

**In The  
Supreme Court of the United States**

STATE OF WASHINGTON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA, ET AL.

*Respondents.*

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**JOINT APPENDIX – VOLUME I OF III**

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PETITION FOR CERTIORARI FILED AUGUST 17, 2017  
CERTIORARI GRANTED JANUARY 12, 2018

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**RELEVANT DOCKET ENTRIES**

U.S. District Court for the Western District of  
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Civil Docket for Case #: 2:01-sp-00001-RSM

- 01-12-2001 REQUEST FOR DETERMINATION by plaintiff tribes (Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha, Port Gamble Band Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Suquamish Indian Tribe, Puyallup Tribe, Hoh Tribe, Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Nation, Swinomish Indian Tribe) re: state construction of road culverts. (NS) (TF). (Entered: 01/17/2001)
- 01-16-2001 RESPONSE TO REQUEST FOR DETERMINATION re: culverts by Interested Party USA in 2:01-sp-00001 request [1-1] in 2:01-sp-00001 (NS) (bz). (Entered: 01/17/2001)
- 01-20-2001 NOTICE OF JOINDER by plaintiff Muckleshoot Indian Tribe in 2:01-sp-00001 in Request for Determination filed by tribes on 1/12/01; service attached -- svc. by mail on 1/12/01 (NS) (bz). (Entered: 01/22/2001)
- 03-16-2001 STATE OF WASHINGTON'S ANSWER, CROSS AND COUNTER REQUESTS

FOR DETERMINATION by defendant Washington State of in 2:01-sp-00001; crsclm against Interested Party USA in 2:01-sp-00001; cntclm against Tribes (Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha, Port Gamble Band Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Suquamish Indian Tribe, Puyallup Tribe, Hoh Tribe, Yakama Indian Nation, Quileute Indian Tribe, Makah Nation, Swinomish Indian Tribe, and the Muckleshoot Indian Tribe) (NS) Modified on 03/16/2001 (bz). (Entered: 03/16/2001)

06-01-2001 PLAINTIFF TRIBES' ANSWER TO WASHINGTON STATE'S COUNTER REQUEST FOR DETERMINATION [9-2] in 2:01-sp-00001 (filed by Swinomish Indian Tribal Community, Jamestown, Lower Elwha & Port Gamble S'Klallam Tribes, Nisqually, Nooksack, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Suquamish, Upper Skagit, Lummi Indian Nation, Makah Tribe, Hoh Tribe, Tulalip Tribes, Quinault Indian Nation, Puyallup Tribe, Muckleshoot tribe, Quileute Tribe, Yakama Indian Nation);

- service attached -- svc. by mail on 5/31/01 (NS) (bz). (Entered: 06/01/2001)
- 06-18-2001 MOTION by Interested Party USA in 2:01-sp-00001 to strike affirmative defenses or for jdgmnt on pleadings NOTED FOR 7/13/01 in 2:01-sp-00001 (NS) (bz). (Entered: 06/18/2001)
- 06-18-2001 MEMORANDUM by Interested Party USA in 2:01-sp-00001 in support of motion to strike affirmative defenses or for jdgmnt on pleadings [36-1] in 2:01-sp-00001 (NS) (bz). (Entered: 06/18/2001)
- 06-27-2001 MOTION by defendant Washington State of in 2:01-sp-00001 for order granting judgment on the pleadings re: law of the case NOTED FOR 7/20/01 in 2:01-sp-00001, (NS) (bz). (Entered: 06/27/2001)
- 06-27-2001 BRIEF IN SUPPORT by defendant Washington State of in 2:01-sp-00001 in support of motion for order granting judgment on the pleadings re: law of the case [43-1] in 2:01-sp-00001 (NS) (bz). (Entered: 06/27/2001)
- 07-12-2001 ORDER REGARDING STATUS CONFERENCE by Judge Barbara J. Rothstein. On July 10, 2001, the court held a status conf. with all parties present. After hearing from the parties, the court considered the following matters and reached the following conclusions: The USA shall be considered a plaintiff in this subproceeding for all purposes; The court

has approved and signed the scheduling order agreed to by all parties; The court concluded it will not require that the "Phase II" designation be included as part of the caption of this subproceeding (please see order for details). (cc: 9213 counsel, BJR) (NS) (Entered: 07/12/2001)

- 07-14-2001 STATE'S OPPOSITION by defendant Washington State of in 2:01-sp-00001 to motion to strike affirmative defenses or for jdgmnt on pleadings [36-1] in 2:01-sp-00001 (NS) (bz). (Entered: 07/17/2001)
- 07-19-2001 REPLY MEMORANDUM by plaintiff USA in 2:01-sp-00001 IN SUPPORT OF US's motion to strike affirmative defenses or for jdgmnt on pleadings [36-1] in 2:01-sp-00001; service attached -- svc. by mail on 7/18/01 (NS) (bz). (Entered: 07/19/2001)
- 07-20-2001 ORDER DENYING MOTION TO DISMISS by Judge Barbara J. Rothstein DENYING USA's motion to dismiss State's Cross-RFD [19-1] in 2:01-sp-00001 (cc: 9213 counsel, BJR) (NS) (Entered: 07/23/2001)
- 07-26-2001 UNITED STATES' OPPOSITION by plaintiff USA in 2:01-sp-00001 to Washington State's motion for order granting judgment on the pleadings re: law of the case [43-1] in 2:01-sp-00001; service attached -- svc. by mail on 7/25/01. (NS) (bz). (Entered: 07/30/2001)

- 07-27-2001 TRIBES' MEMORANDUM OPPOSING STATE OF WASHINGTON'S motion for order granting judgment on the pleadings re: law of the case [43-1] in 2:01-sp-00001; service attached -- svc. by mail on 7/26/01 (NS) (bz). (Entered: 07/30/2001)
- 08-02-2001 ANSWER by plaintiff USA in 2:01-sp-00001 to WASHINGTON STATE'S CROSS REQUEST FOR DETERMINATION [9-1] in 2:01-sp-00001 (NS) (bz). (Entered: 08/03/2001)
- 08-09-2001 REPLY by defendant Washington State of in 2:01-sp-00001 IN SUPPORT of its motion for order granting judgment on the pleadings re: law of the case [43-1] in 2:01-sp-00001; service attached -- svc. by mail on 8/8/01 (NS) (bz). (Entered: 08/09/2001)
- 09-06-2001 ORDER GRANTING UNITED STATES' AND DENYING WASHINGTON'S MOTIONS FOR JUDGMENT by Judge Barbara J. Rothstein. The court concludes that WA's motion for judgment on the pleadings is without merit, and that motion is DENIED [43-1] in 2:01-sp-00001. For the reasons set forth in the order, the Court GRANTS the USA's motion to strike affirmative defenses or for jdgmnt on pleadings [36-1] in 2:01-sp-00001. The court finds that 15 of WA's affirmative defenses are insufficient as a matter of law. Those affirmative defenses are hereby STRICKEN from

WA's answer. (cc: 9213 counsel, BJR)  
(NS) (Entered: 09/06/2001)

- 10-26-2001 ORDER GRANTING UNITED STATES' MOTION FOR RECONSIDERATION AND MOTION TO DISMISS STATE'S CROSS-REQUEST FOR DETERMINATION by Judge Barbara J. Rothstein GRANTING motion for reconsideration of court's order denying motion to dismiss [69-1] in 2:01-sp-00001 (cc: 9213 counsel, BJR) (NS) (Entered: 10/26/2001)
- 03-27-2002 STIPULATION and ORDER DIRECTING NEGOTIATION OF THE COORDINATED PLAN TO REPAIR CULVERTS, AND AMENDING SCHEDULING ORDER by Judge Barbara J. Rothstein: It is hereby ordered that the US, Tribes, and State of WA shall enter into negotiations to address the issues set out in paragraph 2 of the incorporated Stipulation and they shall submit the agreements reached within 6 months from the date of this Order or advise the Court that negotiations have reached an impasse. The State of WA's Motion for Leave to Set Up Counterclaim By Amendment is hereby stricken with leave to renote. The Pretrial Schedule of 7/10/01 shall be amended as follows: discovery ddl continued to 11/22/02 in 2:01-sp-00001; trial set for 12/2/03 (or as set in Pretrial Conference) in 2:01-sp-00001; Disclose Rebuttal Expert Witnesses by 4/4/03 in



- 2:01-sp-00001; Dispositive Motions to be filed by 3/28/03 in 2:01-sp-00001; The week of May 27/June 2, 2003, Pretrial Conf. to set trial deadlines and finalize the trial date. October/November 2003 Final Pretrial Conf (as set by the Court) The parties shall provide a progress report to the Court in 90 days. See order for specifics on all deadlines (cc: 9213 counsel, BJR) (NS) (Entered: 03/27/2002)
- 11-22-2004 REPLY, filed by Defendant WA State of, TO RESPONSE to 17784 MOTION for Leave to File *Leave to Set Up Counterclaim by Amendment and Argument in Support* (Attachments: # 1 # 2 # 3 Exhibit Exhibit A with Cover and Report # 4 Exhibit Ex A with App 1 and 2 # 5 Exhibit Ex A with App 3, 4, and 5 # 6 Exhibit Exhibit B # 7 Exhibit Exhibit C) (Woods, Fronda) (Entered: 11/22/2004)
- 03-08-2005 ORDER denying 17784 Motion for Leave to Amend the Answer to assert cross-claims against plaintiff USA. by Judge Ricardo Martinez. (N S,) (Entered: 03/08/2005)
- 08-14-2006 MOTION for Summary Judgment [and to Allow Equitable Defenses Against the United States] *and Argument in Support* by Defendant WA State of. Noting Date 9/29/2007. (Attachments: # 1 # 2 Proposed Order # 3) (Woods, Fronda) (Entered: 08/14/2006)
- 08-14-2006 DECLARATION of Matthew J. Witecki in Support filed by Defendant WA State

- of re 18552 MOTION for Summary Judgment *and Argument in Support* (Woods, Fronda) (Entered: 08/14/2006)
- 08-14-2006 Second DECLARATION of Alex Nagygyor filed by Defendant WA State of re 18552 MOTION for Summary Judgment *and Argument in Support* (Woods, Fronda) (Entered: 08/14/2006)
- 08-14-2006 DECLARATION of Michael J. Allen filed by Defendant WA State of re 18552 MOTION for Summary Judgment *and Argument in Support* (Woods, Fronda) (Entered: 08/14/2006)
- 08-14-2006 DECLARATION of Donald Haring In Support filed by Defendant WA State of re 18552 MOTION for Summary Judgment *and Argument in Support* (Woods, Fronda) (Entered: 08/14/2006)
- 08-14-2006 DECLARATION of Mary E. Jones filed by Defendant WA State of re 18552 MOTION for Summary Judgment *and Argument in Support* (Attachments: # 1 # 2 # 3 # 4 # 5 # 6 # 7 # 8 # 9 # 10 # 11 # 12 # 13 # 14 # 15 # 16 # 17 # 18 # 19 # 20 # 21 # 22 # 23 # 24 # 25 # 26 # 27) (Woods, Fronda) (Entered: 08/14/2006)
- 08-14-2006 DECLARATION of Paul J. Wagner In Support filed by Defendant WA State of re 18552 MOTION for Summary Judgment *and Argument in Support* (Attachments: # 1 # 2 # 3 # 4 # 5 # 6 # 7 # 8 # 9 # 10) (Woods, Fronda) (Entered: 08/14/2006)

- 08-14-2006 MEMORANDUM filed by Amicus Washington Association of Counties re 18552 MOTION for Summary Judgment *and Argument in Support* (Attachments: # 1 # 2 # 3 # 4 # 5 # 6 # 7 # 8 # 9 # 10) (Loginsky, Pamela) (Entered: 08/14/2006)
- 08-14-2006 MOTION for Summary Judgment by Intervenor Plaintiffs Hoh Indian Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe of Indians, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe. Noting Date 9/29/2006. Oral Argument Requested. (Attachments: #1 pp 26-79 #2 pp 80-124 #3 pp 125-162 #4 pp 163-198 #5 Proposed Order #6 Certificate of Service)(Sledd, John) (Entered: 08/14/2006)
- 08-14-2006 DECLARATION of RICHARD WHITE filed by Intervenor Plaintiffs Hoh Indian Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe of Indians, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe,

Swinomish Tribal Community, Tulalip Tribe re 18560 MOTION for Summary Judgment (Sledd, John) (Entered: 08/14/2006)

08-14-2006 DECLARATION of JOSEPH R. TAYLOR III filed by Intervenor Plaintiffs Hoh Indian Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe of Indians, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe re 18560 MOTION for Summary Judgment (Sledd, John) (Entered: 08/14/2006)

08-14-2006 DECLARATION of ROBERT THOMAS BOYD filed by Intervenor Plaintiffs Hoh Indian Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe of Indians, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe re 18560 MOTION for Summary Judgment (Sledd, John) (Entered: 08/14/2006)

08-14-2006 DECLARATION of KEITH LUTZ filed by Intervenor Plaintiffs Hoh Indian

Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe of Indians, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe re 18560 MOTION for Summary Judgment (Sledd, John) (Entered: 08/14/2006)

08-14-2006 DECLARATION of RONALD McFARLANE filed by Intervenor Plaintiffs Hoh Indian Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe of Indians, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe re 18560 MOTION for Summary Judgment (Sledd, John) (Entered: 08/14/2006)

08-14-2006 DECLARATION of JOHN C. SLEDD filed by Intervenor Plaintiffs Hoh Indian Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe of Indians, Sauk-Suiattle Tribe, Skokomish Indian

Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe re 18560 MOTION for Summary Judgment (Sledd, John) (Entered: 08/14/2006)

- 09-27-2006 RESPONSE, by Defendant WA State of, to 18560 MOTION for Summary Judgment. (Attachments: #1 Decl of Baker #2 Decl of Mary E. Jones #3 Decl Jones Fox #4 Decl Jones Klochak #5 Decl Jones Ladley #6 Decl Jone McHenry #7 Decl Jone Rawson #8 Decl Jones Rogs #9 Decl Jones Table #10 Decl Jones Wasserman April #11 Decl Jones Wasserman June #12 Decl Jones Zischke) (Woods, Fronda) (Entered: 09/27/2006)
- 09-27-2006 RESPONSE, by Plaintiff United States of America, to 18552 MOTION for Summary Judgment *and Argument in Support*. (Attachments: # 1 Certificate of Service) (Monson, Peter) (Entered: 09/27/2006)
- 09-27-2006 RESPONSE, by Intervenor Plaintiff Nez Perce Tribe of Idaho, to 18552 MOTION for Summary Judgment *and Argument in Support*. Oral Argument Requested. (Cummings, David) (Entered: 09/27/2006)
- 09-27-2006 RESPONSE, by Intervenor Plaintiffs Hoh Indian Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Makah Indian Tribe, Muckleshoot Indian Tribe, Nisqually

Indian Tribe, Nooksack Indian Tribe of Washington, Port Gamble Band Clallam, Puyallup Tribe of Indians, Quileute Indian Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe, Upper Skagit Tribe, and the Confederated Bands and Tribes of the Yakama Nation to 18552 MOTION for Summary Judgment *and Argument in Support*. (Attachments: #1 LaSarte-Meeks Declaration #2 Certificate of Service) (Sledd, John) Modified on 9/28/2006 (NS, ). Modified on 9/29/2006 (NS, ). (Entered: 09/27/2006)

10-11-2006 REPLY, filed by Defendant WA State of, TO RESPONSE to 18552 MOTION for Summary Judgment *and Argument in Support* (Attachments: #1 4th Decl Mary E Jones #2 Attch Barber #3 Attch Benson #4 Attch Haring #5 Attch Wagner May 06 #6 Attch Wagner June 06) (Woods, Fronda) (Entered: 10/11/2006)

10-11-2006 REPLY, filed by Intervenor Plaintiffs Hoh Indian Tribe, Jamestown Band Clallam, Lower Elwha Klallam Tribe, Lummi Tribe, Makah Indian Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Indian Tribe of Washington, Port Gamble Band Clallam, Puyallup Tribe of Indians, Quileute

Indian Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe, Upper Skagit Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, TO RESPONSE to 18552 MOTION for Summary Judgment *and Argument in Support* (Attachments: #1 Declaration of John Sledd #2 Certificate of Service) (Sledd, John) (Entered: 10/11/2006)

01-29-2007 STIPULATION OF PLAINTIFFS AND STATE OF WASHINGTON REGARDING SCOPE OF SUBPROCEEDING, AND ORDER. See orders for specifics. by Judge Ricardo S Martinez. (NS,) (Entered: 01/29/2007)

08-22-2007 ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT. DENYING (287) the State of WA's Motion for Summary Judgment; GRANTING (295) the Tribes' Motion for Summary Judgment in case 2:01-sp-00001-RSM; DENYING (18552) the State of WA's Motion for Summary Judgment; GRANTING (18560) the Tribes' Motion for Summary Judgment in case 2:70-cv-09213-RSM in case 2:01-sp-00001-RSM Status Conference set for 8/29/2007 at 01:30 PM before Hon. Ricardo S Martinez. by Judge Ricardo S Martinez. (NS, ) (Entered: 08/22/2007)



- 08-23-2007 AMENDED/CORRECTED ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT 18560 18552 287 295 The amended order corrects the inadvertent omission of the Muckleshoot Indian Tribe from the list of Tribes filing or joining in the Request for Determination by Judge Ricardo S Martinez. (NS.) (Entered: 08/23/2007)
- 08-27-2007 WITHDRAWAL of Motion re (387 in 2:01-sp-00001-RSM, 18874 in 2:70-cv-09213-RSM) MOTIONS IN LIMINE ; by Defendant WA State of. (Woods, Fronda) (Entered: 08/27/2007)
- 08-27-2007 WITHDRAWAL of Motion re (18873 in 2:70-cv-09213-RSM, 386 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE *re: Moderate Living*; by Plaintiffs Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Suquamish Indian Tribe, Makah Nation, Swinomish Tribal Community, Muckleshoot Indian Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Port Gamble Band Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe. (Sledd, John) (Entered: 08/27/2007)

