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Court of Appeals
Division I
State of Washington

NO. 73893-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Petitioner,

v.

BRUCE M. SNYDER
GREGG B. SNYDER

Respondents.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

APPELLANT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: HALEY W. SEBENS, WSBA#43320
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INTRODUCTION

The Respondents were charged and found guilty of unlawful hunting in the second degree following a bench trial in district court. The Respondents claimed the affirmative defense of tribal treaty rights contending they are members of the modern-day group Snoqualmoo Tribe. The Snoqualmoo Tribe is not recognized as an Indian tribe by the federal government, and no court has recognized the group to be political successor in interest to an Indian tribe that signed the Treaty of Point Elliott.

Cases involving treaty Indian hunting rights may address a variety of issues, such as the geographic scope of where a hunting right can be exercised. *See e.g. State v. Buchanan*, 138 Wn.2d 186, 200, 978 P.2d 1070 (1998). But whenever a treaty right is raised as an affirmative defense to a hunting crime, the validity of the defense depends on the legal and factual conclusion that the defendant belongs to a tribe and that the defendant's tribe is the continually-existing political entity that secured treaty rights in 1855. *E.g*. *State v. Posenjak*, 127 Wn.App. 41, 111 P.3d 1206 (2005) (holding that the defendant did not show that the modern day Snoqualmoo had treaty rights).

The sole evidence presented at trial in Skagit County District Court of political continuity between the modern group and a historic Indian tribe merely showed that some members of the modern Snoqualmoo claim ancestors who signed the treaties, but the record did not show how the modern day Snoqualmoo maintained continual political existence from the tribe at treaty times into the present day tribe. The RALJ court reversed the district court's rejection of the affirmative defense. The RALJ court relied on minimal evidence such as anecdotal descriptions of modern day farming of a potato that hearsay dates to treaty-times. This falls short of the evidence required by the federal courts to recognize a group as holding Indian treaty hunting rights. The RALJ court's legal error was to misapprehend the standard for proving that the modern Snoqualmoo are the continually existing political successor in interest to a political entity that contracted with the United States with the Treaty of Point Elliott of 1855. This court must reverse the superior court's decision finding that the district court erred.

I. ASSIGNMENT OF ERROR

Assignment of Error: The superior court erred by reversing the trial court conviction based on its conclusion that the defendants

could invoke rights secured to Indian Tribes in 1855 under the Treaty of Point Elliott.

Issues Presented:

1. The Superior Court erred in failing to provide deference to the District Court as the fact finder by finding the Snoqualmoo Tribe to be a successor in interest to the Treaty of Point Elliot.
2. The Superior Court erred in finding that the respondents had proven by a preponderance of the evidence the affirmative defense of treaty hunting rights where the evidence fell short of the standard of proof for the recognition of tribal treaty rights.
3. The Superior Court erred in allowing litigation over the establishment of treaty rights to occur for the first time in a District Court criminal forum, and where the tribe was not a party to the proceeding.

II. STATEMENT OF THE CASE

Respondents, Gregg and Bruce Snyder were charged with two counts of unlawful hunting of big game in the second degree pursuant to RCW 77.15.410. The facts surrounding the death of the elk were not disputed at trial. Bruce and Gregg Snyder, after killing

an elk out of season produced what they claimed to be Snoqualmoo Tribe hunting licenses and asserted a treaty right. Trial Transcript, Part I, at 8, lines 6-12; CP at 63. On December 6, 2012, the pending cases were consolidated and the Honorable Judge Gilbert presided over the bench trial in Skagit County District Court. Defendants asserted the affirmative defense of tribal treaty rights, as members of a group that self-identifies as the Snoqualmoo Indian Tribe. Following testimony and closing argument, the court found defendant Gregg Snyder guilty of two counts of unlawful hunting of big game in the 2nd degree, and defendant Bruce Snyder, guilty of one count of unlawful hunting of big game in the 2nd degree.

The verdict of the district court included the following oral findings: The district court is not the appropriate court to weigh the appropriateness of tribal recognition or treaty right issues. The district court had jurisdiction to hear the criminal case as charged pursuant to RCW 77.15.410. Only a tribe can exercise treaty rights. Adjudication of a tribe's treaty rights occurs in federal court, and that two individual defendants cannot raise treaty rights as individuals independent of a tribe. A tribe must have an established tribal status, as one of the nine tribes that have treaty rights as set forth in *U.S. v. Washington I and II*. The Snoqualmoo Tribe is not an established treaty tribe. Trial

Transcript, Part II, at 17, lines 13-26, through page 18, lines 1-12.

Respondents appealed to superior court, asserting error in both the district court's denial of the motion to dismiss for lack of jurisdiction, and failure to grant the affirmative defense of tribal treaty hunting rights. The consolidated appeal was heard in May of 2015. The superior court reversed the trial court's findings. The superior court's ruling included findings that the defendant's group Snoqualmoo Tribe is legally entitled to exercise treaty rights vested in the Treaty of Point Elliott, concluding that the defendants proved an ongoing and continuous characteristic of the original Snoqualmoo Tribe. Order on RALJ Appeal, Bruce Snyder and Gregg Snyder v. State of Washington, 12-1-01143-4 (2012) (Docket No. 22), Findings ¶ 2, 4, 5, and 7. ("Order on RALJ Appeal"). Judge Needy found that the lower court abused its discretion in denying the affirmative defense of tribal hunting privileges, and dismissed the criminal charges. The State filed a motion for discretionary review, which the Court of Appeals granted on March 24, 2016. This timely appeal follows.

