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Court of Appeals
Division I
State of Washington

94489-0

NO. 73893-3-1

IN THE COURT OF APPEALS DIVISION I

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

BRUCE M. SNYDER,
Petitioner.

Petition Following Decision by the Court of Appeals, Division I,
Terminating Review

PETITION FOR DISCRETIONARY REVIEW BY THE SUPREME COURT

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A. IDENTITY OF PETITIONER

Petitioner, Bruce Snyder, asks the Court to accept discretionary review.

B. COURT OF APPEALS DECISION

Mr. Snyder asks the Court to accept review of the decision of the Court of Appeals, Division I, filed April 3, 2017, attached hereto as Appendix "A."

C. ISSUES PRESENTED FOR REVIEW

1. Does the decision of the Court of Appeals in this case conflict with the published decision of Division III of the Court of Appeals in *State v. Posenjak*, 127 Wn.App. 41, 111 P.3d 1206 (2005)?
2. Did the Court of Appeals err in holding Mr. Snyder was required to prove the Snoqualmoo Tribe maintained a continuing political tribal structure, and that it was legally insufficient to establish a continuing cultural tribal structure?
3. Should the State have been required to disprove the affirmative defense of treaty hunting rights beyond a reasonable doubt?
4. Does the decision of the Court of Appeals infringe on the exercise of Mr. Snyder's federal treaty rights secured by Article 6, Clause 2 of the Constitution of the United States?

D. STATEMENT OF THE CASE

Mr. Snyder was convicted in Skagit County District Court of one count of unlawful hunting big game in the second degree. At a bench trial before the Hon. Warren Gilbert, Mr. Snyder asserted an affirmative defense of treaty hunting rights as a member of the Snoqualmoo Tribe. At trial, Mr. Snyder presented evidence, in part, as follows. The Snoqualmoo Tribe was specifically referenced as a signatory tribe in the Point Elliott Treaty. RP 50-51, 118, 135. Pat Ka-Nam, Chief of the Snoqualmoo, signed the Point Elliott Treaty, RP 118, 135. Mr. Snyder was a member of the Snoqualmoo Tribe. RP 51, RPII 4. The Point Elliott Treaty was admitted as an exhibit at trial.

Tribal Council meetings and yearly membership meetings occur regularly. RP 45, 96. While not federally recognized, the Snoqualmoo Nation is eligible for Indian health benefits, and members receive payments relating to a land transaction from the U.S. government. RP 61. Earngy Sandstrom, Head Chief and Chairman of the Tribe, testified the Tribe has continually existed and "always lived by the Treaty [of Point Elliott]." RP 100. Mr. Sandstrom testified the Tribe's activities stretch back to the signing of the Point Elliott Treaty; that naming and burial ceremonies currently practiced originated from older Snoqualmoo traditions; and that the current Tribe still grows the original strain of

potatoes from the same "span of potatoes that was growing in the 1800s" by the Tribe. RP 115, 116-117, 135. Mr. Sandstrom testified since the signing of the Point Elliott Treaty there has been a continuous group of people who have called themselves Snoqualmoo. RP 115.

The Tribe's hunting and fishing coordinator, Michael Snyder, issues hunting tags to tribal members in accordance with tribal regulations and consults with the Tribal Council to mete out punishment to members who violate hunting and fishing rules. RP 66-69.

The District Court found Mr. Snyder guilty of one count of Unlawful Hunting Big Game second degree. The Court found Mr. Snyder failed to prove the affirmative defense by a preponderance of the evidence because only members of a federally recognized tribe may exercise treaty rights. RPII 17-18. The Court said, "Um only a tribe can exercise treaty rights. It must be uh an established um tribal status, um one of the 9 tribes established uh to have treaty rights under *U.S. v. Washington I and II.*" RPII 18. The Trial Court did not address or weigh the evidence presented at trial regarding whether the Snoqualmoo Tribe was a signatory tribe or a successor in interest to a signatory tribe to the Point Elliot Treaty, whether the Snoqualmoo Tribe had "some defining characteristic of the original tribe [that] persists in an evolving tribal community," or whether the Tribe had a "continuous and defining political or cultural characteristic to the

entity that was granted the treaty rights," pursuant to *State v. Posenjak*, 127 Wn.App. 41, 49, 111 P.3d 1206 (2005); *Order of Judge Warren Gilbert*, December 6, 2012.

Mr. Snyder timely appealed to the Skagit County Superior Court. Judge Needy of the Superior Court held the District Court erred in its reliance on the lack of federal recognition of the Snoqualmoo Tribe. *Order on RALJ Appeal*, Conclusion #5. The Superior Court further held Mr. Snyder had proven the affirmative defense of treaty hunting rights by a preponderance of the evidence, relying upon *Posenjak, supra. Order on RALJ Appeal*, Findings #1-7. In his oral ruling, Judge Needy stated he "adopt[s] that language" from *Posenjak* that sets forth the tests for determining whether treaty rights have been established for purposes of the affirmative defense of treaty rights. *Transcript of Ruling*, 5. Judge Needy further found the District Court had abused its discretion in finding Mr. Snyder failed to prove the affirmative defense by a preponderance of evidence. *Order on RALJ Appeal*, Conclusion #4.

The Court of Appeals, Division I, granted the State's motion for discretionary review. The Court asked counsel to address, but not brief, the issue of whether the burden of proof of the affirmative defense of treaty hunting rights should remain on the defendant, or whether it should shift to the State to disprove once raised by the defense. On April 3, 2017,

the Court filed a decision reversing the Superior Court, holding tribal continuity must be proven by evidence of political continuity, not by social or cultural continuity evidence alone. *Appendix "A,"* p. 7-11. Without holding whether the burden to disprove the affirmative defense shifted to the State, the Court held the State disproved the defense beyond a reasonable doubt. *Appendix "A,"* p. 14.

E. ARGUMENT

This Court should accept discretionary review pursuant to RAP 13.4(b)(2) because the decision of the Court of Appeals in this case conflicts with the published decision of Division III of the Court of Appeals in *State v. Posenjak*, 127 Wn.App. 41, 111 P.3d 1206 (2005).

This Court should accept review pursuant to RAP 13.4(3) because infringement of tribal treaty rights presents a significant question of law under Article 6, Clause 2 of the Constitution of the United States, which provides all treaties are the "supreme Law of the Land." By extension, a question of law is presented under Article 1, Section 2 of the Constitution of the State of Washington, which states the United States Constitution "is the supreme law of the land."

This Court should accept review pursuant to RAP 13.4(b)(4) because the clarification and delineation of the requirements of the affirmative defense of treaty hunting rights in Washington is an issue of substantial

public interest that should be decided by the Supreme Court, including whether the State should be required to disprove the affirmative defense beyond a reasonable doubt.