- 09-14-2009 MOTIONS IN LIMINE *RE Martin Fox Study* by Defendant WA State of. (Attachments: #1 Proposed Order, #2 Declaration of Fronda Woods In Support of Motion, #3 Certificate of Service) Noting Date 10/2/2009, (Woods, Fronda) (Entered: 09/14/2009)
- 09-14-2009 MOTIONS IN LIMINE *RE Fish Production From State Culverts* by Defendant WA State of. (Attachments: #1 Proposed Order, #2 Declaration of Fronda Woods with Documents in Support, #3 Certificate of Service) Noting Date 10/2/2009, (Woods, Fronda) (Entered: 09/14/2009)
- 09-17-2009 Joint MOTIONS IN LIMINE *to Exclude Expert Smelser* by Plaintiff Lummi Indian Nation. (Attachments: #1 Proposed Order) Noting Date 10/2/2009, (Johnsen, Harry) (Entered: 09/17/2009)
- 09-17-2009 DECLARATION of Harry L. Johnsen filed by Plaintiff Lummi Indian Nation re (574 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Attachments: #1 Pages 6-33 of Declaration, #2 Pages 34-68 of Declaration, #3 Pages 69-82 of Declaration, #4 Pages 83-107 of Declaration) (Johnsen, Harry) (Entered: 09/17/2009)
- 09-24-2009 Exhibit List *Stipulation re: Treaty and Non-Treaty Harvest Data* by Intervenor Plaintiff Puyallup Tribe of Indians. (Stiltner, Samuel) (Entered: 09/24/2009)

- 09-28-2009 RESPONSE, by Plaintiff Muckleshoot Indian Tribe, to (572 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE. (Attachments: # 1 Declaration of Alan Stay pp 1-47, # 2 Declaration of Alan Stay pp 48-86, # 3 Declaration of Martin Fox) (Otsea, Robert) (Entered: 09/28/2009)
- 09-28-2009 RESPONSE, by Plaintiff Lummi Indian Nation, to (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE. (Johnsen, Harry) (Entered: 09/28/2009)
- 09-28-2009 DECLARATION of Lauren Rasmussen filed by Plaintiff Lummi Indian Nation re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Johnsen, Harry) (Entered: 09/28/2009)
- 09-28-2009 DECLARATION of Andris Rankis filed by Plaintiff Lummi Indian Nation re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Johnsen, Harry) (Entered: 09/28/2009)
- 09-28-2009 RESPONSE, by Defendant WA State of, to (574 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE. (Shaftel, Douglas) (Entered: 09/28/2009)
- 09-28-2009 DECLARATION of Kit Rawson filed by Plaintiff Lummi Indian Nation re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Johnsen, Harry) (Entered: 09/28/2009)
- 09-28-2009 DECLARATION of David Smelser filed by Defendant WA State of re (574 in 2:01-sp-00001-RSM) MOTIONS IN

LIMINE (Shaftel, Douglas) (Entered: 09/28/2009)

09-28-2009 DECLARATION of Michael Barber filed by Defendant WA State of re (574 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Shaftel, Douglas) (Entered: 09/28/2009)

09-28-2009 DECLARATION of Eric Warner filed by Plaintiff Lummi Indian Nation re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Johnsen, Harry) (Entered: 09/28/2009)

09-28-2009 DECLARATION of William Beattie filed by Plaintiff Lummi Indian Nation re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Johnsen, Harry) (Entered: 09/28/2009)

09-28-2009 DECLARATION of Douglas D. Shaftel filed by Defendant WA State of re (574 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Shaftel, Douglas) (Entered: 09/28/2009)

09-28-2009 DECLARATION of Robert Hayman filed by Plaintiff Lummi Indian Nation re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Attachments: #1 Exhibit, #2 Exhibit, #3 Exhibit, #4 Exhibit, #5 Exhibit, #6 Exhibit)(Johnsen, Harry) Modified on 9/29/2009 (NS).(NOTE: document filed with duplicated pages; refiled correctly as docket #593) (Entered: 09/28/2009)

- 09-28-2009 DECLARATION of Eric Beamer filed by Plaintiff Lummi Indian Nation re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Attachments: #1 Exhibit) (Johnsen, Harry) (Entered: 09/28/2009)
- 09-29-2009 DECLARATION of Robert Hayman filed by Plaintiff Lummi Indian Nation re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Attachments: #1 Attachment 1, #2 Attachment 2, #3 Attachment 3, #4 Attachment 4, #5 Attachment 5) (Johnsen, Harry) (Entered: 09/29/2009)
- 10-02-2009 REPLY, filed by Defendant WA State of, TO RESPONSE to (572 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Attachments: # 1 Ferester Dec re Fox MIL Reply) (Woods, Fronda) (Entered: 10/02/2009)
- 10-02-2009 REPLY, filed by Defendant WA State of, TO RESPONSE to (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Attachments: #1 Woods Declaration re Daubert Reply, #2 Certificate of Service Certificate of Service re Daubert Reply) (Woods, Fronda) (Entered: 10/02/2009)
- 10-02-2009 REPLY, filed by Plaintiff Lummi Indian Nation, TO RESPONSE to (574 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE (Attachments: #1 Second Declaration of Harry Johnsen) (Johnsen, Harry) (Entered: 10/02/2009)
- 10-08-2009 ORDER ON MOTIONS IN LIMINE, This matter is before the Court for

consideration of the parties three motions in limine. In case SP01-1RSM: DENYING (572) Motion in Limine; GRANTING (573) Motion in Limine; GRANTING (574) Motion in Limine; CV70-9213: denying (19358) Motion in Limine; granting (19359) Motion in Limine; granting (19360) Motion in Limine - SEE ORDER FOR FURTHER DESCRIPTION. by Judge Ricardo S Martinez.(SA) (Entered: 10/08/2009)

10-13-2009 TRIAL BRIEF by Defendant WA State of. (Shaftel, Douglas) (Entered: 10/13/2009)

10-13-2009 TRIAL BRIEF *PLAINTIFF TRIBES' TRIAL BRIEF* by Plaintiffs Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Suquamish Indian Tribe, Makah Nation, Swinomish Tribal Community, Muckleshoot Indian Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Port Gamble Band Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Quinault Indian Nation. (Sledd, John) (Entered: 10/13/2009)

10-13-2009 MINUTE ENTRY for proceedings held before Judge Ricardo S Martinez- Dep Clerk: *Laurie Cuaresma*; Pla Counsel:

*John Sledd, Alan Stay, Alix Foster, Tim Weaver, Mason Morisset, Lauren Rasmussen, John Hollowed, Peter Monson, Yale Lewis, Katherine Krueger, Laura Sagolla, Brian Gruber, Harold Chesnin, Sam Stiltner, Eric Nielsen, Tom Zielman, Bruce Davies; Def Counsel: Rene Tomisser, Fronda Woods, Doug Shaftel, Phil Ferester; CR: Barry Fanning; Time of Hearing: 9:00 AM; Session #: DAY 1; BENCH TRIAL held on 10/13/2009. Counsel make opening statements. Plaintiff calls: CHARLENE KRISE, LORRAINE LOOMIS, LAWRENCE JAY WASSERMAN, MICHAEL McHENRY. Exhibits admitted. Bench trial will resume on 10/14/09 at 9:00 AM. (LC) (Entered: 10/13/2009)*

10-14-2009 PRETRIAL ORDER, Subproceeding 01-1, In Re: Culverts by Judge Ricardo S Martinez. (NS) (Entered: 10/14/2009)

10-14-2009 MINUTE ENTRY for proceedings held before Judge Ricardo S. Martinez- Dep Clerk: *Lowell Williams*; Pla Counsel: *John Sledd, Alan Stay, Alix Foster, Tim Weaver, Mason Morisset, Lauren Rasmussen, John Hollowed, Peter Monson, Yale Lewis, Katherine Krueger, Laura Sagolla, Brian Gruber, Harold Chesnin, Sam Stiltner, Eric Nielsen, Tom Zielman, Bruce Davies; Def Counsel: Rene Tomisser, Fronda Woods, Doug Shaftel, Phil Ferester; CR: Barry*

*Fanning*; Time of Hearing: 9:00 AM; Courtroom: 13206; Bench Trial held on 10/14/2009. MICHAEL McHENRY resumes stand on cross-exam. MARTIN FOX, KIT RAWSON and KAREN WALTER sworn and testify. Exhibits admitted. (LW) (Entered: 10/14/2009)

10-15-2009 MINUTE ENTRY for proceedings held before Judge Ricardo S. Martinez- Dep Clerk: *Lowell Williams*; Pla Counsel: *John Sledd, Alan Stay, Alix Foster, Tim Weaver, Mason Morisset, Lauren Rasmussen, John Hollowed, Peter Monson, Yale Lewis, Katherine Krueger, Laura Sagolla, Brian Gruber, Harold Chesnin, Sam Stiltner, Eric Nielsen, Tom Zielman, Bruce Davies*; Def Counsel: *Rene Tomisser, Fronda Woods, Doug Shaftel, Phil Ferester*; CR: *Barry Fanning*; Time of Hearing: 9:00 Am; Courtroom: 13206; Bench Trial held on 10/15/2009. Defendants respond to plaintiffs' offer of proof and call PAUL SEKULICH. TYSON WALDO, PHILIP MEYER, RANDOLPH KINLEY and EDWARD JOHNSTONE sworn and testify. Plaintiffs rest. Defendants call PAUL SEKULICH. Exhibits admitted. Bench trial to resume October 19, 2009 at 9:00 AM. (LW) (Entered: 10/15/2009)

10-16-2009 MEMORANDUM filed by Plaintiff Tulalip Tribe re (573 in 2:01-sp-00001-RSM) MOTIONS IN LIMINE Treaty Tribes' Bench Memo Re Revised &



Redacted Written Direct Testimony  
(Morisset, Mason) (Entered: 10/16/2009)

10-19-2009 MINUTE ENTRY for proceedings held before Judge Ricardo S Martinez- Dep Clerk: *Laurie Cuaresma*; Pla Counsel: *John Sledd, Alan Stay, Alix Foster, Tim Weaver, Mason Morisset, Lauren Rasmussen, John Hollowed, Peter Monson, Yale Lewis, Katherine Krueger, Laura Sagolla, Brian Gruber, Harold Chesnin, Sam Stiltner, Eric Nielsen, Tom Zeilman, Bruce Davies*; Def Counsel: *Doug Shaftel, Rene Tomisser, Fronda Woods, Phil Ferester*; CR: *Barry Fanning*; Time of Hearing: *9:00 AM*; Bench Trial held on 10/19/2009. Defense witnesses called: PAUL WAGNER, MICHAEL BARBER sworn and testify. Exhibits entered. Bench trial will resume on 10/20/09 at 9:00 A.M. (LC) (Entered: 10/19/2009)

10-20-2009 MINUTE ENTRY for proceedings held before Judge Ricardo S Martinez- Dep Clerk: *Laurie Cuaresma*; Pla Counsel: *John Sledd, Alan Stay, Alix Foster, Mason Morisset, Lauren Rasmussen, John Hollowed, Peter Monson, Yale Lewis, Katherine Krueger, Laura Sagolla, Brian Gruber, Harold Chesnin, Sam Stiltner, Eric Nielsen, Tom Zeilman*; Def Counsel: *Frona Woods, Phil Ferester, Renee Tomisser, Doug Shaftel*; CR: *Barry Fanning*; Time of Hearing: *9:00 AM*; Courtroom: *13206*;

Bench Trial - DAY 5 held on 10/20/2009. Def witnesses called: MICHAEL BARBER, ALEX NAGYGYOR, ROBERT BARNARD, ALLISON HANSON sworn and testify. Exhibits admitted. Bench trial will continue on Friday 10/23/09 at 9:00 AM. Court is in recess. (LC) (Entered: 10/20/2009)

10-23-2009 MINUTE ENTRY for proceedings held before Judge Ricardo S. Martinez- Dep Clerk: *Lowell Williams*; Pla Counsel: *John Sledd, Alan Stay, Alix Foster, Mason Morisset, Lauren Rasmussen, John Hollowed, Peter Monson, Yale Lewis, Katherine Krueger, Laura Sagolla, Brian Gruber, Harold Chesnin, Sam Stiltner, Eric Nielsen, Tom Zeilman*; Def Counsel: *Fronza Woods, Phil Ferester, Renee Tomisser, Doug Shaftel*; CR: *Barry Fanning*; Time of Hearing: *9:00 AM*; Courtroom: *13206*; Bench Trial - Day 6 held on 10/23/2009. ALLISON HANSON resumes stand on cross-examination. JEFFREY KOENINGS and BRIAN BENSON sworn and testify. Exhibits admitted. Bench trial will resume October 26, 2009 at 9:00 AM. (LW) (Entered: 10/23/2009)

10-26-2009 MINUTE ENTRY for proceedings held before Judge Ricardo S Martinez- Dep Clerk: *Laurie Cuaresma*; Pla Counsel: *John Sledd, Alan Stay, Alix Foster, Mason Morisset, Lauren Rasmussen, John Hollowed, Peter Monson, Yale*

*Lewis, Katherine Krueger, Laura Sagolla, Brian Gruber, Harold Chesnin, Sam Stiltner, Eric Nielsen, Tom Zeilman*; Def Counsel: *Rene Tomisser, Fronda Woods, Doug Shaftel, Phil Ferester*; CR: *Nancy Bauer*; Time of Hearing: *9:00 AM*; Courtroom: *13206*; BENCH TRIAL - DAY 7 held on 10/26/2009. Def calls: VICTOR MOORE, JEFF CARPENTER. Exhibits entered. Def rests. Pla calls rebuttal witness: DR. PHILIP RONI. Testimony is concluded. Submissions regarding evidentiary disputes to be filed by 11/9/09; proposed Findings of Fact and Conclusions of Law to be filed by the parties by 12/11/09. Closing arguments to be set at a later date. (LC) (Entered: 10/26/2009)

10-26-2009 PLAINTIFF TRIBES' BENCH MEMORANDUM RE: ADMISSIBILITY OF CERTAIN EXHIBITS PROPOSED BY TRIBES by Plaintiff Swinomish Tribal Community. (Attachments: #1 Exhibit Trial Bench Memorandum Appendix 1-3, #2 Exhibits Trial Bench Memorandum Appendix 4 & 5) (SA) (Entered: 10/27/2009)

11-24-2009 ORDER ON MOTION TO ADMIT EXHIBITS This matter is before the Court for consideration of plaintiff Tribes' motion to admit certain exhibits made during the bench trial in this matter (9213 dkt #19423; 01-1 dkt #624), and the Court directed the parties to

complete briefing on the issue post-trial. This Court's ruling on the admissibility of the exhibits will guide the parties in preparing their Findings of Fact and Conclusions of Law, as directed by the Court on 10/26/2009. The Tribes' motion to admit evidence is GRANTED, and the exhibits listed in the Tribes' memorandum (Dkt #624), with the exception of Exhibit AT-235 which has been withdrawn (Dkt #626), shall be admitted. The parties shall confer and arrange a time for a representative to meet the Courtroom Deputy to review exhibits and conform them to the Court's rulings on admissibility. by Judge Ricardo S Martinez. (NS) (Entered: 11/24/2009)

- 12-16-2009 STIPULATED MOTION AND ORDER GRANTING MOTION (dkt#641 in case 2:01-sp-00001-RSM; dkt #19462 in case 2:70-cv-09213-RSM) IT IS HEREBY ORDERED THAT Exhibits AT-004-4 and AT-004-5 be withdrawn from evidence in this case. by Judge Ricardo S Martinez. (NS) (Entered: 12/16/2009)
- 01-29-2010 Proposed Findings of Fact by Defendant WA State of (Woods, Fronda) (Entered: 01/29/2010)
- 01-29-2010 MOTION for Findings of Fact & Conclusions of Law by Plaintiffs Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation,

Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Suquamish Indian Tribe, Makah Nation, Swinomish Tribal Community, United States of America, Muckleshoot Indian Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Port Gamble Band Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe. (01-sp-01RSM) (Attachments: #1 Plaintiffs' Proposed Conclusions of Law) Noting Date 1/29/2010, (Sledd, John) Modified on 3/14/2012 (CL). (Entered: 01/29/2010)

01-29-2010 MOTION for Permanent Injunction by Plaintiffs Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the Yakama Indian Nation, Quileute Indian Tribe, Suquamish Indian Tribe, Makah Nation, Swinomish Tribal Community, United States of America, Muckleshoot Indian Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Port Gamble Band Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe. (01-sp-01RSM) Noting Date 1/29/2010, (Sledd, John) Modified on 3/14/2012 (CL). (Entered: 01/29/2010)

- 02-02-2010 MINUTE ORDER The State's Motion to ADMIT EXHIBIT W-089 in case 2:01-sp-00001-RSM (dkt #642); case 2:70-cv-09213-RSM (dkt #19465), is GRANTED. The Court will consider the Tribe's objections in determining what weight to accord Mr. Barnard's opinions. by Judge Ricardo S Martinez. (NS) (Entered: 02/02/2010)
- 02-05-2010 NOTICE *United States' Joinder in Plaintiff's Post-Trial Brief* ; filed by Plaintiff United States of America. (Monson, Peter) (Entered: 02/05/2010)
- 02-05-2010 TRIAL BRIEF (*Post Trial*) by Defendant WA State of. (Tomisser, Rene) (Entered: 02/05/2010)
- 02-12-2010 TRIAL BRIEF *Tribal Post-Trial Brief (Corrected)* by Intervenor Plaintiff Puyallup Tribe of Indians. (Stiltner, Samuel) (Entered: 02/12/2010)
- 06-07-2010 MINUTE ENTRY for proceedings held before Judge Ricardo S Martinez- Dep Clerk: *Laurie Cuaresma*; Pla Counsel: *John Sledd, Alan Stay, Alix Foster, Mason Morisset, Lauren Rasmussen, John Hollowed, Peter Monson, Yale Lewis, Katherine Krueger, Brian Gruber, Sam Stiltner, Tom Zeilman, Dan Raas, Kevin Lyon, Mary Neil, Michelle Hansen, Richard Reich, Howard Arnett*; Def Counsel: *Rene Tomisser, Fronda Woods, Doug Shaftel, Phil Ferester*; CR: *Barry Fanning*; Time of Hearing: *1:30 PM*; In Court Hearing held on 6/7/2010. Court

hears CLOSING ARGUMENT of counsel and takes matter under advisement. (LC) (Entered: 06/07/2010)

- 01-11-2013 ORDER ON SUPPLEMENTAL BRIEFING by Judge Ricardo S Martinez. The parties are directed to file supplemental memoranda, together with relevant exhibits, presenting any new and relevant facts which should be brought to the Court's attention. The memoranda, limited to twenty pages each, shall be filed on or before February 1, 2013. Any accompanying declarations and attached exhibits shall be limited to forty pages in total. No rebuttal materials may be filed. (CL) (cc: Clam Acres) (Entered: 01/11/2013)
- 02-01-2013 MEMORANDUM *United States' Supplemental Post-Trial Memorandum* by Plaintiff United States of America. (Monson, Peter) (Entered: 02/01/2013)
- 02-01-2013 DECLARATION *of Yvonne M. Marsh to US' Supplemental Post-Trial Memorandum* by Plaintiff United States of America. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3, #4 Exhibit 4, #5 Exhibit 5, #6 Exhibit 6)(Monson, Peter) (Entered: 02/01/2013)
- 02-01-2013 DECLARATION *of Steven Landino to US' Supplemental Post-Trial Memorandum* by Plaintiff United States of America. (Monson, Peter) (Entered: 02/01/2013)