III. STANDARD OF REVIEW

RALJ 9.1 governs appellate review by a superior court of a decision of a district court. *State v. Ford*, 110 Wn.2d 827, 829–830,

755 P.2d 806 (1988); *State v. Brokman*, 84 Wn. App. 848, 850, 930 P.2d 354 (1997). A superior court reviews the lower court ruling to determine if there are any errors of law and "shall accept those factual determinations supported by substantial evidence in the record" that are expressly made or reasonably inferred. RALJ 9.1(a) and (b). The superior court does not consider the evidence de novo. *State v. Basson*, 105 Wn.2d 314, 317, 714 P.2d 1188 (1986). "These rules likewise apply to appellate courts that grant discretionary review of a superior court's RALJ decision." *State v. Weber*, 159 Wash. App. 779, 785-86, 247 P.3d 782, 785-86 (2011) (citing *Ford*, 110 Wn.2d at 829). "Appellate courts also will treat mislabeled findings or conclusions in accord with what they actually are." *Id.* (citing *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986)). Therefore, to address the Snyders' claim that Snoqualmoo has treaty rights, this Court may address the legal issue of whether there is a sufficient showing of tribal treaty rights de novo and otherwise defer to the trial court's view of the relevant evidence.

IV. ARGUMENT

When charged criminally with unlawful hunting of big game, an affirmative defense of Indian tribal treaty rights may preempt the application of state law if proven by a preponderance of the evidence.

See State v. Petit, 88 Wn.2d 267, 269, 558 P.2d 796 (1977); *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971). When a defendant is accused of violating the State hunting laws and claims a treaty exemption, he has the burden of persuasion and proof that a treaty exists, that he is a beneficiary of it, and that the treaty as a matter of law bars as to him the operation and enforcement of the State regulations. *State v. Courville*, 36 Wn. App. 615, 622, 676 P.2d 1011 (Div. 1, 1983) (citing *State v. Moses, 79 Wn.2d 104, 110, 483 P.2d 832 (1971), cert. denied* 406 U.S. 910, L.Ed. 2d 822, 92 S. Ct. 1612 (1972)).

The Respondents associate themselves with the modern-day group called Snoqualmoo. Because the group of Snoqualmoo Indians are not currently recognized by either the state or federal government to have treaty rights, the defendants attempted to establish, for the first time and in district court, this contractual relationship with the federal government. The trial court ruled that the affirmative defense was not proven by a preponderance of the evidence because Snoqualmoo was not a treaty tribe. On RALJ appeal, superior court reversed and remanded, finding that the trial court abused its discretion in denying the affirmative defense. Consequently, the superior court's decision allowed, for the first time,

an Indian group to establish treaty rights in a District Court criminal adjudication; the decision created a contractual relationship between the Snoqualmoo Indians and the federal government, one never before recognized and one the superior court does not have authority to establish; finally, the superior court misapplied the standard required for proving a contractual relationship between a tribe and the government.

A. REVIEW OF CURRENT OFF-RESERVATION INDIAN TREATY FISHING AND HUNTING RIGHTS IN THE PACIFIC NORTHWEST SHOWS THAT THE SNOQUALMOO TRIBE IS NOT A TREATY TRIBE OR SUCCESSOR IN INTEREST TO A TREATY TRIBE

The Treaty of Point Elliott was created in January 1855 and ratified March 8, 1859. The first article of the treaty includes a description of lands ceded to the United States by the Indians. The treaty provides, in article I, that the "said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at the inlets and bays of western Washington territory to the summit of the Cascade range of mountains." Treaty of Point Elliott at 927. Article 5 of the treaty provides:

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Treaty of Point Elliott at 928. This paragraph is substantially the same in all of the Stevens' Treaties, and its language has been the subject of extensive litigation in both state and federal court over the last century. *See State v. Buchanan*, 138 Wn.2d 186, 200, 978 P.2d 1070 (1998) (referencing the historical litigation of the Stevens' Treaties); *United States v. Washington*, 384 F.Supp. 312, 334 (W.D. Wash. 1974) affm'd 520 F.2d 676 (9th Cir. 1975) (*"Wash I"*), *cert. denied*, 423 U.S. 1086, 47 L.Ed. 2d 97, 96 S. Ct. 877 (1976) (detailing the historical background of the treaties in the Pacific Northwest).

1. Snoqualmoo Tribe is not an established treaty tribe in Washington

Today, it is generally well known which modern-day tribes in Washington have treaty rights. Through federal litigation and adjudication with the federal government, several of Washington's Indian tribes exercise treaty rights. *United States v. Washington*, 384 F. Supp. 312, 359 (W.D. Wash. 1974) (*Washington I*) (recognizing:

the Hoh, Quileute, and Quinault treaty rights as set forth by the Treaty of Olympia; the Lummi, Sauk-Suiattle, Upper Skagit, and Stillaguamish as set forth by the Point Elliott Treaty; Makah as set forth in the Neah Bay Treaty; the Muckleshoot as set forth in the Medicine Creek and Point Elliott Treaties; the Nisqually, Puyallup, and Squaxin Island as set forth in the Medicine Creek Treaty; the Skokomish as set forth in the Point No Point Treaty; and the Yakama treaty rights as set forth in the Yakama Treaty); *United States v. Washington*, 459 F. Supp. 1020, 1039-40 (W.D. Wash. 1975) (*Washington II)* (recognizing treaty rights of the Lower Elwha Klallam and Port Gamble 'Klallam as set forth in the Point No Point Treaty; the Nooksak, Suquamish, Swinomish, and Tulalip set forth in the Point Elliott Treaty); *United States v. Washington*, 626 F. Supp. 1405, 1486 (W.D. Wash. 1984) (recognizing the Jamestown S'Klallam treaty rights granted in the Point No Point Treaty).