1. **The Court of Appeals decision conflicts with the published *Posenjak* opinion.**

The decision of the Superior Court relied upon, and is consistent with, the holding of the Washington Court of Appeals in *State v. Posenjak*, 127 Wn.App. 41, 111 P.3d 1206 (2005) (Division III). The Court of Appeals decision in this matter runs contrary to the holding of *Posenjak*. The Court in *Posenjak* set forth the standards for an affirmative defense of treaty hunting rights:

> To establish the affirmative defense, the defendant must show by a preponderance of the evidence (1) the existence of the treaty, (2) of which he is a beneficiary, and (3) that, as a matter of law, the treaty saves him from the operation and enforcement of the hunting laws and regulations. *Id.* at 48.

To establish the second element of the defense, that a defendant is a beneficiary of a treaty, the defendant must prove he or she is a member of a tribe that was a signatory tribe to the treaty, or that the tribe is a successor in interest to a signatory tribe. *Id.* at 49.

To establish treaty rights as a signatory tribe, it must be shown (1) "it has maintained an 'organized tribal structure,'" which can be "shown

by establishing that '**some** defining characteristic of the original tribe persists in an evolving tribal community;'" and (2) that "a group of citizens of Indian ancestry is descended from a treaty signatory." *Id.* (Citations omitted, emphasis added.)

To establish treaty rights as a successor in interest to a signatory tribe, the successor tribe "must trace a continuous and defining political **or** cultural characteristic to the entity that was granted the treaty rights.'" *Id.* (Citations omitted, emphasis added.)

For purposes of the affirmative defense of treaty hunting rights, the decision of the Court of Appeals in the case at bar sets forth an entirely new and different standard to establish a tribe has maintained an organized tribal structure: that the tribe maintained a continuing political structure.

With regard to signatory tribes, the Court in *Posenjak* required the defendant to establish that "**some** defining characteristic of the original tribe persists in an evolving tribal community." *Id.* at 49 (Emphasis added). With regard to successor tribes, the Court in *Posenjak* held the successor tribe "must trace a continuous and defining political **or** cultural characteristic to the entity that was granted the treaty rights." *Id.* (Citations omitted, emphasis added.). The decision of the Court of Appeals in this case cannot be reconciled with *Posenjak.*

Contrary to the holding by the Court of Appeals in this case, in *Posenjak* the Court only held the defendant in that case, Mr. *Posenjak*, failed to prove that he, through the Snoqualmoo Tribe, possessed treaty hunting rights. The Court said, "[B]ased on the evidence presented at trial, Mr. Posenjak does not have any treaty rights under the Point Elliot Treaty." *Id.* at 50. This is unsurprising given the lack of evidence before the trial court in Mr. Posenjak's case. Only one witness was called, Mr. Posenjak's brother, who testified his grandfather told him "where the elk were," and that his grandfather was on the "Robin Rolls." *Id.* at 47. No other evidence was presented; not even a copy of the Point Elliott treaty was admitted at trial.

Mr. Posenjak failed to present evidence that the Snoqualmoo Tribe maintained an organized tribal structure, that some defining characteristic of the original tribe persists in an evolving tribal community, and failed to provide evidence of a continuous and defining political or cultural characteristic to the entity that was granted the treaty rights.

2. The Court of Appeals misconstrued federal civil case law.

In holding Mr. Snyder was required to prove the Snoqualmoo Tribe maintained a continuing tribal political structure, the Court of Appeals relied upon a federal case, *US v. Washington,* 641 F.2d 1368 (1981), that involved application of federal civil law to the determination

of whether tribes other than the Snoqualmoo Tribe had established treaty fishing rights under the Treaty of Point Elliott. The Court of Appeals noted other tribes were unable to secure treaty hunting rights in the *Washington* case because "the [tribal] governments did not control the lives of the members," and failed to clearly establish a "continuous informal **cultural** influence." *Appendix "A,"* p. 9 (Citing *U.S. v. Washington,* 641 F.2d at 1373) (Emphasis added). The Court of Appeals reasoned, "This case demonstrates that the continuing tribal structure must be political, not merely social or cultural." *Appendix "A,"* at 9-10.

Respectfully, the *Washington* case, to which the Court cites, did not hold, or imply, that federal treaty rights may only be obtained by demonstrating a continuing political tribal structure. Rather, the Court upheld the Federal District Court finding that the tribes "had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian **cultural or political** communities.'" *Washington,* 641 F.2d at 1373 (Emphasis added). Further, the *Washington* Court noted the tribes had failed to establish a "continuous informal **cultural** influence." *Id.* Continuous cultural influence was not relevant to establishing political continuity, but it was relevant to establishing cultural continuity. The Court of Appeals has held for the first time that cultural continuity is insufficient to meet the *Posenjak* test. Clarifying this is an issue of

substantial public interest that should be decided by the Supreme Court per RAP 13.4(b) (4).

With regard to tribal structure in general, the *Washington* Court went to some length to recognize that a tribe evolves over time. It said, "The tribe need not have acquired organizational characteristics it did not possess when the treaties were signed. The white negotiators imputed to many of the tribes a tribal structure they did not have...Change in any community is essential if the community is to survive." *Washington,* 641 F.2d at 1373.

Here, the evidence at trial was that the Snoqualmoo Tribe has always existed as a collection of families whose heads governed tribal activities, and that tribal activities dating back to the signing of the Treaty of Point Elliott continued to be practiced by the Snoqualmoo people. RP 114-119. The tribe also maintains rules and punishes people who violate them, thus exerting some control over the lives of its members. RP 113. This and all other testimony regarding the history and practices of the Snoqualmoo people stood uncontroverted at trial. The State failed to present evidence at trial that the Snoqualmoo, who signed a treaty with the United States, was any more formally organized at that time than it is today. The State failed to present evidence that the Snoqualmoo ever ceased to exist. No factual basis exists in the trial record for the finding by

the Court of Appeals that the Snoqualmoo Tribe formed in the 1980s from a mixture of persons banished from, or found ineligible for membership in, the Snoqualmie Tribe. *Appendix A, p. 11.*

Even should the Court of Appeals' logic regarding the requirement of evidence of political continuity be accepted by the Supreme Court, it was met by the evidence at trial.

3. Federal civil case law is not binding authority.

Federal civil case law does not control, or even address, whether an affirmative defense of treaty rights may be asserted or proven in State court in a criminal prosecution under State law. At most, federal law provides persuasive authority.

"[F]ederal case law interpreting a federal rule is not binding on this court even where the rule is identical '[t]his court is the final authority insofar as interpretations of this State's rules is concerned.'" *In re Detention of Turay,* 139 Wn.2d 379, 402, 986 P.2d 790 (1999) (Citations omitted). "On matters of federal law, we are bound by the decisions of the United States Supreme Court...Decisions of the federal circuit courts are 'entitled to great weight' but are not binding." *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters,* 180 Wn.2d 54, 62, 322 P.3d 1207 (2014) (Citations omitted).