02-01-2013 *State of Washington's Supplemental*  
BRIEF by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Rene Tomisser re  
738 Brief by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Alex Nagygyor re  
738 Brief by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Candace Espeseth re  
738 Brief by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Deborah Petersen re  
738 Brief by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Robert Barnard re  
738 Brief by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Julie Henning re 738  
Brief by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Jay Alexander re 738  
Brief by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Paul Wagner re 738  
Brief by Defendant WA State of.  
(Tomisser, Rene) (Entered: 02/01/2013)

02-01-2013 *Tribal Supplemental BRIEF Regarding*  
*Post-Trial Events and the Need for*  
*Injunctive Relief* by Plaintiffs  
Confederated Tribes and Bands of the  
Yakama Indian Nation, Hoh Tribe,  
Jamestown S'Klallam Tribe, Lower



Elwha Band of Klallams, Lummi Indian Nation, Makah Nation, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Tribe, Port Gamble Band Clallam, Puyallup Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe. (Sledd, John) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Alix Foster by Plaintiffs Confederated Tribes and Bands of the Yakama Indian Nation, Hoh Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Lummi Indian Nation, Makah Nation, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Tribe, Port Gamble Band Clallam, Puyallup Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe. (Sledd, John) (Entered: 02/01/2013)

02-01-2013 DECLARATION of Keith Lutz by Plaintiffs Confederated Tribes and Bands of the Yakama Indian Nation, Hoh Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Lummi Indian Nation, Makah Nation, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Tribe, Port

Gamble Band Clallam, Puyallup Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe. (Sledd, John) (Entered: 02/01/2013)

- 02-06-2013 PRAECIPE re 748 Brief, *Plaintiff Tribes' Post-Trial Supplemental Brief* by Plaintiffs Confederated Tribes and Bands of the Yakama Indian Nation, Hoh Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Lummi Indian Nation, Makah Nation, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Tribe, Port Gamble Band Clallam, Puyallup Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Tribal Community, Tulalip Tribe. (Sledd, John) (Entered: 02/06/2013)
- 03-29-2013 ORDER by Judge Ricardo S. Martinez. The Court GRANTS the Tribes' motion for a Permanent Injunction in 01-sp-01RSM docket no. 660, in 70-cv-9213RSM, docket no. 19508. (CL) (cc: Clam Acres) (Entered: 03/29/2013)
- 03-29-2013 PERMANENT INJUNCTION REGARDING CULVERT (01-sp-01RSM) CORRECTION by Judge Ricardo S Martinez. (CL) (cc: Clam Acres) (Entered: 03/29/2013)

- 04-01-2013 ORDER: SUPPLEMENT TO MEMORANDUM AND DECISION by Judge Ricardo S Martinez. The attached documents, Attachment A and B, were referred to in the Court's Memorandum and Decision filed March 29, 2012. Dckt. #752, (Attachments: #(1) Exhibit A, #(2) Exhibit B) (CL) (cc: Clam Acres) (Entered: 04/01/2013)
- 04-01-2013 NOTICE of Corrected Image/Document re (754 in 2:01-sp-00001-RSM, 20387 in 2:70-cv-09213-RSM) Order, (Service of corrected image is attached). (Attachments: #1 Exhibit A, #2 Exhibit B) (CL) (Entered: 04/01/2013)
- 05-28-2013 NOTICE OF APPEAL (13-35474) to Ninth Circuit by Defendant WA State of. (Purcell, Noah) Modified on 5/28/2013; Filing Fee Paid in main case; 70-CV-9213; Receipt No: 0981-3221568. (LMK). Modified on 5/29/2013, ADD CCA# (SA). (Entered: 05/28/2013)
- 09-27-2013 NOTICE of Filing Lists of Barrier Culverts ; filed by Defendant WA State of. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5) (Shorin, Joseph) (Entered: 09/27/2013)

**RELEVANT DOCKET ENTRIES**

U.S. Ninth Circuit Court of Appeals  
Docket No. 13-35474

- 10-07-2013 Submitted (ECF) First Brief on Cross-Appeal for review. Submitted by Appellant State of Washington in 13-35474, Appellee State of Washington in 13-35519. Date of service: 10/07/2013. [8812577] [13-35474, 13-35519]--[COURT UPDATE: Edited docket text to reflect correct brief type. Resent NDA. 10/10/2013 by RY] (Watson, Laura) [Entered: 10/07/2013 05:37 PM]
- 10-09-2013 Submitted (ECF) excerpts of record. Submitted by Appellant State of Washington in 13-35474, Appellee State of Washington in 13-35519. Date of service: 10/09/2013. [8816274] [13-35474, 13-35519] (Watson, Laura) [Entered: 10/09/2013 04:15 PM]
- 10-11-2013 Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Washington State Association of Counties. Date of service: 10/11/2013. [8819771] [13-35474, 13-35519]--[COURT UPDATE: Attached corrected brief. Resent NDA. 10/16/2013 by RY] (Loginsky, Pamela) [Entered: 10/11/2013 04:31 PM]
- 10-15-2013 Submitted (ECF) Amicus Brief for review. Submitted by Amicus Curiae - Pending State Of Oregon. Date of

service: 10/15/2013. [8821166] (Striffler, Stephanie) [Entered: 10/15/2013 11:57 AM]

- 01-21-2014 Submitted (ECF) Answering Brief for review. Submitted by Appellee USA in 13-35474, - USA in 13-35519. Date of service: 01/21/2014. [8945937] [13-35474, 13-35519] (Shilton, David) [Entered: 01/21/2014 03:25 PM]
- 01-21-2014 Submitted (ECF) Second Brief on Cross-Appeal and supplemental excerpts of record for review. Submitted by Appellees Confederated Tribes and Bands of the Yakama Indian Nation, Hoh Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Lummi Indian Nation, Makah Indian Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe, Quileute Indian Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Indian Tribal Community, Tulalip Tribes and Upper Skagit Indian Tribe in 13-35474. Date of service: 01/21/2014. [8946403] [13-35474, 13-35519]--[COURT UPDATE: Edited docket text to reflect correct brief type. Removed duplicate excerpts (SER part 4). Resent NDA. 01/22/2014 by RY] (Sledd, John) [Entered: 01/21/2014 10:59 PM]

- 01-28-2014 Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Indian Law Professors. Date of service: 01/28/2014. [8956762]--[COURT UPDATE: Attached corrected brief and certificate of service. Resent NDA. 01/29/2014 by RY] (Routel, Colette) [Entered: 01/28/2014 07:08 PM]
- 01-29-2014 Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources. Date of service: 01/29/2014. [8958138] (Brimmer, Janette) [Entered: 01/29/2014 03:33 PM]
- 03-24-2014 Submitted (ECF) Reply Brief and further excerpts of record for review. Submitted by Appellant State of Washington. Date of service: 03/24/2014. [9029239] (Watson, Laura) [Entered: 03/24/2014 04:24 PM]
- 09-01-2015 FILED (ORIGINAL) CERTIFIED RECORD ON APPEAL. Record Part: Clerks Record, No. of Volumes: 4, Sealed: n. [9667567] (SOS) [Entered: 09/01/2015 10:55 AM]
- 10-16-2015 ARGUED AND SUBMITTED TO WILLIAM A. FLETCHER, RONALD M. GOULD and DAVID A. EZRA. [9721123] (SB) [Entered: 10/16/2015 12:01 PM]

- 06-27-2016 FILED OPINION (WILLIAM A. FLETCHER, RONALD M. GOULD and DAVID A. EZRA) AFFIRMED. Judge: WAF Authoring. FILED AND ENTERED JUDGMENT. [10029546] -- [Edited: Attached corrected PDF of opinion (clerical correction/typo). 06/27/2016 by TYL] (MM) [Entered: 06/27/2016 08:26 AM]
- 08-11-2016 Filed (ECF) Appellant State of Washington petition for panel rehearing and petition for rehearing en banc (from 06/27/2016 opinion). Date of service: 08/11/2016. [10086655]--[COURT ENTERED FILING to correct entry [117].] (SLM) [Entered: 08/15/2016 10:37 AM]
- 08-22-2016 Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by States of Idaho and Montana. Date of service: 08/22/2016. [10094731] [13-35474] (Smith, Clay) [Entered: 08/22/2016 09:17 AM]
- 08-22-2016 Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Klamath Critical Habitat Landowners Inc., Modoc Point Irrigation District; Mosby Family Trust; Sprague River Water Resource Foundation, Inc., and TPC, LLC. Date of service: 08/22/2016. [10096797] -- [COURT ENTERED FILING to correct

entry [122] .]--[Edited: attached corrected motion and brief. 08/23/2016 by SLM]--[Edited: attached corrected brief. 08/23/2016 by SLM] (TYL) [Entered: 08/23/2016 10:29 AM]

08-25-2016 Filed clerk order (Deputy Clerk: OC): Appellees are directed to file a response to Appellant's Petition for Rehearing and Rehearing En Banc filed with this court on August 11, 2016. The response shall not exceed fifteen pages or 4200 words, and shall be filed within 21 days of the date of this order. Parties who are registered for Appellate ECF must file the response electronically without submission of papers copies. Parties who are not registered Appellate ECF filers must file the original response plus 50 paper copies. [10100199] (OC) [Entered: 08/25/2016 09:22 AM]

09-29-2016 Filed (ECF) Appellee USA response to petition for panel rehearing and petition for rehearing en banc. Date of service: 09/29/2016. [10142617]. [13-35474]--[COURT UPDATE: Updated docket text to reflect content of filing. 09/29/2016 by SLM] (Ying, Evelyn) [Entered: 09/29/2016 02:28 PM]

09-29-2016 Filed (ECF) Appellees Confederated Tribes and Bands of the Yakama Indian Nation, Hoh Tribe, Jamestown S'Klallam Tribe, Lower Elwha Band of Klallams, Lummi Indian Nation, Makah



Indian Tribe, Muckleshoot Indian Tribe, Nisqually Indian Tribe, Nooksack Indian Tribe, Port Gamble Band Clallam, Puyallup Tribe, Quileute Indian Tribe, Quinault Indian Nation, Sauk-Suiattle Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Indian Tribe, Swinomish Indian Tribal Community, Tulalip Tribes and Upper Skagit Indian Tribe response to Combo PFR Panel and En Banc (ECF Filing), Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 09/29/2016. [10143302]. [13-35474] (Sledd, John) [Entered: 09/29/2016 07:52 PM]

03-02-2017 Filed order and amended opinion (WILLIAM A. FLETCHER, RONALD M. GOULD and DAVID A. EZRA). Amending Disposition Opinion AFFIRMED; The opinion filed on June 27, 2016 is amended as follows: (SEE ORDER FOR FULL TEXT) No new Petition for Panel Rehearing or Petition for Rehearing en Banc will be entertained. Pending petitions remain pending and need not be renewed. [10339453] (RMM) [Entered: 03/02/2017 07:00 AM]

05-19-2017 Filed Order for PUBLICATION (WILLIAM A. FLETCHER, RONALD M. GOULD and DAVID A. EZRA)

(Concurrence by Judge W. Fletcher; Opinion Respecting Denial by Judge O'Scannlain; Statement by Judge Hurwitz) The panel, as constituted above, has voted unanimously to deny the petition for panel rehearing. Judges Fletcher and Gould have voted to deny the petition for rehearing en banc, and Judge Ezra so recommends. A judge of the court called for a vote on the petition for rehearing en banc. A vote was taken, and a majority of the non recused active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f). The petition for rehearing and the petition for rehearing en banc, filed August 11, 2016, are DENIED. [10440900] (RMM) [Entered: 05/19/2017 06:57 AM]

05-30-2017 MANDATE ISSUED.(WAF, RMG and DAE) [10451721] (RL) [Entered: 05/30/2017 10:43 AM]

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OFFICE OF ATTORNEY GENERAL  
FISH & WILDLIFE DIVISION

HONORABLE JUDGE  
BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF  
AMERICA, et al.,

Plaintiff,

v.

STATE OF WASHINGTON,  
et al.,

Defendants.

Civil No. C70-9213

Sub-Proceeding No.  
01-01  
(Culverts)

REQUEST FOR  
DETERMINATION

**INTRODUCTION AND DESCRIPTION OF  
THE SUBPROCEEDING**

The Tribes bring this subproceeding to enforce a duty upon the State of Washington to refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced, which in turn reduces the number of fish available for harvest by the Tribes. In part due to the reduction of harvestable fish caused by those actions of the State, the ability of the Tribes to achieve a moderate living from the Treaty fisheries has been impaired.

The Tribes seek mandatory relief requiring Washington to identify and then to open culverts under state roads and highway that obstruct fish passage, for fish runs returning to or passing through

the usual and accustomed grounds and stations of the plaintiff tribes.

## **I. PRELIMINARY MATTERS**

1.1 Jurisdiction and venue are proper in this Court pursuant to the August 23, 1993 Order Modifying Paragraph 25 of Permanent Injunction.

1.2 A conference pursuant to modified Paragraph 25 was held on July 31, 2000, in accordance with a Request to Meet and Confer dated June 16, 2000, a copy of which is attached as Exhibit A. All parties were notified of this conference, and the defendants and a representative group of plaintiff-intervenors were present. No agreement was reached, although the parties agreed to exchange further positions.

1.3 On August 10, the State, pursuant to revised Paragraph 25(b)(2), demanded mediation.

1.4 In addition to demanding mediation, the State requested a 'government-to-government' meeting with tribal elected officials and Washington Governor Locke, Attorney General Gregoire, Transportation Director Morrison and other State officials. Tribal Chairs, Vice-chairs and other tribal officials from tribal plaintiff-intervenors attended. Governor Locke declared the parties at an impasse, and tribal officials agreed. Nonetheless the parties agreed to attend the mediation, and exchange further documents in preparation for the mediation.

1.5 The mediation took place in Seattle on October 26, 2000, from 9:00 a.m. until 3:00 p.m., with all parties represented. By agreement of the parties, former District of Oregon United States Attorney

Sidney Lezak served as the mediator. The parties were unable to reach an agreement and Mr. Lezak declared an impasse and concluded the mediation.

## **II. ESTABLISHED LAW AND FACTS**

2.1 Each of the plaintiff Tribes has a fishing right reserved in treaties with the United States which “secured” the “right of taking fish, at all usual and accustomed grounds and stations, . . . in common with all citizens, . . .”

2.3 The Indians understood that the sharing of the fish with the citizens of the United States would not be a significant limitation on their right to take fish.

2.3 When the Treaties were signed, neither the United States nor the Indians contemplated that there would be any limitations on the number of fish that either the Indians or the non-Indians could harvest.

2.4 The tribes’ harvest of fish declined for several decades before 1974 due to illegal State regulation, the unlawful exclusion of Indians from their traditional fishing areas, and discriminatory enforcement of State laws against Indian fishers. By 1974 the tribes were collectively harvesting only about 500,000 anadromous fish per year.

2.5 After the Court’s decision in 1974, as the Court’s decision was implemented, the tribes’ harvest rose dramatically until 1986, when the collective tribal harvest, based upon safe and agreed upon escapement standards, exceeded 5,000,000 anadromous fish.

2.6 Since 1986, the number of anadromous fish available for harvest, and consequently tribal harvests, have decreased so greatly that by 1999 the tribal harvest was collectively about the same as their harvest at the time of the 1974 decision.

2.7 A significant reason for the decline of harvestable fish has been the destruction and modification of habitat needed for their survival.

### **III. OPERATIVE FACTS: FISH BLOCKING CULVERTS**

3.1 Where a roadway crosses a river or stream, either a bridge must be constructed above the watercourse or a tunnel, called a culvert, must be built beneath the roadway. Where a culvert is correctly built and maintained, it does not impede the passage of fish through the culvert. However, where a culvert is improperly constructed or maintained, it may completely block all fish passage through the culvert, thereby preventing out-migration of juvenile fish to rearing areas or the salt water, or the return of adult fish to spawning beds, or both.

3.2 The blocking of fish passage at human made barriers such as road culverts is one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington.

3.3 One habitat-related cause for weakening of salmonid production which can be easily resolved is human-made barriers to fish migrations caused by improper placement, construction and maintenance of road culverts.

3.4 The Washington State Department of Transportation (WSDOT) is the State agency

responsible for constructing and maintaining State Highways so that when the highways cross salmonid bearing streams the streams are not obstructed.

3.5 WSDOT, together with the Washington Department of Fisheries and Wildlife (WDFW), has inventoried all of the State Highway stream crossings in Washington State to determine which stream crossings block fish passage.

3.6 WSDOT and WDFW have published this inventory in these reports: (1) Fish Passage Program Progress Performance Report for the Biennium 1991-3; (2) Fish Passage Program Progress Performance Report for the Biennium 1993-5; and (3) Fish Passage Program Department of Transportation Final Report (hereinafter 'Final Report'), dated June, 1997.

3.7 According to the reports listed in Paragraph 3.6 culverts under State Highways owned and maintained by WSDOT block or obstruct adult salmonid access to at least 249 linear stream miles, at least 407,464 square meters of productive salmon spawning habitat, and at least 1,619,839 square meters of productive salmonid rearing habitat in the State of Washington.

3.8 If these blockages to fish passage were removed, WSDOT and WDFW estimate that approximately 200,000 adult salmonids would be produced annually by the areas opened to fish passage. Many of these fish would be available for harvest by the Tribes.

3.9 WSDOT and WDFW estimate that all of the fish blocking culverts identified in the Final

Report will be opened in 20 to 100 years or more, depending on Legislative appropriations.

3.10 Other State agencies or departments, including WDFW and the Washington Department of Natural Resources (DNR), administer state owned lands and have constructed and maintained culverts on those lands which block fish passage.

3.11 WDFW and DNR are each conducting an inventory of the culverts on lands which each department administers.

3.12 Reduction of productive fish habitat as a result of fish blocking culverts owned by the State reduces the number of fish available to plaintiff Tribes.

3.13 Such a reduction in the number of fish available to the plaintiff Tribes impairs the Tribes' ability to achieve a moderate living from their treaty fisheries.

3.14 Today, and since at least 1994, the Tribes are not able to achieve a moderate living from their treaty fisheries.

#### **IV. DEMAND FOR JUDGMENT**

WHEREFORE, the Plaintiff-Intervenor Tribes pray for judgment:

##### **Declaratory Judgment:**

4.1 The "right of taking fish," secured to the plaintiff tribes in the Stevens Treaties, imposes a duty upon the State Washington to refrain from diminishing, through the construction or maintenance of culverts under State owned roads and highways, the number of fish that would otherwise return



to or pass through the tribes' usual and accustomed fishing grounds and stations, to the extent that such diminishment would impair the tribes' ability to earn a moderate living from the fishery.