Additionally, there are federally recognized tribes that do not have treaty benefits, and are categorized as non-treaty tribes. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340-41 (9th Cir. 1996) (Chehalis and Shoalwater Bay tribes); *United States v. Oregon*, 29 F.3d 481 (9th Cir. 1994) (recognizing some off reservation rights for the Colville Tribe in the

Colville Reservation per *Antoine v. Washington*, 420 U.S. 194 (1975) and in part of Lake Roosevelt per 16 U.S.C. § 835d); *United States v. Pend Oreille Pub. Util. Dist.*, 926 F.2d 1502, 1508 n.6 (9th Cir. 1991) (Kalispel Tribe); *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981) (Samish and Snoqualmie Tribes); *Spokane Tribe of Indians v. United States*, 163 Ct. Cl. 58 (1963) (recognizing the Spokane Tribe's off-reservation rights in part of Lake Roosevelt per 16 U.S.C. § 835d). Also existing within the state boundaries are non-treaty organizations of persons with Indian ancestry. *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981) (rejecting Chinook claims); *Washington*, 641 F.2d 1368 (rejecting treaty claims by Samish, Duwamish, Snoqualmie, Steilacoom, and Snohomish tribes).

2. Establishment of a treaty tribe depends on a showing that the tribal organization is the continually existing political successor to a treaty tribe.

Treaty-tribe status and the right to exercise federally protected Indian treaty hunting or fishing right is established when "a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure." *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990) (citing *United States v. Washington (Washington I)*, 520 F.2d 693 (9th Cir. 1975). The Snyders bear the burden of demonstrating that their

putative treaty tribe – the modern Snoqualmoo—are the continually existing political community that is the legal successor to a treaty tribe. *Id.*, *Suquamish Indian Tribe*, 901 F.2d at 775 (9th Cir. 1990).

a. *Stringent proof requirements apply if any party claims that a modern entity is a successor to treaty rights of a tribe that signed the treaty.*

The leading case that sets up the standards for proving that a modern group holds treaty rights of a signatory to the Stevens Treaties is *United States v. Washington (Washington II)*, 641 F.2d 1368 (9th Cir. 1981). A modern-day group can call itself a tribe and include descendants of treaty-signatory tribes, but those facts are insufficient as a matter of law to establishing treaty-tribe status. *Id.* at 1370–71; *United States v. Suquamish*, 901 F.2d at 776. To have the legal rights of a treaty-signatory, a party must show that the contemporary group—in this case the Snoqualmoo organization to which the Snyders' belong—has "treaty tribe status." *Id.* In a nutshell, that requires the Snyders to show that their group not only has some Indian ancestry and they are descendents of a treaty signatory but also that the "necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal

structure." 641 F.2d at 1372, citing *Washington I*, 520 F.2d at 693. The Ninth Circuit explained that:

> the sole purpose of requiring proof of tribal status is to identify the group asserting treaty rights as the group named in the treaty. For this purpose, tribal status is preserved if some defining characteristic *of the original tribe persists in an evolving tribal community*.

Id., 641 F.2 at 1372-73 (emphasis added). [1]

The corollary of the rule that treaty rights belong to the treaty-time tribal community is that those rights will cease to exist if the people of a tribe assimilate into the general public and there is "abandonment of distinct Indian communities." *Washington* II, 641 F.2d at 1173.

> When assimilation is complete, those of the group purporting to be the tribe cannot claim tribal rights. While it might be said that the result is unjust if the tribe has suffered from federal or state discrimination, it is required by the communal nature of tribal rights. To warrant special treatment, tribes *must survive as distinct communities*. See, e. g., *United States v. Antelope*, 430 U.S. 641, 646, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977); *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975).

[1] The Ninth Circuit was careful to avoid suggesting that a tribe must proof the existence of a structure that did not even exist at treaty time because "a structure that never existed cannot be 'maintained.'" *Id.* But the Court is clear that original tribe itself must be maintained even as it adapts to changing federal policies. *See also United States v. Oregon*, 29 F.3d 481, 484 (9th Cir.), amended, 43 F.3d 1284 (9th Cir. 1994) ("The group seeking to exercise treaty rights must show that it has maintained an 'organized tribal structure,' which in turn can be shown by establishing that "some defining characteristic of the original tribe persists in an evolving tribal community." Id. at 1372-73.

Id. (emphasis added).

These touchstones of claiming treaty-tribe status arose in the Ninth Circuit case that affirmed Judge Boldt's finding and conclusion that five modern-day tribes "had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communit(ies).'" *Id.* (quoting *United States v. Washington*, 476 F.Supp. 1101, 1105, 1106, 1107, 1109, 1110). These five tribes were the Duwamish, Samish, Snohomish, Snoqualmie and Steilacoom. The modern-day entity was not "a *political continuation of or political successor in interest*" to the tribes or bands who entered the treaties. 476 F. Supp. at 1104 (emphasis added). Those rulings are squarely on point for holding that the Snyders' claim about Snoqualmoo is insufficient as a matter of law.

b. *Comparable cases applying the test for treaty-tribe status illustrate how the Snyders' defense fell short of satisfying this high burden.*

Before examining how the evidence produced by the Snyders fell short of this showing, it is instructive to review various cases that have addressed the issue. The courts in those cases rejected claims of treaty-tribe status based on evidence that was far more extensive and robust than the Snyders' anecdotes.

