinguishment." *Id.* at 1093; *see also Gila River Pima-Maricopa Indian Cmty. v. United States*, 494 F.2d 1386, 1393-95 (Ct. Cl. 1974) (executive order enlarging reservation followed by congressional appropriation of funds for maintenance of enlarged reservation was sufficient to establish extinguishment); *United States v. Gemmill*, 535 F.2d 1145, 1148-49 (9th Cir. 1976) (a congressional statute requiring individuals claiming lands to present their claims or lose their rights combined with the military defeat of the Native Americans, the designation of land in question as a forest reserve, and the related compensation awards to the Native Americans were sufficient to establish extinguishment); *State v. Coffee*, 97 Id. 905, 910-11, 556 P.2d 1185 (1976) (aboriginal title of the Kootenai Tribe of Idaho was extinguished by Senate ratification of treaty ceding Kootenai lands and requiring Kootenai to move to reservation even though Kootenai were not parties to the treaty).

We construe treaties, statutes, and executive orders liberally in favor of establishing Native American rights. *Confederated Tribes*, 96 F.3d at 340. Any ambiguity should be resolved in favor of Native Americans. *Id.* "These rules of construction 'are rooted in the unique trust relationship

between the United States and the Indians.' " *Id.* (quoting *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985)).

We review an interpretation of presidential proclamations and executive orders de novo. *Id.*

Historical questions of fact, including whether a tribe's aboriginal rights to fish have been extinguished, are reviewed for clear error. *Id.* at 341; *see also State v. Posenjak*, 127 Wn. App. 41, 48, 111 P.3d 1206 (2005). "A clear error is 'when the evidence in the record supports the finding but the reviewing court is left with a definite and firm conviction that a mistake has been committed.' " *North Kitsap Sch. Dist. v. K.W.*, 130 Wn. App. 347, 360, 123 P.3d 469 (2005) (internal quotation marks omitted) (quoting *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001)).

B. *PLAMONDON* AND *CONFEDERATED TRIBES*

The question of whether tribal aboriginal rights previously existing in Washington's coastal areas have been extinguished has been addressed in two cases, by the federal Indian Claims Commission (Court of Claims) in *Plamondon* and by the Ninth Circuit in *Confederated Tribes*.

In *Plamondon*, the Court of Claims considered the question of the extinguishment of the aboriginal title specific to the Cowlitz Tribe. *Plamondon, ex rel. Cowlitz Tribe of Indians v. United States*, 467 F.2d 935, 937-38 (Ct. Cl. 1972). The Court of Claims determined that the initial limited settlement by non-Native Americans in the 1850s alone was insufficient to extinguish aboriginal title because the settlement was limited and did not disrupt the Cowlitz Tribe's way of life. *Id.* However, the Court of Claims determined that by 1863, there was substantial settlement of the Cowlitz Tribe's land such that "the non-Indians greatly outnumbered the Indians, the Indians

intermingled with the non-Indians and no longer maintained an independent existence, and they were thus deprived of the exclusive use and occupancy of their aboriginal lands." *Pueblo*, 350 F. Supp. 3d at 1107 (citing *Plamondon*, 467 F.2d at 936-37). These facts, combined with Congress' attempt to establish a reservation for the Cowlitz Tribe and the evidence that Congress intended to foreclose treaty negotiations and sell the Cowlitz Tribe's land, provided sufficient support for the court to find that the aboriginal title of the Cowlitz Tribe had been extinguished by 1863. *Plamondon*, 467 F.2d at 937.

In *Confederated Tribes*, the Shoalwater Bay Indian Tribe and the Chehalis Tribe asserted they possessed off-reservation fishing rights using several arguments, including that they possessed aboriginal fishing rights that had not been extinguished. 96 F.3d at 337.

Among its holdings, *Confederated Tribes* rejected the tribes' arguments and determined that any non-treaty aboriginal rights had been extinguished. *Id.* at 342. Recognizing the relative ease with which aboriginal rights can be terminated, the Ninth Circuit affirmed the U.S. District Court's decision that the 1863 Lincoln Proclamation that opened the lands of Southwest Washington, including those of the Cowlitz Tribe, for settlement extinguished any remaining aboriginal title, including any remaining fishing rights. *Id*. at 341-42. The court stated:

> The district court found that an 1863 executive order opening lands in Southwest Washington for settlement by non-Indians was inconsistent with exclusive use and occupancy of any of the local tribes and therefore extinguished any remaining aboriginal title in the region. The court also found that all aboriginal fishing rights of Indians to which the Tribes claim successorship were extinguished with aboriginal title.
>
> . . . . We reject the Tribes' claim to Chehalis aboriginal fishing rights.

Id.