4.2 The State has violated, and continues to violate, the duty owed the plaintiff tribes under the Stevens Treaties to refrain from construction and maintenance of culverts that diminish the number of fish that would otherwise return to or pass through the tribes' usual and accustomed fishing grounds and stations.

**Prohibitory Injunction:**

4.3 Prohibiting the State of Washington and each of its agencies, departments, officers, and agents from constructing or maintaining any culverts that reduce the number of fish that would otherwise return to or pass through the usual and accustomed grounds and stations of any plaintiff Tribe.

**Mandatory Injunction:**

Requiring State of Washington and each of its agencies, departments, officers, and agents:

4.4 To identify the location of all culverts constructed or maintained by any State agency or department, including, but not limited to, WSDOT, WDFW, and DNR, that diminish the number of fish that would otherwise return to or pass through the tribes' usual and accustomed fishing grounds and stations, within eighteen months of the date of judgment.

4.5 Within five years of the date of judgment, to fix and thereafter maintain all culverts

built or maintained by any State agency or department, including but not limited to WSDOT, WDFW a DNR, such that they do not diminish the number of fish that would otherwise return to or pass through the usual and accustomed fishing grounds and stations of the plaintiff tribes.

**Other Relief:**

4.6 To award Plaintiff-Intervenor Tribes their actual costs, of litigation, including reasonable attorneys' fees, together with such other relief as may be just, proper and equitable under the circumstances.

**DATED** this 12 day of *January*, 2001.

KANJI & KATZEN, PLLC

RAAS, JOHNSEN &  
STUEN, P.S.

*s/Phillip E. Katzen, per DAR*  
Phillip E. Katzen, WSBA #7835  
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Jamestown, Lower Elwha, Pt.  
Gamble Bands of S'Klallams,  
Nisqually, Nooksack,  
Sauk-Suiattle, Skokomish,  
Squaxin Island, Stillagaumish,  
and Upper Skagit Tribes

*s/Daniel A. Raas*  
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Lower Elwha, Pt. Gamble  
Bands of S'Klallams,  
Nisqually, Nooksack, Sauk-  
Suiattle, Skokomish, Squaxin  
Island, Stillagaumish, and  
Upper Skagit Tribes

*s/Richard Reich*  
Richard Reich, WSBA #8178  
Counsel for the Quinault  
Indian Tribe

## MORISSET SCHLOSSER

AYER et al.

*s/Mason D. Morisset per DAR*  
 Mason D. Morisset, WSBA #273  
 Counsel for the Tulalip Tribe

*s/Michelle Hansen per DAR*  
 Michelle Hansen, WSBA  
 #14051

and

*s/Kevin R. Lyon*  
 Kevin R. Lyon, WSBA #15076  
 Counsel for the Squaxin Island  
 Tribe

*s/Scott Wheat per DAR*  
 Scott Wheat, WSBA #25565  
 Co-Counsel for the  
 Suquamish Indian Tribe

*s/Annette M. Klapstein per  
 DAR*  
 Annette M. Klapstein, WSBA  
 #9312

*s/Timothy Weaver per DAR*  
 Timothy Weaver, WSBA  
 #3364  
 Counsel for the Confederated  
 Tribes and Bands of the  
 Yakama Indian Nation

AND

*s/John Howard Bell per DAR*  
 John Howard Bell, WSBA #5574  
 Counsel for the Puyallup  
 Indian Tribe

ZIONTZ, CHESTNUT, et al.  
*s/John Arum per DAR*  
 John Arum, WSBA #19813  
 Counsel for the Makah  
 Indian Nation

*s/Nettie Alvarez per DAR*  
 Nettie Alvarez, WSBA #12283

*s/Alix Foster per DAR*  
 Alix Foster, WSBA #4943  
 Counsel for the Swinomish  
 Indian Tribal Community

AND

*s/Richard S. Ralston per DAR*  
 Richard S. Ralston, WSBA  
 #8546  
 Counsel for the Hoh Tribe

*s/Richard A. Guest per DAR*  
 Richard A. Guest, WSBA  
 #26205  
 Co-Counsel for the  
 Skokomish Indian Tribe

EISENHOWER, CARLSON, et al.

*s/Tracey A. Thomson per DAR*

Tracey A. Thomson, WSBA

#24546

Co-Counsel for the

Jamestown, Lower Elwa, and

Pt. Gamble Bands of

S'Klallams, and the

Skokomish Indian Tribes

*s/Bill Tobin per DAR*

Bill Tobin, WSBA #4397

Co-Counsel for the Nisqually

Indian Tribe

*s/David Vogel per DAR*

David S. Vogel WSBA #13672

Counsel for the Quileute

Indian Tribe

EXHIBIT A

*[PHILLIP E. KATZEN, PLLC letterhead]*

June 16, 2000

The Honorable Christine Gregoire, Attorney General  
Robert K. Costello, Senior Assistant Attorney  
General  
P.O. Box 40100  
Olympia, WA 98504-0100

Re: REQUEST TO MEET AND CONFER  
PURSUANT TO PARAGRAPH 25:  
The State's Duty To Repair and Maintain State  
Owned Culverts To Prevent Blockage Of  
Anadromous Fish Passage

Dear General Gregoire and Mr. Costello:

The undersigned tribes request that you attend a conference to meet and confer regarding potential litigation in *United States v. Washington* on July 10, 2000, at 10:00 AM, in the conference room of Morisset, Schlosser, Ayer & Jozwiak.

This request is made pursuant to subparagraphs 25(a)(4) and (a)(7) of the Order Modifying Paragraph 25 of Permanent Injunction, entered in *United States v. Washington*, on August 23, 1993.

**FACTUAL BACKGROUND**

During the 1991-93, 1993-95, and 1995-97 biennia, the Washington Department of Fish and Wildlife (WDFW) and the Washington Department of Transportation (WSDOT) cooperated on an assessment of culverts that underlie State highways. Three reports were issued: Fish Passage Program

Progress Performance Report for the Biennium 1991-93; Fish Passage Program Progress performance Report for the Biennium 1993-95; and Fish Passage Program Department of Transportation Final Report (hereinafter 'Final Report'), dated June, 1997. These reports document the culvert study, the development of a methodology for assessing fish passage through culverts, the formulation of a Priority Index based on species of salmonid blocked by a culvert and based on the spawning and rearing habitat interdicted by the culvert, and a list of 177 WSDOT culverts which had been ranked as of the date of the Final Report. The Final Report notes that an additional 186 culverts had not yet been ranked.

The Final Report states that opening the ranked culverts would provide approximately 200,000 more adult salmonids per year to the State of Washington. We believe that number substantially understates the number of adult salmonids that could return were the culverts opened to fish passage. First, as acknowledged in the Final Report, the total would be higher if the additional 186 culverts were included in the assessment. Second, the Final Report deals only with culverts that block adult salmonids from returning to spawn; it does not address juvenile salmonids that are either unable to outmigrate, or are killed, as a result of culverts. Third, the Final Report does not estimate the total number of adult salmonids that could be expected to return if all the WSDOT culverts were opened to fish passage.

If the State Legislature continued to specially fund barrier culvert correction at the same levels that occurred in the 1993-95 and 1995-97 biennia, the Final Report estimates that the time for correction

would exceed 100 years. If WSDOT opened blocking culverts in conjunction with its other highway repair and maintenance projects, the Final Report estimates it would take two to three decades to complete the repair of the barrier culverts.

Most of these fish blocking culverts reduce the productive habitat available for salmonids that return to or pass through *United States v. Washington* case area tribal usual and accustomed fishing grounds and stations. This reduction of productive salmonid habitat caused by blocking culverts is in part responsible for the reduction of the numbers of harvestable fish available to the tribes, which in turn is in part responsible for the failure of the tribes to achieve a moderate living through their treaty reserved fishery.

### **RELIEF THAT WILL BE REQUESTED**

If this matter proceeds to litigation, the tribes will seek at least the following relief:

(1) A declaratory judgment that:

(a) The treaties between the tribes and the United States impose on the State of Washington and its agencies the duty to refrain from constructing and maintaining culverts beneath State highways that block passage of fish that would otherwise return to or pass through tribal usual and accustomed grounds and stations, where such blockage impairs the tribes' ability to achieve a moderate livelihood from the fishery, and

(b) The State's construction and maintenance of culverts beneath State highways that block fish

passage to spawning and rearing habitat violates this duty.

(2) An injunction that:

(a) Prohibits the State of Washington, and its State agencies, from constructing or maintaining any culverts beneath State highways that block passage of fish that would otherwise return to or pass through tribal usual and accustomed grounds and stations, and

(b) Requires the State of Washington, and its State agencies, to establish 100% fish passage through all culverts beneath State highways that block passage of fish that would otherwise return to or pass through tribal usual and accustomed grounds and stations within a period of time to be established by the Court, and to thereafter maintain those culverts to ensure that 100% fish passage is preserved.

#### **PARAGRAPH 25(b)(1) REQUIREMENTS**

A. The basis for the relief stated above is the State's duty, pursuant to the Stevens' Treaties, to refrain from impairing the tribes' ability to achieve a moderate living from their fisheries, including the duty to refrain from actions that block access to spawning and rearing habitat such that the number of fish that would return to or pass through tribal usual and accustomed fishing areas is reduced. The State has violated that duty because the continuing harm to the fishery habitat caused by these culverts has contributed to the reduction in the tribes' harvest below the number of fish needed for the tribes to attain a moderate living from their fisheries.



B. Settlement is possible if the State acknowledges in an enforceable court order:

(1) that it has a duty pursuant to the Stevens treaties to refrain from degrading the fish habitat by blocking access to salmon spawning and rearing habitat through the construction and maintenance of fish blocking culverts as alleged herein to the extent that the tribes' ability to achieve a moderate living from the fishery is impaired;

(2) that it violated this duty;

(3) that it will refrain in the future from violating or avoiding this duty; and

(4) that mitigation measures for the damage caused by its actions will be completed in a timely manner. A timely manner for the purposes of the State highway fish blocking culverts is substantially less than the 20 to 30 year period estimated in the Final Report.

C. This matter is not appropriate for the Fisheries Advisory Board.

D. Technical issues concerning culvert construction and repair, if any, may be capable of resolution by agreement.

E. No independent regulatory action can resolve this controversy because acknowledgement and implementation of the treaty right are at the heart of this dispute.

F. Earlier opinions in this case by the District Court and the Ninth Circuit addressed the existence of the State's duty under the Stevens' Treaties to refrain from actions that adversely affect fish

habitat. Those opinions did not resolve the issue; the Ninth Circuit held that resolution of the issue would depend upon concrete facts which underlie a dispute in a particular case. The case presented here provides a specific fact based situation which satisfies the Ninth Circuit's requirements for resolution of this issue.

Earlier rulings in this case by the District Court, the Ninth Circuit, and the Supreme Court, however, have established that the tribes' rights to take fish are "secured" by the treaties, that those rights are permanent, and that the State may not permit the subject matter of the treaties to be destroyed. Earlier rulings in other cases have also established that a reservation of rights in a treaty includes by implication whatever is necessary to make the reservation of those rights effective.

G. The parties may be able to resolve this dispute by mediation. It is not capable of arbitration.

If the date and time identified above are not convenient, please contact us so that we may reschedule to a mutually acceptable date and time. We look forward to meeting with you and the State's policy representatives to discuss the resolution of the issues described above.

Very truly yours,

*Daniel A. Raas\**

Daniel A. Raas/Harry L. Johnsen  
Attorneys for Lummi Nation

*Philip E. Katzen*

Philip E. Katzen

Attorney for Nooksack, Upper Skagit, Sauk Suiattle,  
Stillaguamish, Nisqually, Squaxin Island,  
Suquamish, Skokomish, Port Gamble S'Klallam, and  
Jamestown S'Klallam Indian Tribes

*Mason D. Morisset\**

Mason D. Morisset

Attorney for Tulalip Tribes

*Alix Foster\**

Alix Foster

Attorney for Swinomish Indian Tribal Community

*John B. Arum\**

John B. Arum

Attorney for Makah Indian Tribe

*Richard Reich\**

Richard Reich

Attorney for Quinault Indian Nation

*Richard Ralston\**

Richard Ralston

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*Kevin Lyon\**

Kevin Lyon

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*Harold Chesnin\**

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Co-Counsel for Upper Skagit Indian Tribe

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Co-Counsel for Nisqually Indian Tribe

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David Vogel

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*Scott Wheat\**

Scott Wheat

Co-Counsel for Suquamish Indian Tribe

*\*Per Telephone Authorization*

C: Client Tribes  
Peter Monson

RECEIVED  
Jan 19 2001  
OFFICE OF ATTORNEY GENERAL  
FISH & WILDLIFE DIVISION

HONORABLE  
BARBARA JACOBS ROTHSTEIN

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT  
OF WASHINGTON

UNITED STATES OF  
AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON,  
et al.,

Defendants.

Civil No. C70-9213 –  
Phase I Sub-proceeding  
No. 01-01  
(Culverts)

UNITED STATES'  
RESPONSE TO  
REQUEST FOR  
DETERMINATION

The United States of America hereby responds to the Request for Determination filed in this matter as follows:

**INTRODUCTION AND DESCRIPTION OF THE  
SUB-PROCEEDING**

This section contains a description of this sub-proceeding, to which no response is required. As described more fully *infra*, the United States supports generally the Tribes' request.

**I. PRELIMINARY MATTERS**

1.1 Admitted

1.2 Admitted. Representatives of the United States also attended the meeting.

1.3 Admitted.

1.4. No representative of the United States was invited to the “government to government” meeting and thus the United States can neither admit nor deny the statements contained in this paragraph, other than to admit, upon information and belief, that such a meeting occurred.

1.5. Admitted. The United States attended and participated in the mediation.

## **II. ESTABLISHED LAW AND ACTS**

2.1. Admitted.

2.2. Admitted.

2.3. Admitted.

2.4. Admitted.

2.5. Admitted.

2.6. Admitted.

2.7. Admitted.

## **III. OPERATIVE FACTS: FISH BLOCKING CULVERTS**

3.1. Admitted.

3.2. Admitted.

3.3. Admitted.

3.4. The United States is without information with which to verify the truth of this statement, but upon information and belief it is admitted.

3.5. Admitted.

3.6. Admitted.

3.7. This paragraph summarizes the conclusions of voluminous reports, which reports speak for themselves.

3.8. This paragraph summarizes the conclusions of voluminous reports, which reports speak for themselves.

3.9. This paragraph summarizes the conclusions of voluminous reports, which reports speak for themselves.

3.10. The United States is without information with which to verify the truth of these statements, but upon information and belief they are admitted.

3.11. The United States is without information with which to verify the truth of these statements, but upon information and belief they are admitted.

3.12. Admitted.

3.13. Admitted.

3.14. Admitted as to the year 1994 and before. *United States v. Washington*, 873 F.Supp. 1422, 1445-1446 (W.D. Wash. 1994) *aff'd*. 14157 F.2d 630 (1998) *cert. denied* 526 U.S. 1060 (1990). The United States is without information with which to verify the truth of this statement as to years after 1994, but it knows of no change in circumstances which would alter the conclusions reached by this Court in 1994.

#### **IV. DEMAND FOR JUDGMENT**

The United States requests that this Court enter an order declaring the rights of the parties and enjoining their actions as follows:

**Declaratory Judgment.**

The United States requests that the Court declare that:

4.1. The right of taking fish secured to the plaintiff tribes in the Stevens Treaties imposes a duty upon the State of Washington to refrain from degrading the fishery resource through the construction or maintenance of culverts under State owned roads and highways in a way that deprives the Tribes of a moderate living from the fishery.

4.2. The State has violated and continues to violate the duty owed to the plaintiff tribes under the Stevens Treaties through the operation and maintenance of culverts which reduce the number of fish that would otherwise return to or pass through the Tribes' usual and accustomed fishing grounds and stations to such a degree as would deprive the Tribes of the ability to earn a moderate living from the fishery.

4.3. The Ninth Circuit held that the legal standards that govern the State's precise obligations and duties under the Treaties with respect to State actions that may affect the environment of the treaty area will depend upon concrete facts which underlie a particular case. In the context of State culverts that appreciably degrade fish passage and interfere with the Tribes' ability to realize a moderate living from the fishery, the State's obligations include the duty to correct in a timely way the fish passage problems associated with the culverts.

**Prohibitory Injunction:**

The United States seeks an Order that:



4.4. Prohibits the State of Washington, and each of its agencies, departments, officers, employees, contractors and agents from constructing, operating, or maintaining any culvert in a manner that would deprive the Tribes of the ability to earn a moderate living from the fishery. Those culverts that are designed, built, and maintained consistent with the current best available design and engineering standards relating to the passage of fish under highways would not be subject to the injunction as they would not appreciably degrade the fishery, thereby, limiting the ability of the plaintiff-Tribes to earn a moderate living from the fishery.

**Mandatory Injunction:**

The United States seeks an Order that:

4.5. Requires the State of Washington and each of its agencies, departments, officers, employees, contractors and agents to identify, within eighteen months of the date of judgment (or such other time period as the Court shall deem necessary and just) the location of all culverts owned, constructed or maintained by any State agency or department, including the Washington State Department of Transportation, the Washington Department of Fish and Wildlife, and the Washington Department of Natural Resources, that degrade appreciably passage of fish that otherwise would pass through usual and accustomed fishing grounds and stations so as to deprive the Tribes of the ability to earn a moderate living from the fishery.

4.6. Requires that, within five years of the date of judgment (or such other time period as the Court deems necessary and just) the State of Washington

and each of its agencies, departments, officers, employees, contractors and agents shall repair, retrofit, maintain, or replace the culverts identified under Paragraph 4.5, in conformity with the best available design and engineering standards for passage of fish beneath highways, as necessary, to avoid depriving the Tribes of the ability to earn a moderate living from the fishery.

**Other Relief:**

4.7. The United States further requests the Court to award to the United States such other relief as the Court shall deem just, proper, and equitable, including costs of litigation.

RESPECTFULLY SUBMITTED this 16th day of January, 2001.

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 WESTERN DISTRICT OF WASHINGTON  
 BY DEPUTY

THE HONORABLE  
 BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 AT SEATTLE

UNITED STATES OF  
 AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON,  
 et al.,

Defendants.

CIVIL NO. C70-9213-  
 Phase II  
 [Sub-Proceeding No. 01-  
 01 (Culverts)]

STATE OF  
 WASHINGTON'S  
 ANSWER AND CROSS  
 AND COUNTER  
 REQUESTS FOR  
 DETERMINATION

**ANSWER**

The State of Washington (hereinafter "State") submits the following Answer to the "Request for Determination" (hereinafter "RFD"):

**INTRODUCTION AND DESCRIPTION OF  
 THE "SUB-PROCEEDING"**

This section contains the Tribes' description of this "sub-proceeding" to which no response is required.