Duwamish claim. The Duwamish Tribe "is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Dwamish Indians and who were party to the Treaty of Point Elliott, 12 Stat. 927." *United States v. Washington*, 476 F.Supp. 1101. Dwamish were named in the treaty with four signatories including Seattle, "who signed as chief of the Dwamish and Suquamish." *Id.* Many Dwamish moved to reservations and their descendants were members of those treaty-status tribes. *Id*. The entity called "Duwamish Tribe" failed to show treaty-tribe status. The facts that were relevant to the ultimate finding that the modern group had not functioned since treaty times as continuous separate, distinct and cohesive Indian cultural or political community included:

- The Duwamish Tribe "exercises no attributes of sovereignty over its members or any territory"
- "None of its organizational structure, governing documents, membership requirements or membership roll has been approved or recognized by the Congress or the Department of the Interior for purposes of administration of Indian affairs."
- It only allegedly had "a constitution and bylaws and purports to operate as an identifiable and distinct entity on behalf of its members" and it had "no current roll approved by the tribe[.]"

United States v. Washington, 476 F. Supp. 1101, 1105. Based on these facts, the group "and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community." *Id.* And, the "[p]resent members have no

common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the" group.

Samish Claim. The Samish Tribe included "persons who are descendants in some degree of Indians who in 1855 were known as Samish Indians and who were party to the Treaty of Point Elliott." *Id.* The Samish claim failed because

> [the members] and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community. The present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity.

476 F.Supp. at 1106. Thus, there was no "organized tribal structure in a political sense."

Snohomish Claim. Judge Boldt's findings about the 1970s Snohomish Tribe are similar to the Samish. The court found that the treaty-time Snohomish people occupied the Snohomish watershed and, for the most part, became part of the treaty-status Tulalip Tribes. 476 F.Supp. at 1107. Tulalip Tribe does enjoy treaty tribe status.

Snoqualmie Claim. The Snoqualmie Tribe, which has more recently been federally recognized, 62 Fed. Reg. 45864 (1997), has failed to established treaty right status. Judge Boldt rejected their

claim after finding that the group "is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Snoqualmoo Indians[.]" *Id.* at 1108. "The Snoqualmoo were named in and a party to the Treaty of Point Elliott" and "[f]ourteen signers … were identified as Snoqualmoo, including their chief, Patkanim." *Id.* The Snoqualmoo people who were the predecessors of the Snoqualmie group "settled on the Tulalip Reservation and many of their descendants are members of the Tulalip Tribes" while others are "enrolled as members of other Indian reservation communities." *Id.* The treaty-tribe claim failed for the same reasons as stated above—there was no "continuous separate, distinct and cohesive Indian cultural or political community." 476 F. Supp. at 1109. "The present members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation with the Intervenor entity." *Id.*

The records, however, show that the decision rejecting the Snoqualmie claim occurred at a time when the Snoqualmie Tribe included that same current "Snoqualmoo" family line that later left the Snoqualmie organization to call itself Snoqualmoo. That is, the Snoqualmie Tribe included the "Julia Pat Kenum line" at the time Judge Boldt and the Ninth Circuit rejected the Snoqualmie Tribe

treaty right claim. *See* Order Docketing and Dismissing Request for Reconsideration, 31 IBIA 260-62, *IN RE FEDERAL ACKNOWLEDGMENT OF THE SNOQUALMIE TRIBAL ORGANIZATION*, Docket No. IBIA 98-26-A (Rejecting Snoqualmoo motion to reconsider recognition of Snoqualmie Tribe). See Supra § B 2, 5 (explaining how the Snoqualmie Tribe that was adjudged to lack treaty right status included the very same people who have splintered off to reorganize as the Snoqualmoo Nation).

Steilacoom Claim. The findings that rejected the Steilacoom Tribe's claim are similar to the other four tribes. 476 F.Supp. at 1110.

The Ninth Circuit affirmed the non-treaty status of these five tribes even though they each had a modern day constitution and formal governments. The claims were insufficient to establish treaty rights because:

> the [tribal] governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required.

641 F.2d at 1373. The Ninth Circuit also observed that many tribes were similarly composed of members descended from treaty tribes and sometimes intermarried with non-Indians. Unlike the Samish, Snohomish, Snoqualmie, Steilacoom, and Duwamish, treaty tribes

were made up of people who settled in distinctly Indian communities proving continuity since treaty time, but "the persons who comprise the [five tribes] have not settled in distinctively Indian residential areas." *Id*. at 1174.