4. **<u>Mr. Snyder established the affirmative defense by a preponderance of the evidence.</u>**

The uncontroverted evidence at trial established the affirmative defense. Specifically: the Snoqualmoo Tribe was a signatory tribe to the Point Elliott Treaty, RP 50-51, 118, 135; Mr. Snyder is a member of the Tribe based upon descent, RP 51, 96; the Snoqualmoo Tribe has been continuously in existence since the Treaty was signed, RP 100, 115; the Tribe has regular meetings, RP 45, 96; the Tribe carries on some of the same traditions as the original Snoqualmoo Tribe, including growing the same potatoes on the same "span," conducting the same burial ceremonies, and conducting the same naming ceremonies, RP 115, 116-117, 135.

Treaty rights are an affirmative defense. To establish the defense, it must be shown that: (1) a treaty exists, (2) of which the defendant is a beneficiary, and (3) "that, as a matter of law, the treaty saves him from the operation and enforcement of hunting laws and regulations". *State v. Posenjak*, 127 Wn. App. 41, 48, 111 P.3d 1206 (2005).

In *Posenjak*, the Court of Appeals provided what amounts to two separate paths to establishing the affirmative defense of treaty rights: one standard that must be met for Indians asserting treaty rights as direct beneficiaries of a treaty, and a second for Indians asserting their tribe has treaty rights as a successor in interest to a signatory tribe. By either

standard, the testimony at trial was sufficient to establish the affirmative defense of treaty rights.

a. Mr. Snyder established the Snoqualmoo tribe has maintained a tribal structure and common descendance from a treaty signatory.

For a tribe asserting treaty rights directly, as a signatory tribe, *Posenjak* held:

> "Indians later asserting treaty rights must establish that their group has preserved its tribal status... First, it must show that it has maintained an organized tribal structure. This can be "shown by establishing that 'some defining characteristic of the original tribe persists in an evolving tribal community.'" Id. (quoting *Washington II*, 641 F.2d at 1372-73). Second, it must show that "a group of citizens of Indian ancestry is descended from a treaty signatory." *Washington I*, 520 F.2d at 693."

State v. Posenjak, 127 Wn. App. 41, 49, 111 P.3d 1206 (2005).

Ultimately, the Court found that Mr. Posenjak "failed to establish" that he was a member of a signatory tribe. *Id* at 49. Given the lack of evidence presented at trial in support of his contention, the Court's conclusion is not surprising. The evidence before the trial court in this case, however, was substantially greater. The treaty itself was admitted as an exhibit at trial. It clearly shows representatives of the Snoqualmoo Tribe, including its Chief, signed the Treaty of Point Elliott. Additionally, three

members and officials of the Tribe testified as to the group's organized tribal structure. Mr. Sandstrom testified regarding the continuity of the Tribe's defining characteristics in naming and burial ceremonies as well as cultivation of potatoes grown by the Snoqualmoo people from the same span since the 1800s. RP 115, 116-117, 135.

b. The Snoqualmoo trace a continuous and defining political or cultural characteristic to the entity that was granted the treaty rights.

A tribal member asserting treaty rights as a successor tribe bears the burden of establishing successorship. To do this, the tribe must show that it has maintained "a continuous and defining political ***or*** cultural characteristic to the entity that was granted the treaty rights." *State v. Posenjak*, 127 Wn. App. 41, 49, 111 P.3d 1206 (2005) (internal citations omitted, emphasis added).

During trial there was somewhat confusing testimony about a rift in the Snoqualmie Tribe in the 1980s that resulted in some members of Snoqualmie becoming members of the Snoqualmoo Nation. RP 55 *et seq*. This does not mean the Snoqualmoo Tribe did not exist before that time-- the signatory designations on the Treaty of Point Elliott establish that, as does Mr. Sandstrom's testimony that he has been a member of the

Snoqualmoo Tribe his entire life, and was never a member of the Snoqualmie tribe. RP 114. Evidence as outlined above was presented at trial to establish the Snoqualmoo Tribe today is entitled to the treaty rights that were bestowed on the Snoqualmoo who signed the Treaty of Point Elliott. However, if this Court is not persuaded the Snoqualmoo tribe is a signatory tribe, there is sufficient evidence to prove by a preponderance of the evidence it is a successor to a signatory tribe.

5. **The State should have been required to disprove the affirmative defense of treaty rights beyond a reasonable doubt.**

The Court of Appeals requested Mr. Snyder to address the issue of the burden of proof of the affirmative defense of treaty rights. In determining who has the ultimate burden of persuasion regarding an affirmative defense, a two part analysis is required: 1) Is the affirmative defense an element of the crime or does it negate an element of the crime, and 2) If it does not, did the Legislature intend to place the ultimate burden of persuasion beyond a reasonable doubt on the State to disprove the affirmative defense? *State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996). Because unlawfulness is in the name of the crime, relied upon by the State as sufficient to state the elements of the crime on a charging document, and without its inclusion the statute would be

unconstitutionally overbroad, unlawfulness is an element of the crime of Unlawful Hunting Big Game in the second degree. RCW 77.15.410.

a. *The charging document and title of the statute support unlawfulness as an element of this crime.*

Under *State v. Kjorsvik,* "All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *Kjorsvik,* 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This matter was charged by citation written by a Department of Fish and Wildlife officer. *Appendix B.* The relevant RCW is referenced on the citation, but the actual text reads simply "Complicity Unlawful Hunting of Big Game, 2nd Deg To Wit: Elk Closed Season...Complicity Unlawful Hunting of Big Game, 2nd Deg To Wit: No License/ Tag." The use of the name of a statute alone may be sufficient in a charging document if it apprises the defendant of all of the essential elements of a crime. *State v. Taylor* 140 Wn.2d 229, 235, 996 P.2d 571 (2000). Here, the State's charging document gives the name of the crime, "complicit" liability, and a description of a kind of violation. Unlawfulness is necessarily an element in order for the text of this citation to fully explain all the elements of this crime.

b. Unlawfulness is an implied element of the Unlawful Hunting statute.

Criminal statutes may be unconstitutionally overbroad if :

> "if they 'make unlawful a substantial amount of constitutionally protected conduct... even if they also have legitimate application.' A statute regulating behavior and not pure speech will not be overturned unless the overbreadth is both real and substantial in relation to the statute's legitimate sweep. A statute will be overturned only if the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation." *State v. Lee,* 135 Wn.2d 369, 388, 957 P.2d 741 (1998).

Without the implied element of unlawfulness, the statute would on its face criminalize a large swath of federally protected activity: all treaty Indian hunting even when following their own tribal regulations. This would violate federal treaties and the federal Constitution. This seems unlikely to be the legislature's desired result. "When engaging in statutory interpretation, the court must avoid constructions that yield unlikely, absurd or strained consequences." *State v. Barbee,* 187 Wn.2d 375, 389, 386 P.3d 729 (2017).

Because unlawfulness is an implied element of Unlawful Hunting Big Game in the second degree, the burden of production of sufficient evidence to raise the affirmative defense lies with the defense. However, once that is met, the burden then shifts to the state to disprove the affirmative defense beyond a reasonable, as is the case with affirmative defenses such as defense of property. *State v. Vander Houwen,* 163

Wn.2d 25, 35-36; 177 P.3d 93 (2008). In this case, the evidence adduced at trial satisfied Mr. Snyder's burden, and because such evidence stood uncontroverted the State did not disprove the affirmative defense beyond a reasonable doubt. Who carries the burden of proof for the affirmative defense of treaty rights is an issue of substantial public interest that should be decided by the Supreme Court per RAP 13.4(b) (4).