**I. STATE RESPONSE TO TRIBES’  
“PRELIMINARY MATTERS”**

1.1 By way of answer to ¶1.1 of the RFD, the State admits that venue is proper in this Court. As explained elsewhere in this Answer, the State denies that a case or controversy exists. The State specifically reserves the right to raise an Eleventh Amendment defense if future circumstances justify the defense. The State denies that the August 23, 1993 Order Modifying Paragraph 25 of the Permanent Injunction, without more, provides this Court with jurisdiction and venue. The State avers that this matter is governed by the Court’s June 22, 1993 Order Dismissing Without Prejudice Phase II and Certain Subproceedings in Phase I.

1.2 The State admits the allegations in ¶1.2.

1.3 The State admits the allegations in ¶1.3.

1.4 The State admits the allegations in the first two sentences of ¶1.4. The State admits the third sentence with the following explanation: At all times the State has been willing to discuss a settlement related to the prioritization process or remedial timetable for fixing State-owned culverts. The Tribes demanded, however, that the State admit the existence of some treaty-based right to environmental protection of indeterminate scope. All involved, including the Governor and the tribal officials, recognized that the parties had reached an impasse. The State admits the final sentence in ¶1.4.

1.5 The State admits the allegations in ¶1.5.

## II. STATE RESPONSE TO TRIBES’ “ESTABLISHED LAW AND FACTS”

2.1 The State admits the allegations in ¶2.1.

2.2 The State admits only that the allegations in ¶2.2 resemble sentences in a paragraph from the decision in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 668 (1979) (hereinafter *Passenger Fishing Vessel*). The State lacks knowledge sufficient to form a belief as to the truth of the remaining averments in ¶2.2 and therefore denies all allegations not specifically admitted.

2.3 The State admits only that the allegations in ¶2.3 resemble sentences in a paragraph from the decision in *Passenger Fishing Vessel*, 443 U.S. at 668. The State lacks knowledge sufficient to form a belief as to the truth of the remaining averments in ¶2.3 and therefore denies all allegations not specifically admitted.

2.4 The State admits only that Judge Boldt made a similar finding that the Supreme Court acknowledged in *Passenger Fishing Vessel*, 443 U.S. at 669 and n.14, and denies the remaining allegations in ¶2.4.

2.5 The State admits the allegation in ¶2.5. The State avers that many of the fish harvested by the Tribes in 1986 included hatchery-spawning fish and Fraser River salmon, whose life history is affected minimally or not at all by State-owned culverts.

2.6 The State admits the allegation in ¶2.6. The State avers that annual harvests fluctuate for many reasons and that conditions unrelated to State-

owned culverts contributed to the poor 1999 harvest. Such reasons include low numbers of Fraser River salmon, a decline in the chum population, and extremely poor hatchery survival rates.

2.7 By way of answer to ¶2.7, the State denies that State-owned culverts have caused significant decline in the number of fish harvested by the plaintiff Tribes since 1986. The number of State-highway culverts did not significantly increase between 1974 and 1986. Since 1986, the number of State-highway culverts that constitute fish passage barriers has declined due to the State's fish passage barrier remediation programs pursuant to state law.

### **III. STATE RESPONSE TO TRIBES' "OPERATIVE FACTS: FISH BLOCKING CULVERTS"**

3.1 By way of answer to the allegations in ¶3.1, the State admits that roadway stream crossings must provide for some means to convey water through or under the roadway and that bridges and culverts are typically used for this purpose. The State avers that culverts that are properly designed, constructed and maintained generally will not impede fish passage. Some culverts designed and constructed according to appropriate standards have become fish passage barriers over time due to erosion, catastrophic events such as earthquakes, and other natural processes. In addition, scientific research (much of which has been funded by the Washington State Department of Transportation (WSDOT) and the Washington Department of Fish and Wildlife (WDFW)) has led to a better understanding of fish behavior and their ability to navigate culverts. Design

and construction standards that were at one time believed to provide adequate fish passage are now recognized as inadequate in some cases. The State denies all remaining allegations not specifically admitted.

3.2 By way of answer to ¶3.2, the State admits that some culverts are a current and generally correctable cause of fish habitat unavailability. The State denies all remaining allegations not specifically admitted.

3.3 By way of answer to ¶3.3, the State admits that road-related fish passage barriers have reduced the available fish habitat. The State avers that correcting the State-owned fish passage barrier culverts that have been identified to-date is estimated to cost hundreds of millions of dollars. In addition to the high cost (and competing demands for limited State funding), factors such as the limited availability of qualified design and construction personnel, limited time periods for conducting in-stream work, and the lengthy permitting time mean that barrier correction will take substantially longer than five years. The State therefore denies that the fish passage barrier culvert problem “can be easily resolved.”

3.4 The State admits the allegation in ¶3.4.

3.5 The State admits that WSDOT and the Washington Department of Fisheries commenced an inventory of state highway stream crossings in Washington State to determine which stream crossings blocked passage to anadromous fish classified as “food fish” under state law. The State further avers that WSDOT and WDFW are now conducting a second inventory of stream crossings on

the state highway system to determine which stream crossings block fish passage. The second inventory considers resident fish and steelhead as well as anadromous fish classified as “food fish.” WSDOT and WDFW estimate that the new inventory will be completed in approximately five years. It is unlikely that the new inventory could be completed in less time. The State denies all remaining allegations not specifically admitted.

3.6 By way of answer to ¶3.6, the State admits that it published the reports identified in that paragraph as well as subsequent reports documenting the progress of the State’s fish passage barrier remediation program being conducted under State law.

3.7 By way of answer to ¶3.7, the State admits that one of the historical reports identified in ¶3.6 contains the figures stated in this paragraph. The State avers that since 1991, the WSDOT/WDFW fish passage barrier removal program conducted under State law has opened over 147 linear miles of stream habitat and restored over 908,000 square meters of salmonid habitat. The State denies all remaining allegations not specifically admitted.

3.8 By way of answer to ¶3.8, the State admits that one of the historical reports identified in ¶3.6 contains the theoretical estimate that the Tribes set forth in this paragraph. The State avers that the estimate assumes that salmon populations are limited only by the amount of available habitat. Whether the barrier removal projects will actually achieve this potential increase in fish production is dependent on many biological and environmental variables



unrelated to the culverts. The State admits that the Tribes would have a right to take a share of the harvestable fish that pass through tribal usual and accustomed grounds and stations. The State denies all remaining allegations not specifically admitted.

3.9 By way of answer to ¶3.9, the State admits that one of the historical reports identified in ¶3.6 states that if only dedicated funding at the then-current level were used to repair barrier culverts, complete resolution would require about 100 years. The State avers that the same report also states that WSDOT's program of fixing barrier culverts encountered during the course of transportation projects would lead to complete resolution in two to three decades. Under the funding levels WSDOT has requested of the Legislature, WSDOT estimates that the identified fish passage barriers will be corrected in 20 years or less. WSDOT has already corrected approximately 70 of the barriers expected to yield the most significant increases in available fish habitat.

The remaining WSDOT fish passage barriers have been or are being prioritized for correction to ensure that available funds are spent on projects that provide the greatest potential for increased fish habitat and fish production. The State denies all remaining allegations not specifically admitted.

3.10 By way of answer to ¶3.10, the State admits that other State agencies or departments, including the Washington Department of Fish and Wildlife and the Washington Department of Natural Resources, operate and maintain roads on State-owned lands that contain some culverts that are fish passage barriers. The State denies all remaining allegations not specifically admitted.

3.11 The State admits the allegation in ¶3.11.

3.12 By way of answer to ¶3.12, the State avers that State-owned culverts have been a factor in making some potential fish habitat inaccessible. The relationship between accessible fish habitat and harvestable fish depends on many other factors unrelated to culverts, however. These factors include but are not limited to ocean and estuary conditions, hatchery survival rates, harvest levels, dams, and predator behavior. The interplay of these factors and fish behavior determines whether the opening of new habitat will result in larger numbers of harvestable fish or will simply redistribute the existing population levels. The State denies that State-owned culverts have been a significant cause of decline in the tribal fish harvest since 1986. Since 1986, the number of State-highway culverts that constitute fish passage barriers has declined due to the State's fish passage barrier remediation programs. The State denies all remaining allegations not specifically admitted.

3.13 The State lacks knowledge sufficient to form a belief as to the truth of the averments in ¶3.13 and therefore denies those averments.

3.14. The State lacks knowledge sufficient to form a belief as to the truth of the averments in ¶3.14 and therefore denies those averments.

3.15. The State denies all allegations in the RFD not specifically admitted and all allegations of unlawful behavior contained in the RFD.

#### **IV. STATE RESPONSE TO TRIBES' AND UNITED STATES' "DEMANDS FOR JUDGMENT"**

To the extent a response to the demands for judgment in the Tribes' RFD and the United States' Response to Request For Determination is deemed necessary, the State provides the following:

For the factual and legal reasons stated elsewhere in this Answer and Cross- and Counter-Request For Determination, the Tribes are not entitled to the relief requested in Part IV of their RFD, and the United States is not entitled to the relief requested in part IV of its Response.

#### **V. ADDITIONAL FACTS AND LAW SUPPORTING STATE'S DEFENSES AN CROSS- AND COUNTER-REQUESTS FOR DETERMINATION**

By way of further answer, and in support of the State's defenses, cross-request for determination, and counter-request for determination, the State avers as follows:

5.1 The United States is a party to treaties with the plaintiff Tribes. Only Congress can modify or abrogate the terms of Indian treaties, and when it does so it must make its intent clear and plain. Federal executive agencies have a duty to ensure that the Tribes' treaty rights are not abrogated or impinged upon when those agencies fund, authorize, approve, or otherwise participate in actions of the State of Washington and its agencies.

5.2 In 1996, the Washington Department of Natural Resources (DNR) applied to the federal

government for an incidental take permit under Section 10 of the Endangered Species Act (ESA) for activities relating to DNR's management of approximately 1.6 million acres of State-owned trust lands, including lands within the *United States v. Washington* "case area." As part of its application, the DNR prepared a "habitat conservation plan" (HCP). The HCP includes provisions for road system management. Those provisions require DNR to identify fish blockages caused by stream crossings and prioritize their retrofitting or removal on lands west of the Cascade crest.

5.3 At no time during the permit application process did the federal government inform DNR that any treaties would be violated if DNR implemented the culvert remediation strategy proposed in the HCP.

5.4 In 1997, the United States Fish and Wildlife Service (USFWS), an agency within the United States Department of the Interior, granted DNR's application for an incidental take permit and approved the HCP. The USFWS published a notice of its approval in the February 27, 1997 issue of the Federal Register. In that notice, the USFWS recognized that the HCP addressed "anadromous salmonids which are a resource subject to the Fish and Wildlife Service's trust responsibility," and announced it was issuing the permit because the HCP met the USFWS's "trust responsibility to Native American Tribes."

5.5 On January 30, 1997, the DNR entered into a 70-year "Implementation Agreement" with the United States Secretaries of Commerce and the Interior concerning the HCP. In the Implementation

Agreement, the Secretaries promised not to require DNR to take additional measures or allocate additional funds beyond the commitments in the HCP absent unforeseen or extraordinary circumstances. At no time has the Secretary of Commerce or the Secretary of the Interior claimed that unforeseen or extraordinary circumstances are present. At no time has the Secretary of Commerce or the Secretary of the Interior taken the position that DNR is violating the HCP or the Implementation Agreement.

5.6 In implementing its road culvert remediation program on State-owned trust lands, the State reasonably relied on the federal government's approval of the DNR HCP, including its representations that the HCP satisfied any "trust responsibility to Native American Tribes."

5.7 In June 1997, the United States Secretaries of Commerce and the Interior issued a "Secretarial Order" on "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" ("Secretarial Order"). The Secretarial Order pledges that the Departments of Commerce and the Interior "will carry out their responsibilities under the [Endangered Species] Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Department." The Secretarial Order sets forth a policy that, when the National Marine Fisheries Service (NMFS), an agency within the United States Department of Commerce, exercises regulatory authority under Section 4(d) of the ESA, it shall avoid or minimize effects on the exercise of reserved Indian fishing rights to the maximum extent allowed by law.

5.8 During the 1990s, DNR worked with other Washington State agencies, the plaintiff Tribes, and others to develop proposals to improve and protect fish habitat on non-federal forestlands in Washington. They released the proposals in 1999 in the “Forests and Fish Report.” The “Forests and Fish Report” proposes that fish-blocking culverts on forest roads be repaired by 2015.

5.9 In 2000, the NMFS adopted a rule under Section 4(d) of the Endangered Species Act prohibiting the take of salmon listed as “threatened” under that Act. NMFS stated that maintaining fish passage barriers can be a “take.” But NMFS said it may exempt from the “take” prohibition activities conducted in accordance with the Forests and Fish Report, including the 15-year period for remediation of fish passage problems on state forest roads. The NMFS knew or should have known of any United States treaty obligations. The NMFS had a duty to ensure that the Tribes’ treaty rights were not abrogated or impinged upon when it adopted its 4(d) rule, and, according to the Secretarial Order, NMFS was supposed to avoid affecting the exercise of Indian treaty fishing rights to the maximum extent allowed by law. The State reasonably concluded that by approving or failing to object to the State’s 15-year remediation schedule for forest roads, the NMFS had determined that the schedule satisfied any treaty obligation.

5.10 The United States Congress has appropriated funds to carry out the proposals in the Forests and Fish Report. The Congress did not make clear and plain any intent to abrogate or modify treaty rights when it made that appropriation. The State

reasonably concluded that the Congress had determined that the Forests and Fish Report, including its 15-year schedule for remediation of fish passage problems on forest roads, was consistent with any treaty obligation.

5.11 Some of the plaintiff Tribes agreed with the Forests and Fish Report. The State reasonably believed that these plaintiff Tribes had concluded that the Forests and Fish Report, including its 15-year schedule for remediation of fish passage problems on forest roads, satisfied any treaty obligation that the State may owe to the Tribes. If those actions do not satisfy some treaty-based duty, the State has relied to its detriment on the actions of these plaintiff Tribes.

5.12 The United States Environmental Protection Agency (EPA) has delegated to the Washington Department of Ecology the authority to set water quality standards under Section 303 of the federal Clean Water Act. The EPA retains authority to determine whether the State's water quality standards are consistent with the Clean Water Act. In exercising such authority, the EPA has a duty to ensure that the Tribes' treaty rights are not abrogated or impinged upon.

5.13 As part of Washington State's implementation of the Forests and Fish Report, the Washington Department of Ecology has adopted interim forest practices rules for water quality, including rules for forest roads. These interim rules incorporate the 15-year road remediation schedule of the Forests and Fish Report. At no time has the EPA informed the State that the interim rules are inconsistent with the Clean Water Act or the Tribes'

treaty rights. The State reasonably concluded that by approving or failing to object to the State's 15-year remediation schedule for forest roads, the EPA had determined that the schedule satisfied any treaty obligation.

5.14 Many of the fish passage barrier culverts in the WSDOT inventory are in highways funded in part by the United States under the Federal Aid Road Act of 1916 and successor legislation. These highways were designed according to standards set or approved by the Federal Highway Administration (FHWA) and its predecessors. The FWHA *[sic]* retained authority for final design approval. The FHWA knew or should have known of any United States treaty obligations. The FHWA has a duty to ensure that the Tribes' treaty rights are not abrogated or impinged upon when it sets design standards, approves designs, and monitors maintenance on federal-aid highways. The State reasonably concluded that by approving or failing to object to the State's culvert design and maintenance, the FHWA had determined that the design and maintenance satisfied any treaty obligation. WSDOT used the same culvert design and maintenance standards on its other roads that were not funded under federal highway-aid legislation.

5.15 When Washington state agencies install culverts, they must comply with the federal Clean Water Act. Since 1977, the United States Army Corps of Engineers has issued nationwide permits under Section 404 of the Clean Water Act for certain activities, including the installation of culverts. The State of Washington has installed culverts in reliance on such permits. The Corps of Engineers has a duty to ensure that the Tribes' treaty rights are not abrogated



or impinged upon when it administers the Clean Water Act. Since 1986, the Corps of Engineers has required as a General Condition of its nationwide permits that activities performed under the permits not impair tribal reserved rights, including, but not limited to, treaty fishing rights. The Corps of Engineers has never informed the State of Washington that any of its culvert installation activities impair treaty fishing rights or violate any nationwide permit. The State reasonably concluded that by approving or failing to object to the State's culvert design, the Corps of Engineers had determined that the design satisfied any treaty obligation.

5.16 When Washington state agencies install some culverts in waters of the United States, they must secure individuals permit from the United States Army Corps of Engineers for the installation. The Corps of Engineers knew or should have known of any United States treaty obligations. The Corps of Engineers has a duty to ensure that the Tribes' treaty rights are not abrogated or impinged upon when it issues permits. The Corps of Engineers has never denied a culvert installation permit on the basis that it abrogated or impinged upon Indian treaty rights. The State reasonably concluded that by approving or failing to object to the State's culvert design, the Corps of Engineers had determined that the design satisfied any treaty obligation.

5.17 Section 7 of the federal Endangered Species Act requires federal agencies to consult with the United States Secretary of the Interior or Commerce to insure that actions they authorize or fund do not jeopardize the continued existence of any

endangered or threatened species or result in the destruction or adverse modification of critical habitat. In June 1997, the United States Secretaries of Commerce and the Interior issued the Secretarial Order described in ¶5.7 of this Response. The Secretarial Order pledges that the Departments of Commerce and the Interior “will carry out their responsibilities under the [Endangered Species] Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Department.” The Secretarial Order sets forth an agency policy that, when federal agencies consult with NMFS or USFWS under Section 7 of the ESA on a proposed action that may affect tribal rights, NMFS or USFWS shall notify affected Tribes, give full consideration to tribal comments, and strive to ensure that any reasonable and prudent alternatives to the proposed action not discriminate against Tribes.

5.18 The United States Army Corps of Engineers authorizes, and the FHWA funds, some WSDOT highway construction work. NMFS and the USFWS have collectively reviewed hundreds of WSDOT road projects as required by § 7 of the ESA, including many since the Secretarial Order was issued in June 1997. NMFS and the USFWS have a duty to ensure that the Tribes’ treaty rights are not abrogated or impinged upon when they consult under § 7 of the ESA. Since June 1997, NMFS and the USFWS have been guided by the Secretarial Order, which requires them to coordinate with Tribes and avoid discriminatory impacts on Tribes when they consult on actions that may affect tribal rights. These federal agencies have routinely approved WSDOT

culvert designs and have never expressed any concern that WSDOT culverts may adversely affect tribal rights. The State reasonably concluded that by approving or failing to object to the State's culvert design, these federal agencies had determined that the design satisfied any treaty obligation.