Other Treaty-Right Claims: The Ninth Circuit applied the same standards in two other cases. In one case, the Suquamish Tribe (which has treaty status) made a claim that the treaty-time Duwamish had "merged" with it such that the Suquamish Tribe today could exercise the treaty fishing rights (and fishing locations) of the treaty-time Duwamish. *See Suquamish Indian Tribe*, 901 F.2d 772. The Ninth Circuit again turned to the political continuity inquiries and required proof that the Duwamish treaty signatory group merged with the Suquamish. Specifically, it required proof that a "cohesive band" merged and "that together they maintain an organized tribal structure." This again shows how treaty rights in a modern tribe depend on the continual existence of a Duwamish treaty tribe from treaty time until today.[2]

[2] In the second case, the Confederated Tribes of the Colville Indian Reservation claimed the treaty rights based on the rights of several bands that had signed the Treaty with the Yakimas. "[T]he Wenatchi, Entiat, Chelan, Columbia, and Palus tribes were each parties to the Yakima Treaty of June 9, 1855." *United States v. Oregon*, 29 F.3d at 485. The Wenatchi, Entiat, Chelan, Columbia, and Palus did not move to the Yakima Reservation, carried out a nomadic existence, and negotiated with the government in 1879 and 1883, before eventually moving to the Colville Reservation. In this way, the those bands separated themselves from the

These cases show that treaty-tribe status requires a detailed showing that confirms continuity of political existence as a tribal community or organization that controls its members, and that it must be shown from treaty-time to the present. This is the law because treaty rights arise from agreements between an Indian tribe acting as a self-governing sovereign over its members and the federal government. *See Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 675, 679, 99 S.Ct. 3055 (1979); *United States v. Oregon*, 29 F.3d at 484 (Tribes as they existed at treaty councils were "the entities receiving treaty rights."). The treaty rights belong to a tribe as a community; rights are not personal property of individuals. *Whitefoot v. United States*, 155 Ct. Cl. 127, 293 F.2d 658, 663 (1961). And, rights of treaty-time communities cannot be brought back to life after the treaty-time tribe ceased to exist and function as the self-governing separate entity that treated with the federal government in 1855, and when the modern tribe is composed of members not living in a separate Indian community. *Washington II*, 641 F.2d at 1173.

In the absence of a showing of a cohesive and separate Indian community, and its continuation since treaty times, the RALJ court

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Yakima Nation and did not retain any communal rights that might have otherwise

should have reached the same conclusion reached by Judge Boldt when the Snoqualmie Tribe litigated. First, the group "and their ancestors do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community." 476 F.Supp. at 1109. Second, the "[p]resent members have no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation" with the group. *Id*.

B. AS A MATTER OF LAW, THE SNYDERS' EVIDENCE IS INSUFFICIENT TO SHOW THAT THE SNOQUALMOO TRIBE HAS TREATY TRIBE STATUS.

If the state criminal court action is an appropriate forum for adjudication of tribal treaty status for the first time, the case law is clear that only the tribe that signed the treaty, called a "signatory tribe," can exercise treaty rights. *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) (*Washington II*). A tribe seeking to assert rights as a treaty signatory must establish treaty tribe status. *State v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir. 1990) (citing *U.S. v. Washington*, 641 F.2d at 1370-71) (a contemporary tribe must therefore obtain 'treaty tribe status'). The burden the Snyders faced is not whether members of their group have

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been created by the treaty.

Snoqualmoo ancestry or cultural ties. That is, at best, a starting point. But is it not even a prima facie case of treaty-tribe status as shown by the cases reviewed above. Rather, their burden is to show that there was a treaty-time tribe, and that it has had a continued existence as an Indian community. To do that, they needed to present details about the treaty-time entity they claim to be and show its history from then up to the present. In contrast to a proper showing, the evidence adduced by the Snyders "damns by faint praise." Simply put, if the treaty-time Snoqualmoo Tribe has occupied Washington since treaty times and governed over its members until today in a cohesive Indian community, there would surely be real evidence.

The RALJ court decision drastically oversimplified the legal standard required to prove treaty-tribe status. The RALJ court concludes little more than the fact that the Snyders proved ancestry back to Pat Ka-nam, who was a signatory of the Treaty on behalf of a treaty time Snoqualmoo group. From that point, the RALJ court leapt to the conclusion that the recently organized descendants of Pat Ka-nam identifying as Snoqualmoo Tribe are a continuation of the treaty-time Snoqualmoo with treaty rights. Order on RALJ Appeal, Conclusions ¶ 2, 3. These reasons are the stated basis for

concluding that the Snyders' tribe had an ongoing and continuous political structure since treaty time. Order on RALJ Appeal, Conclusions ¶ 1, 2.

1. The evidence disproved continual existence as a tribe.

The first reason to reverse the RALJ decision is because concessions and conclusions showed that the Snoqualmoo organization was recently formed and lacked any hallmarks of a continually functioning and persisting tribal community. A reorganized group of Indians cannot establish the 'persisting' tribal culture as the fact of reorganization confirms the lack of a persisting tribal community. At the trial level, this was acknowledged by counsel in closing argument stating that the tribal structure was "not set up as a tribe" but rather families living together for a common purpose. Trial Transcript, page 12, lines 22-24. Furthermore, the Superior Court judge on RALJ recognized that the Respondents had not demonstrated a persisting tribal culture in stating that "only in the last twenty to thirty years, the Snoqualmoo have been reorganized, if you will, or actively participating as a tribe or a group . . ." RP 22, 11. 9-12 Proceedings of May 28, 2015.

This recognition by both counsel for the Respondents and the RALJ judge should, as a matter of law, defeated the Snyders' claim that the Snoqualmoo has treaty rights.