6. The Supreme Court should accept review of this matter because a significant question of law under the U.S. and Washington State Constitutions is involved.

Article 6, Clause 2 of the Constitution of the United States provides all treaties are the "supreme law of the land." The decision of the Court of Appeals unconstitutionally infringes on the exercise of Mr. Snyder's Federal treaty rights secured by Article 6, Clause 2 of the U.S. Constitution.

The standards adopted by the Court of Appeals improperly restrict the exercise of treaty rights to those who can establish his or her tribe has maintained political continuity. This holding is contrary to federal law regarding the exercise of treaty rights. The Court in *U.S. v. Washington,* 641 F.2d 1368 (9th Cir. 1981), said:

> We have defined a single 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... For this purpose, tribal status is preserved if **some** defining characteristic of the original tribe persists in an evolving tribal community.

Id. at 1372-73. (Emphasis added).

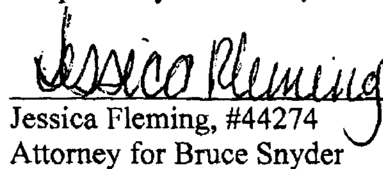
By extension, Article 1, Section 2 of the Constitution of the State of Washington states the United States Constitution "is the supreme law of the land." This incorporates the enshrining in the Constitution of the supremacy of treaties, such as the Treaty of Point Elliott. Denial of treaty rights by operation of state law is inherently a constitutional question implicating the State Constitution as well.

F. CONCLUSION

Because the decision of the Court of Appeals is in conflict with a published opinion of Division III of the Court of Appeals, because a significant question of law under the Washington State and Federal Constitutions is involved, and because an issue of substantial public interest is presented, Mr. Snyder respectfully requests the Supreme Court to accept review in this matter.

DATED: May 3, 2016

Respectfully submitted,



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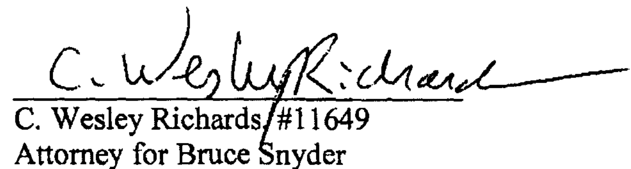

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

FILED
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STATE OF WASHINGTON
2017 APR -3 AM 9:28

STATE OF WASHINGTON,	)	No. 73893-3-I
Appellant,	)	DIVISION ONE
v.	)	
BRUCE M. SNYDER and GREGG B. SNYDER,	)	UNPUBLISHED
Respondents.	)	FILED: April 3, 2017

Cox, J. — We granted discretionary review of the superior court's reversal of the convictions of Bruce Snyder and Gregg Snyder in district court for unlawful hunting in the second degree. The Snyders fail in their burden to establish their affirmative defense—that they were exercising treaty rights to hunt. Accordingly, we reverse the superior court's order on RALJ appeal and reinstate the district court judgments on the convictions for unlawful hunting in the second degree. We deny any request for sanctions.

Gregg Snyder shot and killed an elk outside a reservation in the Hamilton area of Skagit County. The season for hunting was closed and he did not have a state hunting license or tag. Bruce Snyder assisted Gregg Snyder in yarding out the elk from where it was shot and loading the elk for transport to his residence.

They were interviewed by State officials about these events during the investigation that followed the kill. The Snyders freely admitted what they had done. They asserted that they were exercising treaty rights as members of the Snoqualmoo Tribe. At the time of arrest, they had a tag issued by this tribe in their possession.

The State charged both with unlawful hunting in the second degree. The district court convicted them as charged. In doing so, it rejected their affirmative defense that they were exercising treaty rights as members of the Snoqualmoo Tribe.

Pursuant to Rule 2.2 and the other Rules for Appeal of Decisions, the Snyders appealed to superior court. On appeal, the RALJ court made its own findings of fact and conclusions of law. Among other things, this decision stated that the Snyders proved by a preponderance of the evidence their affirmative defense. Accordingly, the superior court directed that the case be remanded for an order of dismissal with prejudice of the criminal charges.

We granted the State's motion for discretionary review.

UNLAWFUL HUNTING

Notably, the factual determinations by the district court, which tried the case, to the extent of its findings on commission of the charged crime of unlawful hunting in the second degree remain undisturbed. Specifically, neither the RALJ court nor the Snyders, in their briefing on review, challenge the determination that Gregg Snyder killed an elk out of season and outside a reservation and without a State tag. Likewise, Bruce Snyder does not challenge the

determination that he assisted Gregg Snyder in yarding out the elk from where it was shot and loading the elk for transport to his residence. Accordingly, these findings are verities on appeal.

The sole issue before us is whether their affirmative defense—the assertion of alleged treaty rights—bars conviction of the charges of unlawful hunting in the second degree. Thus, we focus on this affirmative defense.

AFFIRMATIVE DEFENSE

The State argues that the superior court improperly concluded that the Snyders proved, by a preponderance of the evidence, their affirmative defense of treaty rights. We hold that this affirmative defense does not bar these charges.

RALJ 9.1 governs appellate review by a superior court of a district court decision. The rule explains that the superior court reviews whether the lower court committed legal error.[1] The superior court "shall accept those factual determinations supported by substantial evidence in the record (1) which were expressly made by the court of limited jurisdiction, or (2) that may reasonably be inferred from the judgment of the court of limited jurisdiction."[2] The superior court must accept not only the substance of the district court's factual findings but the weight the district court gave them.[3] We apply the same standard of review to a decision of the superior court.[4]

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[1] RALJ 9.1(a).

[2] RALJ 9.1(b).

[3] See State v. Thomas, 150 Wn.2d 821, 866, 83 P.3d 970 (2004).

[4] State v. Weber, 159 Wn. App. 779, 786, 247 P.3d 782 (2011).

The State argues, among other things, that the RALJ court erred by making new factual findings based on anecdotal agricultural evidence. We need not address whether it was proper for the RALJ court to enter its own findings rather than accepting those findings of the district court that were supported by substantial evidence in the record. Rather, we examine this record and relevant case law to determine whether the Snyders established in the district court their affirmative defense of treaty rights to hunt.

A member of an Indian tribe may assert his or her treaty right to hunt or fish as an affirmative defense to a charge of illegal hunting or fishing.[5] This is because such rights, affirmed by federal treaty, preempt the application of state hunting laws.[6] The defendant asserting such rights must prove them by a preponderance of the evidence.[7]

Both the district court and the RALJ court looked to State v. Posenjak.[8] This Division Three case addressed a similar assertion of the affirmative defense of treaty rights. There, the court stated and applied a three-part test to determine whether an individual may invoke treaty rights as an affirmative defense to hunting.