5.19 In June 1997, the United States Secretaries of Commerce and the Interior issued the Secretarial Order described in paragraphs 5.7 and 5.17 of this Response. The Secretarial Order pledges that the Departments of Commerce and the Interior "will carry out their responsibilities under the [Endangered Species] Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Department." The Secretarial Order sets forth a policy that, when NMFS exercises regulatory authority under Section 4(d) of the ESA, it shall avoid or minimize effects on the exercise of reserved Indian fishing rights to the maximum extent allowed by law.

5.20 The NMFS has adopted a rule under § 4(d) of the ESA that prohibits the taking of threatened salmon, subject to certain exceptions that NMFS deems to contain adequate safeguards. One such exception applies to employees or agents of a state conducting routine road maintenance activities under a program substantially similar to that of the Oregon Department of Transportation. In June 2000, WSDOT requested that NMFS include WSDOT's routine road maintenance activities performed according to the WSDOT "Maintenance Manual for Water Quality and Habitat Protection" in the 4(d) rule. WSDOT's current maintenance activities conform to the protocols in this manual and meet or

exceed the standards in the Oregon DOT manual. The WSDOT manual contains protocols for inspecting culverts and maintaining fish passage through the culverts. The NMFS had a duty to ensure that the Tribes' treaty rights were not abrogated or impinged upon when it adopted its 4(d) rule, and according to the Secretarial Order NMFS was supposed to avoid affecting the exercise of Indian treaty fishing rights to the maximum extent allowed by law. The State reasonably concluded that by approving or failing to object to the ODOT routine maintenance program, or Washington's "Maintenance Manual for Water Quality and Habitat Protection," the NMFS had determined that these maintenance activities satisfied any treaty obligation.

5.21 Washington State law has long required that anyone constructing a hydraulic project in a stream must obtain a Hydraulic Project Approval from the WDFW or its predecessors to ensure the proper protection of fish life. WDFW has developed extensive design criteria for all hydraulic conveyances, which are the state-of-the-art. All new culverts installed on state roads and highways must conform to these criteria. In its Federal Register document adopting a rule prohibiting the take of threatened salmon under Section 4(d) of the ESA, the NMFS praised the WDFW criteria as an excellent framework for making decisions on culverts and road crossings and as ensuring adequate fish passage. NMFS has adopted these criteria in its own documents. The NMFS has a duty to ensure that the Tribes' treaty rights are not abrogated or impinged upon. According to the Secretarial Order, when NMFS adopted its 4(d) rule it was supposed to avoid affecting

the exercise of Indian treaty fishing rights to the maximum extent allowed by law. The State reasonably concluded that by approving or failing to object to the State's culvert design, the NMFS had determined that the design satisfied any treaty obligation.

5.22 As described in paragraphs 5.2 through 5.10 and 5.12 through 5.21 above, the United States has funded, authorized, approved, or otherwise participated in the design, construction and maintenance of many of the State's culverts. The United States has funded, authorized, approved, or otherwise participated in the State's proposals to correct fish passage problems on state-owned roadways. The State of Washington reasonably concluded that the United States had determined that the state actions described in paragraphs 5.2 through 5.21 satisfied any treaty obligation. If those actions do not satisfy some treaty-based duty, the State has reasonably relied to its detriment on the actions of the United States. The United States has a duty to pay all costs incurred by the State to identify and fix any and all barrier culverts. As described below, the United States also has a duty to take action on its own lands so as not to place on the State of Washington an unfair burden of complying with any such treaty-based duty.

5.23 Any treaty-based duty owed by the State to the Tribes must also be owed by the United States to the Tribes.

5.24 The United States, as a land owner, owes a duty to the State not to use its land in such a way as to injure the State. This includes a duty that the United States assume its fair share of the burden of

complying with any treaty-based duty to protect fish habitat.

5.25 Federal agencies own about 7000 miles of public road within the State of Washington. These agencies include the United States Forest Service, the Bureau of Indian Affairs, the National Park Service, the United States military departments and others. In addition to these public roads, federal agencies such as the United States Forest Service manage federal lands within the case area that contain tens of thousands of miles of other roads that are poorly designed and maintained. With respect to the design, construction, and maintenance of culverts and other road-related hydraulic conveyances, the State's standards and practices meet or exceed those of the federal agencies. Roads on federal lands within the *United States v. Washington* "case area" include a very large number of fish passage barriers.

5.26 Upon information and belief, the federal government has not completed an inventory of its own fish passage barriers in the case area. If the federal government had an accurate inventory of its own road-related fish passage barriers, it is likely that the amount of potential salmon habitat made inaccessible by federal barriers would equal or exceed any amount of potential habitat made inaccessible by State-owned culverts.

5.27 In addition to the federal culvert problem, the United States and its agencies have caused widespread destruction of fish habitat within the State of Washington. Destruction of fish habitat by the United States has reduced the number of fish passing through the Tribes' usual and accustomed

fishing grounds and stations and has reduced the tribal harvest. The loss of harvestable fish attributable to these federal actions exceeds any loss reasonably attributable to State-owned culverts.

5.28 Any treaty-based duty to protect fish habitat owed by the State to the Tribes must also be owed by the Tribes to the State.

5.29 Upon information and belief, some or all of the plaintiff Tribes own or maintain roads and have not inventoried or corrected their own road-related fish passage barriers.

5.30 Washington State and territorial law has long required that obstructions across or in streams be provided with a durable and efficient fishway. Washington law has required that such fishways be maintained in an effective condition and continuously supplied with sufficient water to freely pass fish.

5.31 A principal purpose of the treaties was to extinguish Indian claims to the land in Washington Territory. The United States negotiators anticipated industrial and urban development in the relevant geographical area. At least some of the Tribes understood that the United States or the settlers would build public roads, and that the Indians would be able to use them. Governor Stevens and the treaty commissioners were not authorized to grant to the Indians or treat away on behalf of the United States any governmental authority of the United States. The Indians ceded and relinquished all right, title, and interest in most of what is now western Washington, reserving certain specifically-stated off-reservation rights, such as the “right of taking fish, at all usual and accustomed grounds and stations . . . in common

with all citizens . . . .” There is no mention in the treaties of a duty to protect fish habitat.

5.32 Washington State was admitted to the Union in 1889. When Congress provided for the admission of the State of Washington, it said the State would be admitted “on an equal footing with the original States.” The original States do not have the duty that the Tribes allege in the RFD or the duty that the United States alleges in its Response. There is no mention of such a duty in the 1889 Enabling Act.

5.33 The treaties do not give the Tribes or the United States the power to control the state legislative process so as to dictate to the people of the State of Washington or their representatives how they shall allocate scarce state resources.

## **VI. STATE’S DEFENSES**

6.1 The United States and the Tribes are barred by principles of waiver and/or estoppel from seeking any relief related to culverts owned by the Washington Department of Natural Resources on roads within lands covered by the DNR’s Habitat Conservation Plan.

6.2 The United States and the Tribes are barred by principles of waiver and/or estoppel from seeking any relief related to culverts on lands covered by the State’s Forests and Fish Report.

6.3 The United States and the Tribes are barred by principles of waiver and/or estoppel from seeking any relief related to the State’s design, construction, and maintenance of culverts on federal-aid highways and on other state highways designed,



constructed, and maintained in accordance with the standards for federal-aid highways.

6.4 The United States and the Tribes are barred by principles of waiver and/or estoppel from seeking any relief related to the State's installation of culverts under nationwide permits or individual permits issued by the United States Army Corps of Engineers.

6.5 The United States and the Tribes are barred by principles of waiver and/or estoppel from seeking any relief related to the State's installation of culverts in projects that have been the subject of consultation under Section 7 of the Endangered Species Act.

6.6 The United States and the Tribes are barred by principles of waiver and/or estoppel from seeking any relief related to culverts covered by routine road maintenance activities under a program substantially similar to that of the Oregon Department of Transportation.

6.7 The United States and the Tribes are barred by principles of waiver and/or estoppel from seeking any relief related to culverts that conform to the design standards of the Washington Department of Fish and Wildlife in existence as of March 3, 1999.

6.8 If the Tribes have any cause of action under the treaties with respect to state-owned culverts, it is against the United States for breach of the duty to ensure that the Tribes' treaty rights are not abrogated or impinged upon when federal executive agencies carry out their responsibilities. The Tribes have no cause of action against the State.

6.9 The Court lacks subject matter jurisdiction over some of the claims in the RFD and in the United States' response because there is no case or controversy related to the State's current culvert design, construction, and maintenance standards.

6.10 The Tribes and the United States lack standing to seek relief related to the State's current culvert design, construction, and maintenance standards.

6.11 The law of the case doctrine bars the claims in the RFD and in the United States' response.

6.12 The Equal Footing Doctrine bars the claims in the RFD and in the United States' response.

6.13 The political question doctrine bars the claims in the RFD and in the United States' response.

6.14 The claims are non-justiciable because the treaties are not self-executing with respect to the rights alleged in the RFD and the United States' response.

6.15 Any State obligation to the Tribes or the United States is satisfied by compliance with the federal Endangered Species Act and other federal statutes and regulations.

6.16 The Tribes and the United States are not entitled to retroactive remedial equitable relief that is appropriate only for constitutional violations.

6.17 The relief that the Tribes and the United States demand is unconstitutional under the provisions of the United States Constitution, including Article IV, Section 4.

6.18 The requested relief would require federal court intrusion into legislative decisions reserved to the State under principles of federalism, state sovereignty and the 10th Amendment to the United States Constitution.

6.19 The claims in the RFD are barred by the 11th Amendment to the United States Constitution.

6.20 The RFD and the United States' response fail to state a claim upon which relief can be granted.

## **VII. CROSS-REQUEST FOR DETERMINATION AGAINST THE UNITED STATES AND COUNTER-REQUEST FOR DETERMINATION AGAINST THE TRIBES**

The State avers as follows:

7.1 This Court has jurisdiction over the State's Cross- and Counter-Requests For Determination under 28 U.S.C. § 1331 and the Court's June 22, 1993 Order Dismissing Without Prejudice Phase II and Certain Subproceedings in Phase I.

7.2 If the actions of the State of Washington that are the subject of the RFD violate any treaty-based duty owed the Tribes, the executive branch of the United States government has violated its duty to ensure that the Tribes' treaty rights are not abrogated or impinged upon by funding, authorizing, approving, or otherwise participating in the state actions that are the subject of the RFD.

7.3 If the treaties include a duty to protect fish habitat independent of laws passed by Congress, the United States has violated its duty to the Tribes

in failing to protect fish habitat on federally-owned lands.

7.4 If the treaties include a duty to protect fish habitat independent of laws passed by Congress, the plaintiff United States has unlawfully injured the State of Washington by, among other things, placing on the State a disproportionate burden to meet any such treaty-based duty.

7.5 If the treaties include a duty to protect fish habitat independent of laws passed by Congress, the United States has managed its lands in such a way as to create a nuisance that unfairly burdens the State of Washington.

7.6 If the treaties include a duty to protect fish habitat independent of laws passed by Congress, the Tribes have violated their duty to the State by failing to inventory and correct their own road-related fish passage barriers.

#### **VIII. STATE'S DEMAND FOR JUDGMENT**

WHEREFORE, the defendant State of Washington requests the following relief:

8.1 A judgment that the RFD and the United States' Response be dismissed and that the Tribes and the United States take nothing.

#### **DECLARATORY JUDGMENT**

8.2 A declaration that there is no treaty-based right or duty of fish habitat protection as described in the Tribes' RFD and in the United States' "Response."

8.3 In the alternative, should the Court conclude that the actions of the State of Washington

that are the subject of the RFD violate any treaty-based duty owed the Tribes, a declaration that the executive branch of the United States government has violated its duty to ensure that the Tribes' treaty rights are not abrogated or impinged upon by funding, authorizing, approving, or otherwise participating in the state actions that are the subject of the RFD.

8.4 In the alternative, should the Court recognize the existence of a treaty-based duty of fish habitat protection owed by the State of Washington, a declaration that the correlative duty runs to the Tribes and the United States as well.

8.5 In the alternative, should the Court recognize the existence of a treaty-based right or duty of fish habitat protection, a declaration that the United States has violated the duty owed the plaintiff Tribes.

8.6 In the alternative, should the Court recognize the existence of a treaty-based right or duty of fish habitat protection, a declaration that the United States has placed on the State a disproportionate burden of meeting any such treaty-based duty.

8.7 In the alternative, should the Court recognize the existence of a treaty-based right or duty of fish habitat protection, a declaration that the United States has managed its lands in such a way as to create a nuisance that unfairly burdens the State of Washington.

8.8 In the alternative, should the Court recognize the existence of a treaty-based right or duty

of fish habitat protection, a declaration that the plaintiff Tribes have violated the duty owed the State.

### **PROHIBITORY INJUNCTION**

8.9 In the alternative, should the Court recognize the existence of a treaty-based right or duty of fish habitat protection, an order prohibiting the Tribes and the United States from constructing and maintaining any culverts that reduce the number of fish that would otherwise return to or pass through the usual and accustomed grounds and stations of any plaintiff Tribe.

### **MANDATORY INJUNCTION**

Also in the alternative, should the Court recognize the existence of a treaty-based right or duty of fish habitat protection, the State requests that the Court enter Orders that:

8.10 Require the United States and each of its agencies, departments, officers, and agents to identify the location of all culverts constructed, maintained, or managed by the United States government or any of its agencies and departments including but not limited to the United States Forest Service, the United States Bureau of Indian Affairs, the United States Bureau of Land Management, the United States Fish and Wildlife Service, the National Park Service, and the United States military departments that diminish the number of fish that would otherwise return to or pass through any plaintiff Tribe's usual and accustomed fishing grounds and stations, before the State of Washington is required to conduct any such identification of state-owned culverts.

8.11 Require the United States and each of its agencies, departments, officers, and agents to fix and thereafter maintain all culverts built or maintained by any Federal agency or department, such that they do not diminish the number of fish that would otherwise return to or pass through the usual and accustomed fishing grounds and stations of the plaintiff Tribes, before the State of Washington is required to repair or remove any of its culverts.

8.12 Require each of the plaintiff Tribes to identify the location of all culverts constructed, maintained, or managed by that Tribe that diminish the number of fish that would otherwise return to or pass through any plaintiff Tribe's usual and accustomed fishing grounds and stations, on the same schedule applied to the State of Washington.

8.13 Require each of the plaintiff Tribes to fix and thereafter maintain all culverts built or maintained by that Tribe, such that they do not diminish the number of fish that would otherwise return to or pass through the usual and accustomed fishing grounds and stations of the plaintiff Tribes on the same schedule applied by the Court to the State of Washington.

#### **OTHER RELIEF**

8.14 The State of Washington further requests that the Court award the State its actual costs of litigation including reasonable attorneys' fees.

8.15 The State of Washington further requests all other relief the Court deems just and equitable.

Dated this *15th* day of March, 2001.

CHRISTINE O. GREGOIRE  
Attorney General of Washington

*s/Robert K. Costello*

ROBERT K. COSTELLO, WSBA #12920  
Senior Assistant Attorney General



The Honorable Ricardo S. Martinez  
 UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 AT SEATTLE

UNITED STATES OF AMERICA,  <div style="text-align: right;">Plaintiffs,</div>  v.  STATE OF WASHINGTON,  <div style="text-align: right;">Defendant.</div>	NO. C70-9213 Subproceeding No. 01-1 (Culverts)  WASHINGTON’S REPLY IN SUPPORT OF MOTION FOR LEAVE TO SET UP COUNTERCLAIM BY AMENDMENT
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**I. ARGUMENT**

**A. Washington has Identified “Agency Action Unlawfully Withheld” Within the Waiver of Sovereign Immunity in the Administrative Procedure Act.**

This case is not like *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004) (“*SUWA*”). Paragraphs 5.36, 5.43, 5.47, and 5.52 of Washington’s proposed amended answer identify discrete agency actions—the Federal Agency Plaintiffs’ failure to provide fish passage through specific culverts. The locations of some of these culverts are precisely known. *See* Wagner Decl. Ex. 2. The Federal Agency Plaintiffs’ failure to fix these culverts is a discrete “failure to act” under 5 U.S.C. § 551(13). *SUWA*, 124 S. Ct. at 2379. It is an “agency action” under 5 U.S.C. § 702. *See* 5 U.S.C. §§ 551(13), 701(2); 706(1).

The United States’ declarations show that the Forest Service alone has well over 200 fish-blocking culverts within the *United States v. Washington* case area. The United States [*caption page only*]

The Honorable Ricardo S. Martinez  
 UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 AT SEATTLE

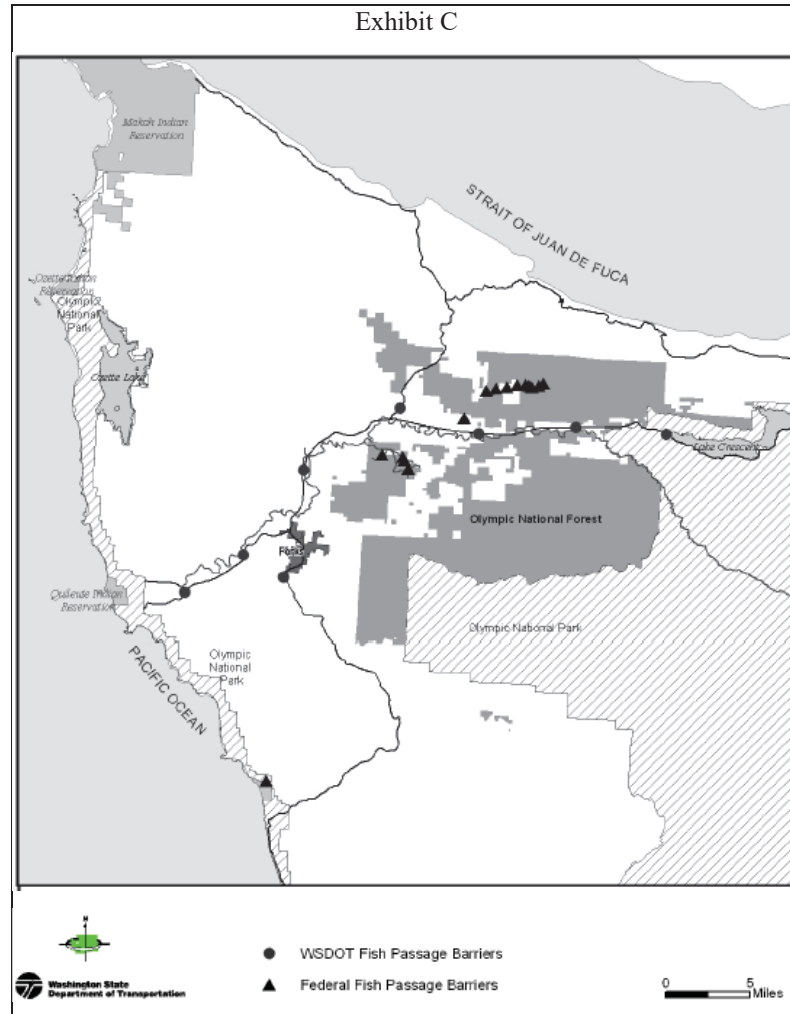
UNITED STATES OF AMERICA, et al.,  Plaintiff,  v.  STATE OF WASHINGTON,  Defendant.	NO. C70-9213M Subproceeding No. 01-1 (CULVERTS)  DECLARATION OF PAUL J. WAGNER IN SUPPORT OF WASHINGTON'S REPLY IN SUP- PORT OF MOTION FOR LEAVE TO SET UP COUNTERCLAIM BY AMENDMENT
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I, Paul J. Wagner, declare as follows:

1. I am the Biology Branch Manager for the Environmental Services Office of the Washington State Department of Transportation ("WSDOT"). I have held this position for 11 years and I have worked for the WSDOT as a biologist for a total of 15 years. My duties include management of the WSDOT's Fish Passage Barrier Removal Program. I have a BS degree in natural history from Juniata College. The statements in this declaration are based on my personal knowledge and upon my review of official agency records.