2. The RALJ court relied on legally erroneous standards.

The second reason to reverse is that the RALJ court admitted to reasoning that is legally erroneous. For example, the court commented that "just because a tribe didn't exist at a point, they still could exist and be recognized in the future." Transcript on RALJ, p. 21, ll 3-5. This contradicts the case law reviewed above. The law requires a "continuous" existence as a political identity from treaty-time to the present so that if a treaty-time tribe did not exist at some point, it would defeat a claim based on that tribe. *Washington II*, 641 F.2d at 1173. The RALJ court erred by concluding that no reasonable trier of fact could have reached any other conclusion. Order on RALJ Appeal, Conclusions ¶ 4. The record, however, left endless questions about the details of the treaty-time Snoqualmoo tribe and how and where it continued as a tribe into the present day.

For the present issue, revisiting litigation of treaty rights in federal court is particularly relevant because the RALJ court relied on Snoqualmoo culture when "blended with Snoqualmie." Transcript of Oral Argument on Appeal at 23, line 23-24, Bruce and Gregg Snyder

v. State of Washington, 12-1-01143-4 (2012). ("Appellate Transcript"). And, the current Snoqualmie Tribe "is composed primarily of persons who are descendants in some degree of Indians who in 1855 were known as Snoqualmoo Indians." *United States v. Washington*, 476 F.Supp. 1101, 1105; Trial Transcript, page 55, lines 10-20 (witness acknowledging that 15 years back [approx 1997], the tribal meetings were Snoqualmie, not Snoqualmoo); page 114, lines 9-14 (acknowledging recent division between Snoqualmie Tribe and members of modern Snoqualmoo). This 'blended' tribal group was acknowledged by counsel for Respondents in closing argument: "The testimony has been that there have been in existence this group of Snoqualmoo/Snoqualmie . . ." Trial Transcript, part 2, page 12, lines 18-19. At trial, the fact that the current Snoqualmie Indians do not have treaty rights was conceded by defense. Trial Transcript page 50, lines 14-17 (answering in the negative as to whether Snoqualmie Indians have treaty rights).

The Snoqualmie tribe is not a treaty tribe, not a signatory tribe and not successors in interest to the Point Elliott Treaty. 476 F. Supp. at 1108 (specific findings as to Intervenor Snoqualmie Tribe). In this regard it is worth noting that Judge Boldt found the current Snoqualmie Tribe, like the current Snoqualmoo Tribe, "is composed

primarily of persons who are descendants in some degree of Indians who in 1855 were known as Snoqualmoo Indians." *Washington*, 476 F. Supp at 1108. But that fact was not helpful in establishing the existence of treaty rights for the current Snoqualmie Tribe because federal courts have consistently held that it is not enough for a current group identifying as a tribe to simply trace some lineage to a treaty-time Indian. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, 679, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (holding that individual Indians do not have treaty rights, even if they are descendants of the signors of the treaty, because a treaty is a contract between sovereigns, not individuals); *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981).

The concessions acknowledged by the Snyders, their witnesses, their counselors, and the RALJ court highlight how the Snyders' tribe is only recently organized and how implausible it is for the Snoqualmoo to have rights when the Snoqualmie do not. Trial Transcript Part I, p. 60, ll. 19-21; page 62, ll. 18-26 (acknowledging individual Indian recognition, but no benefits to the Snoqualmoo as an organization).

3. The RALJ court erred by making new findings based on anecdotal agricultural evidence

The RALJ court's third error is shown by its reliance on evidence potatoes. *See* Transcript on Appeal, page 24, line 3-7 ("So the potato is certainly the strongest cultural or ongoing persisting characteristic of the tribe"). Eschewing historians, records, or anthropologists, the Snyders relied on a comment at trial by Earngy Sandstrom, "Chairman of the Tribe," was that "we still have the originals uh span of potatoes that was growing in the 1800s by the tribes and all the families still grow em." Trial Transcript, page 115, line 14-18; CP at 360. The RALJ court's quip that defendant proved Snoqualmoo rights "by a thin potato seed" shows that the Superior Court ruling was not even attempting to apply the rigorous standards for a modern group who claims status as a treaty Indian tribe. *See* 5/28/15 RP at 23, lines 18-20 (RALJ Transcript). The superior court later said that "the potato is certainly the strongest cultural or ongoing persisting characteristic of the tribe[.]" RP at 24, lines 3-5 (RALJ Transcript).

Moreover, reliance on comments about potato use as if it proved 125 years of continual tribal political organization shows that the RALJ court erroneously reweighed evidence. *State v. Thomas*,

150 Wn.2d 821, 874-75, 83 P.3d 970, 997 (2004) (reviewing courts must defer to trier of fact on issues of weight of the evidence and credibility of witnesses). The RALJ order compounds its erroneous reliance on the potato species by adding findings that have no basis in the record. It thought that the "Tribe has continuously grown the same potato crop on the same tribal lands". Order on RALJ at 5. There are no Snoqualmoo "tribal lands," there was no mention of tribal lands at trial, no proof was presented at trial of current members of Snoqualmoo having resided in the same location for any period of time, let alone since 1855.

4. The remaining evidence cited by the RALJ court was unreliable and does not demonstrate continuity of a tribal political organization.