Under that test, a person must "show by a preponderance of the evidence (1) the existence of the treaty, (2) of which he is a beneficiary, and (3) that, as a

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[5] State v. Posenjak, 127 Wn. App. 41, 48, 111 P.3d 1206 (2005).

[6] Id.

[7] Id.

[8] 127 Wn. App. 41, 48, 111 P.3d 1206 (2005).

matter of law, the treaty saves him from the operation and enforcement of the hunting laws and regulations."[9] We consider, in turn, each of these three elements as applied to the case before us.

Existence of a Treaty

The first element, existence of a treaty, is undisputed. In 1855, the United States signed the Treaty of Point Elliot with numerous Puget Sound tribes.[10] The list of tribal signatories included Patkanim, chief of the Snoqualmoo and Snohomish tribes. Under this treaty, the signatory tribes ceded vast swathes of territory. In exchange, Article 5 guarantees:

> [t]he 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.***[11]

Thus, the Treaty of Point Elliot protects the hunting rights of its proper beneficiaries.

Treaty Beneficiary Status

Whether the Snyders are proper beneficiaries of this treaty is the next issue. The State argues the Snyders are not such beneficiaries of the treaty because their group, the Snoqualmoo Tribe, is not a treaty tribe. Thus, it argues

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[9] Id.

[10] Treaty Between the United States & the Dwamish, Suquamish, & Other Allied & Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927.

[11] Id. at art. 5 (emphasis added).

that no treaty right is an affirmative defense to the charges in this matter. We agree.

To exercise treaty rights, members of a modern tribe "'must establish that their group has preserved its tribal status.'"[12] This is because treaty rights reside in the group, not the individual. Division Three of this court has explained that the required showing has two elements. First, the tribal member asserting the defense must show his tribe has "maintained an 'organized tribal structure.'"[13] Second, members must show their group is one of "'citizens of Indian ancestry [who are] descended from a treaty signatory.'"[14] This reflects the rule that "[i]ndividual 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."[15]

The tribal member, or in appropriate circumstances not present here, the tribe, bears the burden of proving these elements by a preponderance of the evidence.[16]

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[12] Posenjak, 127 Wn. App. at 49 (quoting United States v. Oregon, 29 F.3d 481, 484 (9th Cir. 1994)).

[13] Id. (quoting Oregon, 29 F.3d at 484).

[14] Id. (quoting United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975)).

[15] Id. at 48.

[16] Id. at 49.

The parties' dispute focuses on the first element, whether the modern Snoqualmoo tribe represents a continued "'organized tribal structure'" from that original form.[17]

The federal courts have considered this element at length regarding the tribal parties to the Treaty of Point Elliot. The Posenjak court, following Ninth Circuit precedent, has explained that a party can meet this element in one of two ways.[18]

First, tribal members can show their organization was the same tribe that signed the treaty.[19] To do so, they must show their tribe "has maintained an organized tribal structure" from treaty time to the present.[20] A tribe does so if "some defining characteristic of the original tribe persists in an evolving tribal community."[21] In considering that persistence, we remain mindful that centuries of political challenge have forced tribes to adapt, and thus "[c]hanges in tribal policy and organization attributable to adaptation will not necessarily destroy

[17] Id. (quoting Oregon, 29 F.3d at 484).

[18] Id.

[19] Id.

[20] Id.

[21] Id.

treaty tribe status."[22] But "[t]o warrant special treatment, tribes must survive as distinct communities."[23]

The Ninth Circuit Court of Appeals elaborated upon this analysis in considering the effort of several tribes, including the modern Snoqualmie Tribe, to intervene in the ongoing United States v. Washington fishing dispute.[24] These tribes descended from Puget Sound Indians who "did not go to reservations, because the reservations were inadequate" and now "live[d] among non-Indians and [we]re not federally recognized."[25] Addressing whether such tribes could assert treaty rights, the Ninth Circuit first held that mere federal recognition was unnecessary to support the exercise of treaty rights.[26] "The [p]roper [i]nquiry," by contrast, focused on whether the group had "maintained an organized tribal structure," defined by the preservation of "some defining characteristic of the original tribe."[27]

The tribes in that group "point[ed] to their management of interim fisheries, pursuit of individual members' treaty claims, and social activities as evidence of

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[22] United States v. Suquamish Indian Tribe, 901 F.2d 772, 776 (9th Cir. 1990).

[23] United States v. State of Wash., 641 F.2d 1368, 1373 (9th Cir. 1981).

[24] Id. at 1370.

[25] Id. at 1370-71.

[26] Id. at 1372.

[27] Id. at 1372-73.

tribal organization."[28] The trial court had found the tribal members had descended from treaty signatories.[29] The Snoqualmie Tribe, for example, descended from Patkanim and the treaty time Snoqualmoo Indians.[30] The tribes had modern "constitutions and formal governments."[31] But the trial court in that case found that the groups' "[p]resent members ha[d] no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation."[32] The court found that tribes' dealings with the United States and Washington "were not different in substance from those engaged in by any social or business entity."[33]

But the Ninth Circuit concluded these facts were insufficient for two reasons. First, "the [tribal] governments [did] not control[] the lives of the members."[34] Second, the facts failed to "clearly establish[] the continuous informal cultural influence the[tribes] concede is required."[35] Thus, the Ninth Circuit concluded the tribes could no longer assert treaty rights. This case

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[28] Id. at 1373.

[29] Id.

[30] United States v. State of Wash., 476 F. Supp. 1101, 1108 (W.D. Wash. 1979).

[31] Washington, 641 F.2d at 1373.

[32] Washington, 476 F. Supp. at 1109.

[33] Id.

[34] Washington, 641 F.2d at 1373.

[35] Id.

demonstrates that the continuing tribal structure must be political, not merely social or cultural.

These principles later led the Ninth Circuit to reject a Snoqualmoo member's claim that the Washington State Department of Fish and Wildlife had violated his treaty rights.[36] The court did so because the member failed to prove sufficient facts showing that the Snoqualmoo preserved a sufficient defining characteristic of a treaty tribe.[37] Similarly, Division Three of this court held that the modern Snoqualmoo Tribe was not a signatory to the Treaty of Point Elliot.[38]

Here, the RALJ court stated the appropriate standard. It concluded that the Snyders could meet their burden if they showed they were the beneficiaries of a treaty that barred application of the hunting laws. It concluded that they could show themselves the treaty's beneficiaries if they could establish that their tribe had maintained its structure and its defining characteristics. But because the court did not require that structure to be political, it relied on the wrong sort of characteristics.

The Snyders failed to show the Snoqualmoo Tribe has maintained the continued political structure contemplated by the relevant case law. Indeed, the record shows that tribal enforcement of hunting restrictions appears theoretical and non-existent in practice. Substantial evidence presented in the district court

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[36] Posenjak v. Dep't of Fish & Wildlife of State of Wash., 74 F. App'x 744, 747 (9th Cir. 2003).