C. APPLICATION

Both parties agree that there was no treaty between the Cowlitz Tribe and the federal government. Petitioners concede that the Cowlitz Tribe does not have treaty rights to fish off the Cowlitz Tribe's reservation, but they argue that the Cowlitz Tribe's aboriginal rights to do so have not been extinguished. Specifically, Petitioners maintain that the 1863 Lincoln Proclamation did not effectively extinguish the Cowlitz Tribe's right to fish because, under the Indian Commerce Clause[8] and U.S. treaty power, these rights can be extinguished only by an express act of Congress, and there has been no such act. They argue that because the 1863 Lincoln Proclamation was not ratified or authorized by Congress, the Cowlitz Tribe continues to possess an aboriginal right to fish. We disagree and determine that the off-reservation rights of the Cowlitz Tribe to fish have been extinguished.

Although an act of Congress is required to extinguish aboriginal title, this does not mean Congress is required to pass a law, execute a treaty, or otherwise explicitly state that it is extinguishing aboriginal title. Congressional intent to extinguish aboriginal title can be inferred from its actions. In 1853, Congress declared that in 1855 all lands west of the Cascades were to be subject to public sale. And in 1861, Congress allocated money to remove the non-treaty Native Americans, including the Cowlitz Tribe, from their territory. The Cowlitz Tribe subsequently had the opportunity to move onto the Quinault Reservation prior to their land being put up for sale. And in 1863, the Cowlitz Tribe's land was ordered to be sold by the 1863 Lincoln Proclamation. As the Court of Claims explained in *Plamondon*, congressional intent can be inferred from

[8] U.S. CONST. art. I, § 8, cl. 3.

Congress' allocation of funds to remove the Cowlitz Tribe and its attempt to establish an allotment for the Cowlitz Tribe on the Quinault Reservation. The 1863 sale of the Cowlitz Tribe's land and the additional congressional actions surrounding that sale so substantially interfered with the previous and historical use of the area by the Cowlitz Tribe that it extinguished their aboriginal title to the land.

Petitioners also argue that, even if their aboriginal rights of *occupancy* have been extinguished, the Cowlitz Tribe's aboriginal *fishing rights* have not been extinguished. They assert that aboriginal fishing rights are separate and more expansive than aboriginal occupancy rights and survive the extinguishment of the aboriginal right to occupy a territory. Citing *Kimball v. Callahan*, 590 F.2d 768, 773 (9th Cir. 1979), Petitioners claim that tribal members hold fishing rights separate from the rights to occupy ancestral ground.

Kimball's holding is not as broad as Petitioners urge and does not help them here. *Kimball* involved a statute terminating tribal occupancy that specifically stated that hunting and fishing rights were not abrogated. 590 F.2d at 772. Because there is no similar provision here that excepted fishing rights from the 1863 extinguishment of aboriginal title, there is no persuasive parallel to be drawn between *Kimball* and the present case. Moreover, not only is Petitioners' argument contrary to the holding in *Confederated Tribes* (which found aboriginal hunting and fishing rights extinguished along with occupancy rights), but Petitioners cite to no authority that would permit us to recognize, in the current context, their distinction between aboriginal occupancy rights and aboriginal fishing rights.

Finally, Petitioners maintain that the county district court and superior court both misread *Confederated Tribes* and that the case has minimal relevance to their appeal. They argue that

Confederated Tribes did not analyze its legal questions under the normal canons of construction of Indian law that give preference to tribal interests. This argument is unpersuasive.

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.

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*, 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.

II. WASHINGTON CIVIL RIGHTS LAW

Separate from federal Indian law, Petitioners also argue that their aboriginal rights to fish are protected by Washington civil rights law, pointing to our Supreme Court's recent decision in *State v. Towessnute*, 197 Wn.2d 574, 486 P.3d 111 (2021). We disagree.

In *Towessnute*, our Supreme Court repudiated its prior decision, which rejected the off-reservation treaty rights to fish of Towessnute as a member of the Confederated Tribes and Bands of the Yakama Nation. *Id.* at 575-78. 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. *Id.* at 577.

We agree that much of the historical mistreatment of indigenous peoples in this country has been a product of racial prejudice.[9] 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.

[9] "History, despite its wrenching pain cannot be unlived, but if faced with courage, need not be lived again." MAYA ANGELOU, ON THE PULSE OF MORNING (Random House 1993) https://billofrightsinstitute.org/activities/maya-angelou-on-the-pulse-of-morning-january-20-1993.

CONCLUSION

Because the Petitioners' aboriginal rights to fish have been extinguish, we affirm their convictions.

PRICE, J.

We concur:

LEE, P.J.

VELJACIC, P.

DESCHUTES LAW GROUP, PLLC

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