Finally, the RALJ court found ongoing tribal culture based on "the same naming process; and continuous recognition of tribal heritage and culture." Order on RALJ Appeal, at ¶ 5. The comment at trial about a naming ceremony was made by Earngy Sandstrom who simply explained a gathering with food and elders, then bestowing a member with their Indian name. Trial Transcript, page 115, line 22-page 116, line 15; CP 340-41. This falls far short of continual tribal practices, cultures, or lifestyle of the Snoqualmoo Tribe of 1855, such that the defining characteristic of the treaty time

tribe persists and continues as today's Snoqualmoo. To be relevant under the case law, "continuous recognition of heritage and culture" requires a record proving that it defined the tribe in 1855 and continues.

The district court declined to give these issues weight to prove over one hundred and fifty years of ongoing culture and tradition. Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton,* 64 Wn. App. 410, 415-16, 824 P.2d 533, *rev. denied,* 119 Wn.2d 1011, 833 P.2d 386 (1992); *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970, 997 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily. *State v. Tocki,* 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied,* 98 Wn.2d 1004 (1982). Under the RALJ standards in RALJ 9.1(b), the superior court erred by making contrary findings and conclusions.

5. The RALJ court's reliance on connections with the Snoqualmie Tribe proves no rational basis for showing treaty time rights with the Snoqualmoo.

As discussed above, the RALJ court relied on Snoqualmoo being "blended with" the Snoqualmie Nation. 5/28/15 RP at 23, lines 24 (RALJ Transcript) (finding the two defendants proved an ongoing and continuous culture "even when perhaps at one point blended with Snoqualmie[.]"). Reliance on the modern Snoqualmie Tribe provides no substantive basis for a new finding given the rulings holding that the Snoqualmie Indians are descendants of people called Snoqualmoo, who do not have treaty rights. *Washington II*, 641 F.2d at 1373-74; *Washington*, 476 F.Supp. at 1109. Simply put, on this record, the relationship of the contemporary Snoqualmoo to the recognized Snoqualmie tribe is no basis for proving the important historical facts required to have treaty-tribe status.

6. The Synders' evidence was insufficient as a matter of law to show Snoqualmoo has treaty tribe status.

In summary, the Snyders' evidence did not support a conclusion that the modern Snoqualmoo tribe has treaty rights. The evidence did not show: (1) a continuing special political relationship between the Snoqualmoo organization and the United States; (2) how the membership of the Tribe is determined to confirm Indian and

Snoqualmoo ancestry; (3) that Snoqualmoo members live in and are brought up in an Indian community; (4) continuity of that community since treaty times; (5) that the Snoqualmoo has a functioning government or other control over members' lives and activities and how that has continued since treaty times; or that (6) members extensively participate in tribal affairs and have done so in a continuously functioning Indian community since treaty times.

In the absence of compelling evidence along such lines, there is no colorable basis for accepting the Snyders' claim that their tribe has treaty rights. This Court should affirm the district court and reverse the superior court. The Snyders' showing of treaty tribe status fails as a matter of law, for the reasons stated above.[3]

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[3] The Snyders' legal argument here fails for the same reason that an analogous case by one of their colleagues was rejected in federal court. A Snoqualmoo Tribal representative named Posenjack sued the Department of Fish and Wildlife and its Director and certain individuals. He failed.

> [T]he record contained very few allegations relevant to whether the Snoqualmoo Tribe has maintained an organized tribal structure since the time of the Point Elliott Treaty. Those allegations that it did contain were too conclusory and too vague to defeat a properly supported motion for summary judgment. …

Posenjak v. Dep't of Fish & Wildlife, 74 F. App'x 744, 746 (9th Cir. 2003) (internal quotation marks, citation, and footnotes omitted). The plaintiff "failed to plead facts sufficient to establish that the Snoqualmoo Tribe has rights under the Point Elliott Treaty." *Id*.

> [T]he record contained very few allegations relevant to whether the Snoqualmoo Tribe has maintained an organized tribal structure since the time of the Point Elliott Treaty. Those allegations that it did contain were too conclusory and too vague to defeat a properly supported motion for summary judgment. …

Posenjak v. Dep't of Fish & Wildlife, 74 F. App'x 744, 746 (9th Cir. 2003) (internal quotation marks, citation, and footnotes omitted). The plaintiff "failed to plead facts

C. WASHINGTON'S AFFIRMATIVE DEFENSE OF TREATY RIGHTS IS NOT AN AVENUE TO ESTABLISH TREATY TRIBE STATUS FOR THE FIRST TIME

To establish the affirmative defense of treaty rights, the defendant must show by a preponderance of the evidence (1) the existence of a treaty, (2) of which he or she is a beneficiary, and (3) that as a matter of law, the treaty bars him or her from operation and enforcement of the hunting laws and regulations. *State v. Moses*, 79 Wn. 2d 104, 110, 483 P.2d 832 (1971). Tribal treaty status has been a pre-established fact, litigated in the appropriate forum, and not raised for the first time as the affirmative defense. *See State v. Buchanan*, 138 Wn.2d 186, 978 P.2d 1070 (1999) (Nooksack Tribe's treaty rights previously litigated). For several reasons, a district court criminal trial is not the appropriate forum for the issue of treaty rights to be litigated for the first time. The necessary parties are not present, specifically: the tribe in question, other interested tribes, and the state regulatory agencies with expertise in ensuring that treaty tribes can fairly exercise treaty rights.

1. <u>Federal court is the appropriate forum for the issue of treaty rights to be litigated for the first time.</u>

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sufficient to establish that the Snoqualmoo Tribe has rights under the Point Elliott Treaty." *Id*.