[37] Id.

[38] Posenjak, 127 Wn. App. at 49.

showed that the modern Snoqualmoo Tribe formed in the 1980s out of a mixture of persons banished from, and persons found ineligible for membership, in the recognized Snoqualmie Tribe. Thus, like the putative tribal intervenors in United States v. Washington, the Snoqualmoo Tribe can show a modern formal government and continued cultural traditions. But they can show "no common bond of residence or association other than such association as is attributable to the fact of their voluntary affiliation."[39] Accordingly, the RALJ court improperly concluded that the Snyders proved by a preponderance of the evidence that their tribe had maintained a sufficient political structure to warrant treaty rights.

By contrast, the RALJ court relied upon findings that the Snoqualmoo Tribe had maintained cultural naming rituals and practices of potato cultivation. Such practices are insufficient to show that the tribe had continued to maintain a ***political*** structure.

The Snyders argue that the superior court correctly concluded that even if the modern Snoqualmoo Tribe did not sign the Treaty of Point Elliot itself, it is a successor in interest to the treaty time Snoqualmoo Tribe's rights. We disagree.

If a modern tribe cannot show itself the same entity that signed the treaty, it can attempt to prove itself the successor in interest to the original signatory tribe.[40] To do so, it must still show both ancestry from a signatory and continued organizational structure.[41] But it must also show that it and the signatory tribe

[39] Washington, 476 F. Supp. at 1109.

[40] Id.

[41] Suquamish Indian Tribe, 901 F.2d at 776.

"consolidated or merged and demonstrate also that together they maintain an organized tribal structure."[42]

This rule allows modern tribal confederations like the Tulalip and Muckleshoot Tribes, not in existence when the Treaty of Point Elliot was signed, to succeed to the rights of the smaller treaty tribes that long ago merged into their consolidated governments.[43] By contrast, the Ninth Circuit has declined to find a merger on the mere fact that two tribes descend from the same treaty signatory or lived together in the same territory.[44] Based upon the same standards, Division Three of this court concluded that a Snoqualmoo member failed to show his tribe was the successor to a signatory tribe.[45]

Here, the Snyders cannot prove their tribe was the successor to a treaty tribe. The RALJ court failed to account for the lack of political continuity. Thus, it failed to appropriately consider whether the Snoqualmoo Tribe had treaty rights as successor to a treaty status tribe.

The Snoqualmoo Tribe did not consolidate or merge with a recognized treaty tribe. Rather, it appears to have split in the 1980s from the Snoqualmie Tribe. Its members share common ancestry with that tribe. But the Snoqualmie Tribe is a sovereign nation with legal control over the structure of its membership. To the extent the Snoqualmoo were historically merged with the Snoqualmie,

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[42] Id.

[43] Id. at 775 n.8.

[44] Id. at 776.

[45] Posenjak, 127 Wn. App. at 49.

they are no longer because the latter concluded that the Snoqualmoo members could not meet the requirements for membership. Besides, the Snoqualmie Tribe itself does not enjoy previously adjudicated treaty rights.[46] Thus, we conclude that the Snyders fail to establish that their tribe succeeded to the Snoqualmie Tribe's rights.

The second element is undisputed. The Snyders descend from the original Snoqualmoo Tribe that signed the Treaty of Point Elliot.

Gregg Snyder advances several arguments why the above analysis is improper. He argues that these tests are not relevant because they originate in fishing and not hunting cases. He claims that "[t]here are no hunting cases in Washington state that establish a tribe's right to hunt or not." This argument is without merit.

Not only did the supreme court address hunting rights in State v. Buchanan,[47] but the distinction is irrelevant. Hunting rights differ from fishing rights in their exercise, based upon the different language of the treaty rights. But Gregg Snyder provides no argument why that distinction should apply to determining whether a modern tribe enjoys a signatory's treaty status. Thus, the test derived from the fishing cases equally controls here.

He also argues that state courts cannot consider these tests to determine tribal treaty status because they concern a "matter of federal law." Gregg Snyder

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[46] Washington, 476 F. Supp. at 1111.

[47] 138 Wn.2d 186, 978 P.2d 1070 (1999).

cites no authority for this contention, so we need not consider it.[48] We decline to do so.

Gregg Snyder finally argues that the "criminal law in Washington has changed regarding affirmative defenses since the Moses, James and Petit cases [discussing the burden of proof for such defenses] were decided."[49] While not entirely clear what point he seeks to make, he cites State v. Lively,[50] a case discussing whether the burden of proof respecting an affirmative defense may shift to the State. The State does not respond to this attempt at an argument. We do.

To the extent Gregg Snyder intends to argue that the burden of proof shifted to the State in this case, we conclude that the State met its burden to disprove beyond a reasonable doubt the affirmative defense. We do so on the bases previously discussed in this opinion. In addressing this contention, we do not imply that there has been a showing that the burden of proof shifted in this case.

Bruce Snyder also argues these Ninth Circuit Court of Appeals decisions governing Northwest treaty rights are not controlling in this matter. He cites two cases in support but neither is persuasive.

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[48] See Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 248, 350 P.3d 647 (2015); RAP 10.3(a)(6).

[49] Respondent Gregg Snyder's Response Brief and Objection to Snoqualmie Tribe's Status as Amicus Curiae and Filing a Brief at 13.

[50] 130 Wn.2d 1, 921 P.2d 1035 (1996).

The first, In re Detention of Turay, considered whether federal precedent controlled interpretation of Washington evidence rules.[51] There, the supreme court held that "'federal case law interpreting a federal rule is not binding on this court even where the rule is identical [because] [t]his court is the final authority insofar as interpretations of this State's rules is concerned.'"[52] This criminal prosecution case is distinguishable because it concerns not a state evidentiary rule but whether the affirmative defense of federally guaranteed Indian treaty rights applies.

In the second case, W.G. Clark Construction Co. v. Pacific Northwest Regional Council of Carpenters, the supreme court held that federal circuit precedents were not binding upon the state supreme court's interpretation of United State Supreme Court ERISA precedent.[53] This holding does not bar us from following persuasive precedent from federal courts.

In 1974, the United States District Court for the Western District of Washington, as affirmed by the United States Supreme Court, took continuing jurisdiction over fishing disputes arising from the Treaty of Point Elliot and other

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[51] 139 Wn.2d 379, 986 P.2d 790 (1999).

[52] Id. at 402 (quoting State v. Copeland, 130 Wn.2d 244, 258-59, 922 P.2d 1304 (1996)).

[53] 180 Wn.2d 54, 62, 322 P.3d 1207 (2014).

treaties.[54] Since then, the federal courts have not only interpreted these treaties but continue to supervise their application. The supreme court has held that the lower federal court rulings in this matter bind the State, state courts, private individuals like the Snyders, and organizations like the Snoqualmoo Tribe.[55] We see no reason why we should not follow this guidance in the case of hunting rights.

SANCTIONS

Gregg Snyder argues that we should sanction the State for citing to the Ninth Circuit's opinion in Posenjak because that opinion was unpublished. We disagree.