2. One of the problems facing salmon and trout populations is an inability to migrate into usable stream habitat for rearing and spawning because of barrier culverts at stream crossings. Many roads in the State of Washington use culverts to span streams and *[caption page only]*

Exhibit C



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THE HONORABLE RICARDO MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF  
AMERICA, et al.,

Plaintiff,

v.

STATE OF WASHINGTON,

Defendant.

No. C70-9213M  
Subproceeding No. 01-1  
(Culverts)

DECLARATION OF  
MATTHEW J. WITECKI  
IN SUPPORT OF  
WASHINGTON'S  
MOTION FOR  
SUMMARY  
JUDGMENT

I, Matthew J. Witecki, declare as follows:

1. I am the Chief Hydraulic Engineer and Branch Manager of the Hydraulic Engineering Office for the Washington State Department of Transportation ("WSDOT"). I have held this position or its equivalent for 15 years and I have worked for the WSDOT as a hydraulic engineer for a total of 30 years. In all, I have worked for WSDOT since 1971. My duties include supervising the publication of the WSDOT Highway Run-off Manual and the WSDOT Hydraulics Manual, which prescribe design standards for hydraulic and drainage design work on WSDOT facilities. My other duties include assisting WSDOT bridge design office with the design of in-water bridge structures, and assisting other designers with highway drainage and water quality design issues. I was the principal author of the WSDOT

Hydraulics Manual (1989. Ed.). This manual establishes the design standards for all WSDOT drainage and hydraulic work. I have taught numerous training classes for designers and spoken at many conferences on hydraulic design. I have a BS degree in civil engineering from St. Martin's College (now University). Since then I have completed intensive training courses in statistics and hydrology for engineers sponsored by the Federal Highway Administration ("FHWA") as well as numerous continuing education classes in hydraulics, hydrology and related topics. The statements in this declaration are based on my personal knowledge.

2. Until the Washington Department of Fish and Wildlife ("WDFW") developed new culvert design guidelines specifically intended to accommodate fish passage, WSDOT's culvert design standards were based upon FHWA guidance. Specifically, WSDOT relied upon an FHWA publication entitled Hydraulic Engineering Circular #10 ("HEC #10"). The FHWA has issued many publications such as HEC #10 as guidance for state and local highway and road departments. The earliest version of HEC #10 in our library is dated March, 1965. The FHWA has updated the circular many times but the substance of the sizing procedures has remained virtually unchanged over the years. WSDOT has used the procedures identified in the then-current version of HEC #10 as the basis for Chapter Three of the WSDOT Hydraulic Manual, which relates to the use of hydraulic criteria for sizing culverts. The WSDOT manual contains the same culvert sizing charts and nomographs originally set forth in HEC #10.

3. During the course of my career, I have reviewed the hydraulic design manuals used by several other state highway agencies. All of those manuals used HEC #10 as the basis for culvert sizing protocols. I know that concrete, plastic, and corrugated metal pipe manufacturers all recognize, accept, and support the protocols contained in HEC #10 for the design of road culverts. The protocols and techniques set forth in HEC #10 are generally accepted as the industry standard for the design of road culverts.

4. In the early 1990's, WDFW notified WSDOT that in some circumstances, culverts designed according to the guidelines in HEC #10 failed to provide for adequate fish passage. A number of interagency meetings took place and ultimately WSDOT found the WDFW's position compelling and adopted the WDFW fish passage culvert design standards. We modified the Hydraulic Manual and our training to reflect the WDFW's fish-friendly design methods.

5. Virtually all of the WSDOT culverts identified as barriers to fish passage were designed according to the FHWA design standards promulgated in HEC #10. At no time did FHWA notify WSDOT that the federal design standards failed to provide fish passage or that culverts designed pursuant to the standards might violate treaty fishing rights. Although I understand that it is considering revisions to its culvert design standards, the FWHA has not officially modified HEC #10 to better provide for fish passage. Because the methods set forth in HEC #10 were considered the industry design standard, WSDOT would have adopted any fish

passage-related design improvements identified by the FHWA.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 4 day of August, 2006.

*s/Matthew J. Witecki*  
MATTHEW J. WITECKI



The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  Plaintiffs,  v.  STATE OF WASHINGTON,  Defendant.	NO. C70-9213 Subproceeding 01-1 (Culverts)  DECLARATION OF MARY E. JONES RE: WASHINGTON'S MOTION FOR SUMMARY JUDGMENT
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I, MARY E. JONES, declare as follows:

1. I am a Paralegal with the Washington State Attorney General's Office, assigned to the Fish, Wildlife and Parks Division. As part of my duties, I am assigned to assist the attorneys handling the above litigation.

2. The State's Motion for Summary Judgment contains numerous footnotes referring to discovery in this matter. Due to the complexity of this case and the number of parties involved, tribal discovery answers were produced over the course of five years in response to three sets of discovery. Additionally, depositions were taken of 12 tribal witnesses.

3. To assist the court in finding discovery pages referred to in the footnotes, attached hereto (Attachment 1) is a footnote/discovery cross-reference table together with a seriatim numbered record containing true and correct copies of all discovery referenced in the footnotes.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this *9th* day of *August*, 2006.

*s/Mary E. Jones*  
MARY E. JONES

.\_\*.\_\*.\_\*.\_\*.\_\*.\_\*.\_\*.\_

*[Page 001]*

HONORABLE JUDGE  
BARBARA JACOBS ROTHSTEIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  <div style="text-align: right;">Plaintiff,</div> v.  STATE OF WASHINGTON, et al.,  <div style="text-align: right;">Defendants.</div>	Civil No. C70-9213  Sub-Proceeding No. 01-01 (Culverts)  PLAINTIFF-INTERVENOR TRIBES' ANSWERS AND RESPONSES TO WASHINGTON'S FIRST DISCOVERY REQUESTS
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\* \* \* \* \*

*[Page 0017]*

INTERROGATORY NO. 40: Please identify the quantity of fish that you contend would enable each Tribe to achieve a moderate living from treaty fisheries.

ANSWER: The Tribes make no contention as to the quantity of fish that would enable each Tribe to achieve a moderate living from its fisheries. This Court has held that, as of 1994, the Tribes were not making a moderate living. The Tribes are aware of no facts which would suggest a different conclusion today. Given that the Tribes are not now making a moderate living, it is not necessary to speculate as to

what a moderate living might be at some future date with unknown conditions. Furthermore, such  
*[Page 0018]*

speculation would not lead to the discovery of admissible evidence.

\* \* \* \* \*

INTERROGATORY NO. 43: With respect to each Tribe how many fish are required to provide a moderate living?

*[Page 0019]*

ANSWER: Unknown.

INTERROGATORY NO. 44: With respect to each Tribe, when was the last time that the Tribe obtained a moderate living from fishing?

ANSWER: Unknown.

INTERROGATORY NO. 45: Please describe in detail how the State can determine whether any Tribe has achieved a moderate living from the fishery.

ANSWER: See Answer to Interrogatory No. 40.

INTERROGATORY NO. 46: Please describe in detail how the State can determine whether a Tribe's inability to achieve a moderate living from the fishery is attributable to State-owned fish passage barrier culverts or to some other cause.

ANSWER: Because the Tribes are not achieving a moderate living from their fishing, any diminution of harvestable fish attributable to State owned culverts contributes to the Tribes' inability to earn a moderate living.

\* \* \* \* \*

*[Page 0020]*

ANSWERS AND RESPONSES dated this 7th  
day of September, 2001.

RAAS, JOHNSEN &  
STUEN, P.S. OFFICE OF  
SPECIAL COUNSEL

*s/Daniel A. Raas*

DANIEL A. RAAS, WSBA  
#4970  
Counsel for the Lummi  
Indian Tribe  
Tribal Coordinating Counsel

MORISSET SCHLOSSER  
AYER et al.

*s/Mason D. Morisset by DAR*

MASON D. MORISSET,  
WSBA #273  
Counsel for the Tulalip Tribe  
Tribal Coordinating Counsel

KANJI & KATZEN, PLLC

*s/Phillip E. Katzen by DAR*

PHILLIP E. KATZEN,  
WSBA #7835  
Co-Counsel for the  
Suquamish, Jamestown,  
Lower Elwha, Pt. Gamble  
Bands of S'Klallams,  
Nisqually, Nooksack,  
Sauk-Suiattle, Skokomish,  
Squaxin Island,  
Stillagaumish, and Upper  
Skagit Tribes  
Tribal Coordinating Counsel

\* \* \* \* \*

[Page 0051]

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  <div style="text-align: right;">Plaintiff,</div>  v.  STATE OF WASHINGTON, et al.,  <div style="text-align: right;">Defendants.</div>	Civil No. C70-9213  Sub-Proceeding No. 01-01 (Culverts)  PLAINTIFF-INTERVENOR TRIBES' ANSWERS AND RESPONSES TO WASHINGTON'S THIRD DISCOVERY REQUESTS
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\* \* \* \* \*

[Page 0052]

INTERROGATORY NO. 70: Do you contend that the Stevens Treaties reserve a fish passage easement or servitude in the lands that the Tribes ceded in Article I of each of the Stevens Treaties?

ANSWER: Objection. Interrogatory is vague and ambiguous. The term "fish passage easement or servitude" is not defined. Also, the scope of the easement or servitude that is the subject of this Interrogatory is unknown so that it cannot be answered without assumptions and speculation as to the State's meaning. In addition, the usual and

*[Page 0053]*

accustomed fishing grounds and stations of the Tribes are neither limited nor circumscribed nor even meaningful in reference to the lands ceded by the Tribes in the Stevens Treaties.

Notwithstanding these objections, the Tribes contend that the Stevens Treaties secure to them the “right of taking fish” which imposes a duty upon the State to refrain from diminishing the number of fish that would otherwise return to or pass through the tribe’s usual and accustomed fishing grounds and stations by, among other things, blocking fish passage to the extent that such diminishment would impair the tribes’ ability to earn a moderate living from the fishery. This could be characterized as a negative easement or negative servitude.

\* \* \* \* \*

*[Page 0063]*

INTERROGATORY NO. 98: If the court grants all the relief you request in your Request For Determination, will the Tribes be able to earn a moderate living from the fishery?

ANSWER: Objection. Interrogatory requires speculation and assumption on a variety of issues, including the impacts of the granted relief over an extended time and the effectiveness of other current and future restoration and conservation efforts.

Notwithstanding these objections, as ¶ 4.1 of our Request For Determination implies, correcting the many state-owned culverts that diminish the number of fish that would otherwise return to or pass through the tribe’s usual and accustomed fishing

grounds and stations would enhance the ability of the Tribes to earn a moderate living from their fisheries.

\* \* \* \* \*

INTERROGATORY NO. 100: Have the Tribes collectively or any individual Tribe or Tribes ever earned a moderate living from the fishery?

ANSWER: We do not have enough information to answer this Interrogatory.

\* \* \* \* \*

*[Page 0084]*

ANSWERS AND RESPONSES dated this 27th day of May, 2005.

RAAS, JOHNSEN &  
STUEN, P.S. OFFICE OF  
SPECIAL COUNSEL

KANJI & KATZEN, PLLC

DANIEL A. RAAS, WSBA  
#4970  
Counsel for the Lummi  
Indian Tribe  
Tribal Coordinating Counsel

PHILLIP E. KATZEN,  
WSBA #7835  
Co-Counsel for the  
Suquamish, Jamestown,  
Lower Elwha, Pt. Gamble  
Bands of S'Klallams,  
Nisqually, Nooksack,  
Sauk-Suiattle, Skokomish,  
Squaxin Island,  
Stillagaumish, and Upper  
Skagit Tribes  
Tribal Coordinating Counsel

MORISSET SCHLOSSER  
AYER et al.

MASON D. MORISSET,  
WSBA #273  
Counsel for the Tulalip Tribe  
Tribal Coordinating Counsel



\* \* \* \* \*

*[Page 0097]*

The Honorable  
Barbara Jacobs Rothstein

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, et al.,  Plaintiffs,  v.  STATE OF WASHINGTON, et al.,  Defendants.	CIVIL NO. C70-9213  Sub-Proceeding No. 01-1 (Culverts)  WASHINGTON's FIRST DISCOVERY REQUESTS TO PLAINTIFF UNITED STATES AND RESPONSE THERETO TOGETHER WITH INITIAL DISCLOSURES
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\* \* \* \* \*

*[Original page 5]*

**INTERROGATORY NO. 28:** If the answer to Interrogatory No. 26 is yes, please particularly identify all facts that support your contention that the State of Washington has violated the duty to refrain from diminishing the number of fish that would otherwise return to or pass through the Tribes' usual and accustomed fishing grounds and stations.

**ANSWER:** Not applicable. See response to Interrogatory No. 26 which does not call for a "yes or no" answer. Furthermore, we object on the basis that you mis-characterize the United States' contention.

**INTERROGATORY NO. 29:** Do you contend that the Stevens Treaties impose a duty upon private

parties to refrain from diminishing the number of fish that would otherwise return to or pass through the Tribe's usual and accustomed fishing grounds and stations to the extent that such diminishment would impair the Tribes' ability to earn a moderate living from the fishery?

**ANSWER:** Objection. Neither the Tribes nor the United States in this sub-proceeding have made any claims against private parties, and thus an answer to this Interrogatory would not lead to the discovery of relevant evidence. Furthermore, to the extent this interrogatory seeks the legal research or analysis of counsel, it is objectionable under the work product doctrine.

**INTERROGATORY NO. 30:** Do you contend that the Stevens Treaties impose a duty upon the State of Washington to refrain from diminishing the number of fish that would otherwise return to or pass through the Tribes' usual and accustomed fishing grounds and stations, if such diminishment did not impair the Tribes' ability to earn a moderate living from the fishery?

**ANSWER:** No.

**INTERROGATORY NO. 31:** Do you contend that a Tribe has a right to relief from all State or State-authorized environmental degradation of fish habitat that interferes with a Tribe's ability to achieve a moderate living from the fishery?

**ANSWER:** No. The United States' contentions in this sub-proceeding are set forth in the United States' Response to Request for Determination, and relate

solely to state-owned

*[Original page 6]*

culverts. Other “State or State-authorized environmental degradation of habitat that interferes with a Tribe’s ability to achieve a moderate living from the fishery” is not at issue, and as the Court of Appeals has instructed, such State conduct and any State obligation or tribal rights to relief would depend for their precise legal formulation on all of the facts presented by a particular dispute. Moreover, an Indian tribe may have “a right to relief” under any other applicable law in addition to the treaty rights at issue here.

**INTERROGATORY NO. 32:** For each Tribe, please particularly identify all actions that the Tribe has taken to preserve and enhance the fishery occurring within that Tribe’s tribal land.

**ANSWER:** Objection. This interrogatory it is overbroad, vague, ambiguous, unduly burdensome, oppressive and not calculated to lead to admissible evidence. Without waiving the foregoing objection, the United States notes that each Tribe engages in continuing actions to preserve and enhance its fisheries, including participation in management activities pursuant to the Magnuson Fisheries Management Act, participation in annual management planning with other tribes and the State of Washington, participation in hatchery and rearing operations, participation in habitat improvement and protection activities, participation in water quality and water permitting activities and numerous other actions all designed to preserve and enhance fisheries

and habitat in general throughout the case area as well as in its tribal lands.

See also documents produced in response to Request for Production No. 8.

**INTERROGATORY NO. 33:** Do you contend that prior to the execution of the Stevens Treaties, the Tribes had developed systems and institutional arrangements for the allocation and protection of fish resources within lands and waters used by the Tribes?

**ANSWER:** Yes.

**REQUEST FOR PRODUCTION NO. 30:** If the answer to Interrogatory 33 is yes, please produce for inspection and copying all documents supporting your contention that before the

*[Original page 7]*

Stevens Treaties were executed, the Tribes developed systems and institutional arrangements for allocation and protection of fish resources within lands and waters used by the Tribes.

**RESPONSE:** In part these documents are the subject of expert witness testimony and will be produced in due course. In part these documents are referenced in Exhibits USA-20-30 and USA 53, and in the record and documents supporting FF 3 and 6, 384 F. Supp. at 350-1. see also FPTO §3-33.

**INTERROGATORY NO. 34:** If the answer to the preceding interrogatory is yes, please identify all facts supporting your contention.

**ANSWER:** In part these facts are the subject of expert witness testimony and will be stated in due course. In part these facts are referenced in Exhibits USA-20-30

and USA 53, [and others] and in the record and in the other documents supporting FF 3 and 6. see also FPTO §3-33.

**INTERROGATORY NO. 35:** (a) Do you contend that the Stevens Treaties secure to the Tribes a right to be supplied with sufficient fish so as to enable the Tribes to achieve a moderate living from treaty fisheries? (b) Do you contend that the Treaties secure to the Tribes a right to be supplied with sufficient fish to satisfy the Tribes' present and future needs for a subsistence and livelihood?