The federal district court has continuing jurisdiction, and the ongoing nature of *Washington I* case is well-established. *See Greene v. United States*, 996 F.2d 973 (9th Cir. 1993) (noting that the federal district court forum is the proper forum where "all other interested parties can have their say." The recognition of a new treaty tribe affects other tribes, who typically appear as amicus or intervene in such claims. *See United States v. Washington*, 476 F.Supp. 1101 (W.D. WA. 1979) (demonstrating several groups of Indians intervening to assert treaty fishing rights following Judge Boldt's initial decision).

As noted in *Washington I*, the federal District Court urged all interested parties, tribes, agencies or organizations having any interest in the outcome of the decision to be joined so all related issues could be adjudicated. *United States v. Washington*, 384 F.Supp. 312, 328 (W.D. Wa 1974) (*"Washington I"*). Individual Indians do not have any treaty rights, even if they are descendants of the signors of the treaty, because a treaty is a contract between sovereigns, not individuals. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, 679, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). *See also United States v. Oregon*, 29 F.3d 481, 483-84 (9th Cir. 1994) (recognizing that the

tribal entity is the only entity that can legally act on behalf of its members). Snyders' Snoqualmoo Tribe can seek to intervene in that forum if it wishes to demonstrate treaty tribe status. It is obvious that there is no avenue to allow joinder or intervention of a non-party in an individual's criminal case.

The *Washington I* court goes on to recite which Indian tribes and bands have a treaty contract with the United States. *Id*. at 348-49. The contemporary Snoqualmoo Tribe apparently did not exist at the time that the federal court extended invitation to join, but that merely confirms that the modern day group of Snoqualmoo Indians are not the continually existing treaty signatory tribe of 1855.

Of course, any defendant may claim a treaty right preempts state law and this causes the state district court to sort through legal or factual issues relevant to their claim. State court retains jurisdiction to determine the factual and legal issues involved. *See State v. Courville*, 36 Wn. App. 615, 621-622, 676 P.2d 1011 (1983). *See also State v. Buchanan*, 138 Wn.2d 186, 196, 978 P.2d 1070 (1999) (citing *State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996); *Bour v. Johnson*., 80 Wn. App. 643, 647, 910 P.2d 548 (1996)). If a tribe has established such rights, a tribal member can logically assert the defense outlined in case law – showing that he

was utilizing the tribe's rights and benefits, subject to the tribe's control as envisioned in *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974). But, as shown above, this case involves the threshold question of whether the tribe even has a treaty right. To address that question, this Court should follow the federal cases and *Posenjak*. This can best assist the district courts and litigants by clarifying that the defense fails in the absence of serious evidence documenting treaty tribe status according to the standards set forth above.

2. *State v. Posenjak*, 127 Wn. App. 41 (Div. 3 2005) did not create a new path to establish treaty rights.

Under the federal cases described above, a tribe (and equally to the Snyders) face a significant burden to claim that a treaty right exists for a modern group. By misapplying and citing language stated in *State v. Posenjak*, the RALJ court created a new avenue to the establishment of tribal treaty rights, an avenue not supported in case law. But *Posenjak* does not change the legal standards. To the contrary, it starts from the proposition that "[o]nly the tribe that signed the treaty, or signatory tribe, can exercise treaty rights." *Posenjak*, 127 Wn. App. at 48, 111 P.3d 1206 citing *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) (*Washington II*). It cited *Washington II* for the requirements that for a tribe to establish

themselves as a treaty tribe, or a treaty signatory, or a successor in interest to a signatory tribe. *Id*. Thus, the Division III case does not set forth a new way for a tribe to establish rights. It does not change the law that the Snoqualmoo, or the Snyders, must meet to claim that the modern Indian group holds treaty rights.

IV. CONCLUSION

This case shows that the Snyders did not establish and prove treaty benefits in order to preempt state hunting laws. The State adds that this case cannot adjudicate with any finality if the Snoqualmoo Nation has treaty rights. Snoqualmoo is not a party, and neither is any other critically interested party. The case is a criminal prosecution against two hunters who deliberately hunted without state licenses and were caught for their illegal hunting. The burden on the Snyders is no different than the burden that would be placed on the Snoqualmoo or any other modern tribe claiming treaty-tribe status. Without that constant rigorous test, the law will become inconsistent – with one set of standards for tribes in *United States v. Washington* and a different standard in criminal courts. Such an approach would simply cause any putative treaty tribes to forum shop and bypass bringing a case with the proper parties in the proper federal court.

The conviction should therefore be affirmed. The district court properly rejected the Snyders' argument that their tribe has treaty rights as a successor in interest to a continually existing treaty-time tribe. Their evidence fell far short of what is required by law to demonstrate the conditions where federally created treaties preempt state laws governing fish and wildlife.

DATED this 13th day of June, 2016.

Respectfully Submitted,

By: _____
HALEY W. SEBENS, WSBA#43320
Deputy Prosecutor
Attorney for Petitioner

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Paula Plumer, addressed as 417 West Gates Street, Suite 1, Mount Vernon, WA 98273. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 13th day of June, 2016.

_____
Karen R. Wallace, DECLARANT

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [ ]United States Postal Service; []ABC Legal Messenger Service,[X] placing a true and correct copy of the document to which this declaration is attached, to: Jessica Fleming and C. Wesley Richards, in the Public Defender's pickup basket located in the Skagit County Prosecutor's office. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 13th day of June, 2016.

_____
Karen R. Wallace, DECLARANT