Gregg Snyder fails to cite to authority to support this argument concerning citation to unpublished decisions of federal courts. Accordingly, we could reject this argument on this basis alone.[56]

In any event, it is difficult to see why the citation to this single case prejudiced him in any way. For these reasons, we reject this argument.

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[54] United States v. Wash., 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086, 96 S. Ct. 877, 47 L. Ed. 2d 97, rehearing denied, 424 U.S. 978, 96 S. Ct. 1487, 47 L. Ed. 2d 750 (1976); 459 F. Supp. 1020 (W.D. Wash. 1978), aff'd sub nom., Puget Sound Gillnetters Ass'n v. U.S. Dist. Court for the W. Dist. of Wash., 573 F.2d 1123 (9th Cir. 1978), aff'd in part, vacated in part, and remanded sub nom., Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979).

[55] Puget Sound Gillnetters Ass'n v. Moos, 92 Wn.2d 939, 950-51, 603 P.2d 819 (1979).

[56] See Darkenwald, 183 Wn.2d at 248; RAP 10.3(a)(6).

We reverse the superior court's order on RALJ appeal and reinstate the district court judgments on the convictions for unlawful hunting in the second degree. We deny the request for sanctions.

Cox, J.

WE CONCUR:

Trickey, ACJ

Schindler, J.

APPENDIX B

CRIMINAL ☐ TRAFFIC ☑ NON-TRAFFIC C 11195

IN THE ☒ DISTRICT ☐ MUNICIPAL COURT OF MT VERNON, WASHINGTON

FILED

☒ STATE OF WASHINGTON, PLAINTIFF VS. NAMED DEFENDANT
☐ COUNTY OF SKAGIT
☐ CITY/TOWN OF

L.E.A. ORI #: WA0349900 COURT ORI #: WA

Skagit Co. Dist. Court

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO.	STATE	EXPIRES	PHOTO I.D. MATCHED
SNYDEBM505PZ	WA		☑ YES ☐ NO

NAME: LAST	FIRST	MIDDLE	CDL
SNYDER	BRUCE	M	☐ YES ☐ NO

ADDRESS: 5300 E. DIVISION ST ☐ IF NEW ADDRESS

CITY	STATE	ZIP CODE	EMPLOYER	LOCATION
MT VERNON	WA	98274		

DATE OF BIRTH	RACE	SEX	HEIGHT	WEIGHT	EYES	HAIR
10/09/1950	W	M	5'06	180	HAZ	WHT

RESIDENTIAL PHONE NO.	CELL/PAGER NO.	WORK PHONE NO.
( )	( )	( )

VIOLATION DATE ON OR ABOUT: MONTH 2 DAY 12 YEAR 2011 TIME 24 HOUR 0830 ☐ INTERPRETER NEEDED LANG:

AT LOCATION: MEDFORD RD M.P. CITY/COUNTY OF SKAGIT

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO.	STATE	EXPIRES	VEH. YR.	MAKE	MODEL	STYLE	COLOR

TRAILER #1 LICENSE NO.	STATE	EXPIRES	TR. YR.	TRAILER #2 LICENSE NO.	STATE	EXPIRES	TR. YR.

OWNER/COMPANY IF OTHER THAN DRIVER

ADDRESS CITY STATE ZIP CODE

ACCIDENT NO NR R I F | BAC READING | COMMERCIAL VEHICLE ☐ YES ☐ NO | HAZMAT ☐ YES ☐ NO | EXEMPT VEHICLE ☐ FARM ☐ R.V. ☐ FIRE ☐ OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES

#1 VIOLATION/STATUTE CODE 77.15.410.1 (9A.08.020.2.C) - COMPLICITY
UNLAWFUL HUNTING OF BIG GAME, 2ND DEG
TO WIT: ELK CLOSED SEASON

#2 VIOLATION/STATUTE CODE 77.15.410.1 (9A.08.020.2.C) - COMPLICITY
UNLAWFUL HUNTING OF BIG GAME, 2ND DEG
TO WIT: NO LICENSE/TAG

☑ MANDATORY COURT APPEARANCE OR ☐ BAIL FORFEITURE IN U.S. $ NA MD

APPEARANCE DATE	MO.	DY.	YR.	TIME	A.M./P.M.	RELATED #	DATE ISSUED
	1	17	12	830	A.M.		

☐ Served on Violator
☐ Sent to Court for Mailing
☑ Referred to Prosecutor
SUMMONS

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I HAVE ISSUED THIS ON THE DATE AND AT THE LOCATION ABOVE, THAT I HAVE PROBABLE CAUSE TO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE OFFENSE(S).

OFFICER [signature] #W113
OFFICER PHILLIPS #W37
DPA [signature] 32745

COMPLAINT / CITATION C 11195

ABSTRACT OF JUDGMENT

CRG	PLEA	CN'3	FINDINGS	FINE	SUSPENDED	SUB-TOTAL	FIND/JUDG DATE
1	G NG		G NG D BF	$	$	$	ABS. MLD TO OLY
2	G NG		G NG D BF	$	$	$	TO SERVE
					OTHER COSTS $		WITH DAYS SUP.

RECOMMENDED NO EXTENSION OF SUSPENSION ☐ | LICENSE SURRENDER DATE | TOTAL COSTS $ | CREDIT / TIME SVD

WASHINGTON UNIFORM COURT DOCKET - COURT COPY May 2007
WASHINGTON UNIFORM COURT DOCKET - DOL COPY May 2007
WASHINGTON UNIFORM COURT DOCKET - DEFENDANT COPY May 2007

APPENDIX C

NO. 73893-3-I

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. BRUCE M. SNYDER and GREGG B. SNYDER, Respondents,	WASHINGTON DEPARTMENT OF FISH AND WILDLIFE'S MOTION TO PUBLISH OPINION

I. IDENTITY AND INTEREST OF MOVING PARTY

The Washington Department of Fish and Wildlife (WDFW), by and through its attorneys, ROBERT W. FERGUSON, Attorney General, and MICHAEL S. GROSSMANN, Senior Counsel, asks for the relief designated in Part II. Pursuant to RAP 12(e)(1), WDFW identifies its relation to this matter, and its interests, as follows:

WDFW was not a party to this case, but participated as amicus encouraging the grant of discretionary review. WDFW is the state agency empowered to manage the state's fish and wildlife resources. WDFW's mandate is to "preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters." RCW 77.04.012. In connection with that mandate, WDFW issues licenses

that allow hunting and fishing activity, develops management plans for fish and wildlife resources, and promulgates appropriate regulations governing hunting and fishing.

Violations of the state's licensing and regulatory requirements are punishable pursuant to the Fish and Wildlife Enforcement Code – RCW 77.15. WDFW employs a division of enforcement officers to oversee the faithful application of the agency's licensing and regulatory regimes. RCW 77.15.075. One of the more complex challenges for WDFW is to ensure that licensing and regulatory enforcement not violate federal treaty rights.

WDFW also works with multiple treaty tribes, many with overlapping geographic claims, in order to share and manage fish and wildlife resources. New tribal treaty harvesting claims increase the complexity of this undertaking and can produce management conflicts.

Accordingly, adjudication of treaty-right status for a group of people who are asserting treaty rights is of direct significance to WDFW. It affects planning, cooperative management, and the exercise of licensing and regulatory authority within the state. In particular, the determination of such claims has significant impact on state enforcement authority.

II. STATEMENT OF RELIEF SOUGHT

Pursuant to RAP 12.3(e), WDFW moves for publication of this

Court's opinion in the above-titled case filed on April 3, 2017.

III. GROUNDS FOR RELIEF AND ARGUMENT

The Court's opinion in this case is of precedential value and should be published as provided for in RCW 2.06.040. RAP 12.3(e)(4) & (5).

Specifically, publication of this opinion is appropriate because it clarifies application of the treaty right affirmative defense to state enforcement of licensing and regulatory controls over hunting and fishing activity. In particular, the opinion helps clarify application of these principles as articulated in *State v. Posenjak*, 127 Wn. App. 41, 111 P.3d 1206 (2005). As such, it is a useful and informative guide to agency enforcement staff, and to WDFW policy-making staff who engage with tribal organizations that claim treaty rights in the face of existing tribes who deny the treaty-tribe status.

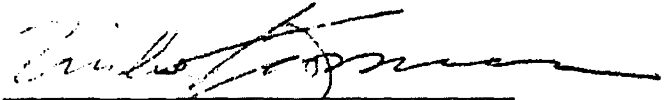
WDFW has also been in contact with the Washington Association of Prosecuting Attorneys and the Kittitas County Prosecuting Attorney who support publication on the basis that the opinion is a helpful guide – to both district courts and attorneys – on a complex area of Indian law.

Finally, publication is directly helpful to allow WDFW law enforcement to contact and apply state law to persons in the future who might claim treaty rights based on connection with the modern-day Snoqualmoo Indian organization or other similar entities.

Accordingly, WDFW requests that this Court grant its motion to publish the opinion issued in this case.

RESPECTFULLY SUBMITTED this 24th day of April, 2017.

ROBERT W. FERGUSON
Attorney General



MICHAEL S. GROSSMANN
WSBA # 15293
Senior Counsel
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OID No. 91033

CERTIFICATE OF SERVICE

I certify that I served a copy of the Washington Department of Fish and Wildlife's Motion to Publish on all parties or their counsel of record on the date below as follows:

By United States Mail Postage Prepaid via Consolidated Mail Service to:

Erik Pedersen
Senior Deputy Prosecutor
Skagit County Prosecutor's Office
Courthouse Annex
605 South Third Street
Mount Vernon, WA 98273-3867
Attorney for Petitioner State of Washington

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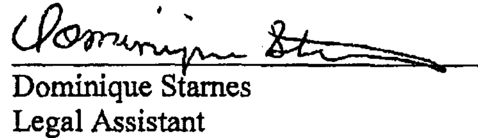
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24th day of April, 2017, at Olympia, Washington.



Dominique Starnes
Legal Assistant

APPENDIX D

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

STATE OF WASHINGTON, Appellant, v. BRUCE M. SNYDER and GREGG B. SNYDER, Respondents.	No. 73893-3-I ORDER DENYING MOTION TO PUBLISH OPINION

Appellant, State of Washington, has moved for publication of the opinion filed in this case on April 3, 2017. The panel hearing the case has considered the motion and has determined that the motion to publish should be denied. The court hereby

ORDERS that the motion to publish the opinion is denied.

Dated this 25th day of April 2017.

For the Court:

Cox, J.

Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 APR 25 PM 2:37

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

STATE OF WASHINGTON,

Appellant,

v.

BRUCE M. SNYDER and GREGG B. SNYDER,

Respondents.

No. 73893-3-I

ORDER DENYING MOTION TO PUBLISH OPINION

The Washington Department of Fish and Wildlife, a state agency who is not a party to this appeal, has moved for publication of the opinion filed in this case on April 3, 2017. The panel hearing the case has considered the motion and has determined that the motion to publish should be denied. The court hereby

ORDERS that the motion to publish the opinion is denied.

Dated this 1st day of May 2017.

For the Court:

Cox, J.

Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2017 MAY -1 PM 12:50

APPENDIX E

RCW 77.15.410

Unlawful hunting of big game—Penalty.

(1) A person is guilty of unlawful hunting of big game in the second degree if the person:

(a) Hunts for, takes, or possesses big game and the person does not have and possess all licenses, tags, or permits required under this title; or

(b) Violates any department rule regarding seasons, bag or possession limits, closed areas including game reserves, closed times, or any other rule governing the hunting, taking, or possession of big game.

(2) A person is guilty of unlawful hunting of big game in the first degree if the person commits the act described in subsection (1) of this section and:

(a) The person hunts for, takes, or possesses three or more big game animals within the same course of events; or

(b) The act occurs within five years of the date of a prior conviction under this title involving unlawful hunting, killing, possessing, or taking big game.

(3)(a) Unlawful hunting of big game in the second degree is a gross misdemeanor. Upon conviction of an offense involving killing or possession of big game taken during a closed season, closed area, without the proper license, tag, or permit using an unlawful method, or in excess of the bag or possession limit, the department shall revoke all of the person's hunting licenses and tags and order a suspension of the person's hunting privileges for two years.

(b) Unlawful hunting of big game in the first degree is a class C felony. Upon conviction, the department shall revoke all of the person's hunting licenses or tags and order the person's hunting privileges suspended for ten years.

(4) For the purposes of this section, "same course of events" means within one twenty-four hour period, or a pattern of conduct composed of a series of acts that are unlawful under subsection (1) of this section, over a period of time evidencing a continuity of purpose.

[2012 c 176 § 26; 2011 c 133 § 1; 2005 c 406 § 4; 1999 c 258 § 3; 1998 c 190 § 10.]

APPENDIX F

West's Revised Code of Washington Annotated
Constitution of the State of Washington (Refs & Annos)
Article 1. Declaration of Rights (Refs & Annos)

West's RCWA Const. Art. 1, § 2

§ 2. Supreme Law of the Land

Currentness

The Constitution of the United States is the supreme law of the land.

Credits
Adopted 1889.

West's RCWA Const. Art. 1, § 2, WA CONST Art. 1, § 2
Current through amendments approved 11-8-2016.

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2017 MAY -5 PM

Case Name: State of Washington v. Bruce M. Snyder
Court of Appeals Case Number: 73893-3

Party Respresented: Bruce M. Snyder
Is this a Personal Restraint Petition? ○ Yes ◉ No
Trial Court County: Skagit
Superior Court # 12-1-01143-4

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ___
- ○ Answer/Reply to Motion: ___
- ○ Brief: ___
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ___
  Hearing Date(s): ______
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: ______

Comments:

$200 filing mailed by check

Sender Name: Jessica J Fleming - Email: jessicaf@co.skagit.wa.us