**ANSWER:** Objection. The phrase "to be supplied with" is ambiguous and could be read to equate treaty rights with a government entitlement or a "supply of fish." Without waiving the objection, the United States makes neither contention. The United States' contentions in this sub-proceeding are set forth in the United States' Response to Request for Determination, and relate solely to state-owned culverts. Furthermore, the United States does not contend that the Treaties by themselves reserve to the tribes a right "to be supplied with sufficient fish \* \* \* ." See United States Opposition to Washington's Motion for Judgment on the Pleadings re: Law of the Case, at 2-3 (filed July 26, 2001). The supply of fish available to treaty fishers is subject to natural fluctuations in abundance. Other laws or agreements may require other things,

*[Original page 8]*

including compensation or mitigation for fishery losses resulting from habitat destruction, overfishing or other human caused factors.

**INTERROGATORY NO. 36:** If your answer to either part of the preceding interrogatory is yes, please identify all facts supporting your contention that the treaties secure to the Tribes a right to be supplied with sufficient fish so as to enable the Tribes to achieve a moderate living from treaty fisheries or to satisfy the Tribes' present and future needs for a subsistence and livelihood.

**ANSWER:** Not applicable. See Response to Interrogatory No. 35.

**REQUEST FOR PRODUCTION NO. 31:** If your answer to either part of Interrogatory No. 35 is yes, please produce for inspection and copying all documents supporting your contention that the treaties secure to the Tribes a right to be supplied with sufficient fish so as to enable the Tribes to achieve a moderate living from treaty fisheries or to satisfy the Tribes' present and future needs for a subsistence and livelihood.

**RESPONSE:** Not applicable. See Response to Interrogatory No. 35.

**INTERROGATORY NO. 37:** Please identify all facts supporting the contention at ¶3.13 of the Tribes' Request for Determination that the "[s]uch a reduction in the number of fish available to the plaintiff Tribes impairs the Tribes' ability to achieve a moderate living from their treaty fisheries" or that formed the basis for your decision to "admit" that contention in ¶3.13 of the United States' Response.

**ANSWER:** The United States is aware of no facts which would support a denial of the contention in ¶3.13. It logically follows, moreover, that if the

quantity of fish available for harvest by the Tribes declines, the tribes' ability to earn a moderate living from fishing would likewise decline. As this Court has held as a matter of fact in Sub-proceeding 89-3, the Tribes are not now able to obtain a moderate living from their fisheries; the reduction in available fish caused by state owned culverts that diminish fish runs thus impairs the Tribes' ability to

*[Original page 9]*

achieve a moderate living from their fisheries.

**REQUEST FOR PRODUCTION NO. 32:** Please produce for inspection and copying all documents supporting the contention at ¶3.13 of the Tribes' Request for Determination that "[s]uch a reduction in the number offish available to the plaintiff Tribes impairs the Tribes' ability to achieve a moderate living from their treaty fisheries" or that formed the basis for your decision to "admit" that contention in ¶3.13 of the United States' Response.

**RESPONSE:** The United States admitted the contention because this Court has ruled that the Tribes are not now making a moderate living from their treaty fisheries and it follows that reductions in the number of fish available for harvest would impair the Tribes ability to do so.

**INTERROGATORY NO. 38:** Please identify the quantity of fish that you contend would enable each Tribe to achieve a moderate living from treaty fisheries.

**ANSWER:** The U.S. makes no contention as to the quantity of fish that would enable each Tribe to achieve a moderate living from treaty fisheries. This

Court has held that, as of 1994, the plaintiff-Tribes were not making a moderate living. We are aware of no facts which would suggest a different conclusion today. Given that the Tribes are not now making a moderate living, it is neither necessary nor possible to speculate as to what a moderate living might be at some future date with unknown conditions. Furthermore, because such speculation would not lead to the discovery of admissible evidence, the United States objects to this interrogatory.

**REQUEST FOR PRODUCTION NO. 33:** Please produce for inspection and copying all documents supporting your contention that the quantity of fish identified in your answer to Interrogatory 38 would enable each Tribe to achieve a moderate living from treaty fisheries.

**RESPONSE:** Not applicable.

**INTERROGATORY NO. 39:** With respect to the allegation in ¶3.14 of the Tribes' Request for Determination, please identify all facts supporting your contention that the Tribes are not able to achieve a moderate living from their treaty fisheries or your decision to admit that . . .

\* \* \* \* \*

*[Page 00106]*

**INTERROGATORY NO. 42:** With respect to each Tribe, when was the last time that the Tribe obtained a moderate living from fishing?

**ANSWER:** Unknown.

\* \* \* \* \*



*[Page 00107]*

INTERROGATORY NO. 82: Please describe what the Federal Highway Administration has done to ensure that the Tribes' treaty rights were not abrogated or impinged upon when it has set or approved design standards for federal-aid highways within the case area.

ANSWER: The FHWA Washington Division Office responds as follows:

Many factors are considered in setting design standards. We have not specifically looked at treaty rights, but the standards are intended to provide the maximum safety, efficiency, and durability for all users. Generally states that receive Federal aid monies must comply with the standards in the AASHTO Green Book on Federal-aid projects. However, FHWA has approved WSDOT's Design Manual to be used in lieu of the AASHTO Green Book.

Standards used for the design of roadway and roadside features, including drainage culverts, are contained in several State manuals (Design Manual, Roadside Design Manual, Highway Runoff Manual, Hydraulic Manual, Local Agency Guidelines, etc.). The FHWA approves all of these manuals and, therefore the design standards used by the State and local agencies for Federal-aid highway projects. When new standards are proposed, the FHWA uses standards developed by American Association of State Highway and Transportation Officials and others, best practices guides, etc., for determining the acceptability of new standards.

\* \* \* \* \*

[Page 00110]

INTERROGATORY NO. 105: Please describe in detail how the State can determine whether a Tribe's inability to achieve a moderate living from the fishery is attributable to the State-owned fish passage barrier culverts or some other cause.

ANSWER: If the Tribes are not achieving a moderate living from their fishing, any diminishment of harvestable fish which is attributable to state-owned fish passage barrier culverts contributes to the Tribes' inability to earn a moderate living.

\* \* \* \* \*

[Page 00121]

DATED this 7th day of September, 2001.

*s/Peter C. Monson*  
Peter C. Monson  
U.S. Department of Justice  
Environment & Natural  
Resources Div.  
Indian Resources Section  
999 18th Street, Suite 945  
Denver, CO 80202

[Page 00122]

The Honorable  
Barbara Jacobs Rothstein

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  <div style="text-align: right;">Plaintiffs,</div>  v.  STATE OF WASHINGTON, et al.,  <div style="text-align: right;">Defendants.</div>	CIVIL NO. C70-9213  Sub-Proceeding No. 01-1 (Culverts)  WASHINGTON's FIRST REQUESTS FOR ADMISSION TO PLAINTIFF UNITED STATES AND RESPONSE THERETO
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\* \* \* \* \*

*[Page 00124]*

REQUEST FOR ADMISSION NO. 2: Please admit that the reduction in productive fish habitat caused by culverts owned or controlled by federal agencies has diminished the amount of fish that would otherwise return or pass through the Tribes' usual and accustomed fishing grounds and stations.

RESPONSE:

Deny. The United States does not agree with the assumptions implicit in this request. There are many causes for reductions in the amount of fish that would return to or pass through tribal fishing grounds, including but not limited to state and private culverts, habitat degradation, dams, harvest, water quality, ocean conditions, and disease. Some culverts owned or controlled by federal agencies may be one cause in reduced quantities of fish produced from a particular stream, but information that such federal culverts are the cause of reduced fish runs is inconclusive and it is impossible to generalize. Moreover, after reasonable inquiry and evaluation, the United States lacks sufficient information to determine the quantity or quality of impact of

federally owned or controlled culverts on fish passage in the case area, and therefore cannot determine “the amount of fish” impacted.

\* \* \* \* \*

[Page 00125]

DATED this 15th day of March, 2002.

*s/Peter C. Monson*  
Peter C. Monson  
U.S. Department of Justice  
Environment & Natural  
Resources Div.  
Indian Resources Section  
999 18th Street, Suite 945  
Denver, CO 80202

\* \* \* \* \*

[Page 00132]

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  Plaintiffs,	CIVIL NO. C70-9213 Sub-Proceeding No. 01-1 (Culverts)
v.	WASHINGTON'S THIRD DISCOVERY REQUESTS TO PLAINTIFF UNITED STATES AND RESPONSE THERE TO TOGETHER WITH INITIAL DISCLOSURES
STATE OF WASHINGTON, et al.,  Defendants.	

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\* \* \* \* \*

*[Page 00135]*

INTERROGATORY NO. 173: Have the Tribes or any individual Tribe or Tribes ever earned a moderate living from the fishery?

ANSWER: The United States does not have sufficient data from which to formulate a definitive response, but understand that the Tribes take the position that the answer is in the affirmative.

INTERROGATORY NO. 174: If your answer to Interrogatory No. 173 is yes, please identify the Tribe or Tribes and the approximate year or years during which the Tribe or Tribes earned a moderate living from the fishery.

ANSWER: The plaintiff Tribes contend that they frequently earned a moderate living from their fisheries until the mid to late 19th Century.

*[Page 00139]*

Dated this 26<sup>th</sup> day of May 2005.

*s/Peter C. Monson*  
Peter C. Monson  
United States Department  
of Justice  
Environment and Natural  
Resources Div.  
Indian Resources Section  
999 18th Street, Suite 945  
Denver, CO 80202

THE HONORABLE RICARDO S. MARTINEZ  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

<p>UNITED STATES OF AMERICA, et al.,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>STATE OF WASHINGTON, et al.,</p> <p style="text-align: right;">Defendants.</p>	<p>Case No.: C70-9213 Subproceeding No. 01-1 (Culverts)</p> <p>DECLARATION OF RICHARD WHITE IN SUPPORT OF PLAINTIFF- TRIBES' MOTION FOR SUMMARY JUDGMENT</p>
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I, Richard White, hereby declare as follows:

1. I am currently Margaret Byrne Professor of American History in the History Department of Stanford University. I have a Ph.D in History, awarded in 1975 from the University of Washington, and have been teaching that topic at the university level since 1976.

2. I have published numerous academic papers and books on the history of the American West, including Native American history and issues. My CV is attached to this declaration.

3. I have been previously certified as an expert witness in U.S. v. Washington Subproceeding No. 89 (Shellfish).

4. I was asked by counsel for Plaintiff Tribes in this sub-proceeding to investigate the history of the Stevens Treaties including the intentions, expectations and understandings of the negotiators of

the Stevens Treaties, including Isaac Stevens, George Gibbs, other U.S. Commissioners, and the Indian negotiators, regarding both the immediate and future implementation of those agreements and the rights included. I prepared a written report setting forth the results of that investigation. This declaration is a summary of portions of that report.

5. During the winter of 1854 - 1855, Governor Isaac Ingalls Stevens, assisted by George Gibbs, and working under directions received from the federal Commissioner of Indian Affairs, George Manypenny, and his chief clerk, Charles Mix, negotiated three treaties with the Indian villagers living around Puget Sound. He then proceeded over the mountains to negotiate a treaty with inland bands and tribes of whom the current Yakama Nation is a successor. The treaties of Medicine Creek, Point-No-Point, Olympia, Point Elliott, and the treaty with the Makah contained virtually identical language, which would be echoed in the Yakama treaty:

The right of taking fish at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses upon open and unclaimed lands; Provided, however, that they shall not take shellfish from any bed staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses and shall keep up and confine the latter.

The treaties Stevens negotiated allotted only small land reservations to tribes on the Sound, “a few spots in their domains,” and lacked any clause allowing the confinement of the Indians to the reservations. This, and the preservation of fishing rights, reflected the particular realities of life for both Indians and whites on Puget Sound and in greater Washington Territory.

6. The Stevens treaties recognized that by 1854 whites and Indians on Puget Sound had been in steady contact for over twenty years and in sporadic contact for much longer. Indians exchanged fish, furs, and game at Hudson’s Bay Company posts, helped build forts, planted and harvested the crops of the Puget Sound Agricultural Company and herded sheep and cattle. Most worked seasonally. Some became plowmen and skilled carpenters and worked the year around. Later, as more American settlers arrived, Indians remained the primary labor force on the Sound. In an 1854 report surveying railroad routes from the Mississippi River to the Pacific Ocean, Gibbs noted that “they provided agricultural labor for the Americans as well as selling them potatoes; they provided them with transportation around the Sound; they carried the mail. And they sold fish and shellfish.” The Stevens treaties recognized the interdependence of Indians and whites, on the Sound.

7. Although not all whites hoped that Indians and whites would continue to live and work together in Puget Sound after the adoption of the treaties, the men who gained Stevens’ ear recognized the utility of Indians and wanted treaties which would both cede land and leave Indians available to participate in a larger interracial economy. As their meeting notes reveal, the treaty commissioners, including Stevens,



recognized that in negotiating with the Indians they were dealing with a people who:

have been for a considerable time in contact with the whites, have acquired many of their habits and all their vices. They form a very considerable proportion of the trade of the Sound. Many are good laborers and are employed in families, vessels, lumberyards, mills and on farms. They catch most of our fish, supplying not only our people with clams and oysters but salmon to those who cure and export it.

Writing to Manypenny, Stevens argued for a plan that would create a number of small Indian reservations on the Sound, rather than relocating the tribes to a large reservation east of the Cascades or on the Pacific coast:

There is a strong sympathy for the Indians among the whites. They are very useful in many ways, for transporting persons about the sound in their canoes, &c. Many of the men, as laborers, are very useful in chopping wood, plowing, driving wagons, &c. Some of the women wash clothes well, and in a variety of ways make themselves useful; and, if confined on reservations, under the direction of efficient agents, I am inclined to think that but little objection, if any, would be made by the whites.

The Stevens treaties sought to perpetuate the early relations between Indians and whites on the Sound.

8. One vital part of the relations that Stevens sought to perpetuate was Indian fishing, both for

subsistence and for trade. Stevens and the other treaty negotiators knew well that Puget Sound Indians relied heavily on their fisheries. Gibbs later observed in his 1877 ethnological monograph, *Tribes of Western Washington and Northwestern Oregon* that: "The principal food of the Indians on the west side of the Cascades may be briefly set down as fish, roots, and berries." Stevens made clear to both the Indians on Puget Sound and the white officials in Washington, D.C., that he planned to preserve this crucial resource. Treaty minutes reveal that Stevens assured the Indians at Point Elliott that the Great Father wished his Indians children "to have homes, pastures for your horses and fishing places." He wished them to learn to farm and to be educated. In return for selling their lands they would "be provided for all these things." At the same time, Stevens argued in his 1854 annual report to Manypenny that "It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries.

9. The Indians themselves expressed the importance of fishing to their way of life, and Stevens and the other negotiators assured them of their continued access to the fisheries. Treaty minutes record that at Point-No-Point, One-lun-teh-tat, an "Old Sko-komish Indian" worried how they were to feed themselves once they ceded so much land to the whites, while Hool-hole-tan-akim also wanted to retain half the land. "Why," he asked, "should we sell all? We may become destitute. Why not let us live together with you?" In the face of such objections, Benjamin F. Shaw, the interpreter, reassured the Indians that they were "not called upon to give up

their old modes of living and places of seeking food, but only to confine their houses to one spot.” And Michael Simmons, the special Indian agent for Puget Sound, explained that if they retained a large amount of land they would be confined to it, but that “when a small tract alone was left, the privilege was given of going wherever else they pleased to fish and work for the whites.” In negotiations at Neah Bay, the Makah raised questions about the role that the fisheries were to play in their future. Stevens replied that “far from wishing to stop their fisheries, he intended to send them oil, kettles and fishing apparatus.” What Stevens and his negotiators explicitly promised in response to Indian objections was access to the usual places for procuring food and continued economic exchange with the whites.

10. Stevens sought, as he described in a letter to Manypenny, to preserve Indian access to fisheries in part to “illustrate, not so much the power as the beneficence and paternal care of the government.” Indeed, Manypenny himself argued in his 1854 report to the President that the government was obliged to uphold the treaty provisions. The “duty of the government,” he wrote, was “plain.” The government had to “fulfil (sic), with the greatest promptness and fidelity, every treaty stipulation with these Indians.” As presented by the whites, the treaties required no choosing between fishing and farming, between reservations and education. They were to be part of a single, compatible whole. The Great Father, Stevens told the Indians at Point Elliott, wanted them to be farmers and artisans, he wanted them to be Christian and educate their children, but he “also wants you to take your fish and go back to the mountains and get

berries.” Stevens and Gibbs worried that as whites took up claims under the Donation Land Act of 1850, they would drive Indians from their fishing grounds. The men argued that whites whose donation claims encompassed Indian fishing grounds had no right to monopolize them.

11. Stevens also sought to preserve Indian fishing rights to reduce the cost of implementing the treaties. In his instructions to Stevens, Mix had emphasized that whatever the form of the treaties, they should incur minimal expenses for the government. Mix began and ended his instructions on the same note of financial caution. He allowed Stevens to “exercise a sound discretion” in departing from the general instructions, but he was “to leave no question open, out of which difficulties may hereafter arise, or by means of which the Treasury of the United States may be approached.” Stevens believed Mix wanted him to reduce the costs of negotiation and of annuity payments as well as to encourage Indian self-sufficiency. As the Treaty Commissioners noted in their meeting of December 26, 1854, “it was necessary to allow them to fish at all accustomed places” because this “was necessary for the Indians to obtain a subsistence.” And securing the Indians a subsistence was critical if Stevens was to follow his very clear instructions to keep the cost of the treaty down. By guaranteeing the Indians a right to their share of the bounty of the land, rivers, and Sound, the treaties would enable them to feed themselves at little cost to the government.

12. Stevens also preserved Indian fishing rights to encourage continued Indian participation in the interracial economy of the Sound. By giving Indians

access to the commodities they not only used for subsistence but also sold on local markets, the Indians would remain close enough to white settlements to provide necessary labor and to continue to trade with whites. Stevens argued that the small reserves and the fishing and other rights preserved in Article III would allow “the Indians to catch salmon, gather roots, and berries, pasture their animals on unclaimed land and participate as heretofore in the labor of the Sound.” After detailing to Commissioner Manypenny the centrality of Indian peoples to the economy of the Sound, Stevens argued that the provisions of Article III had “strict references” to their actual wants and “to the part they play and *ought to play hereafter* in the labor and prosperity of the territory (emphasis added).”

13. Stevens and the other negotiators believed that the abundant fisheries they had observed in Puget Sound would continue unabated forever. Early white accounts of these fisheries breathlessly reported that they were inexhaustible. J.G. Cooper and G. Suckly [*sic*], who conducted natural history research in the Pacific Northwest between 1853 and 1857, reported in *The Natural History of Washington Territory . . .*, published in 1859, that “This arm of the sea [Observatory Inlet] was frequented at the time by such myriads of the salmon that a stone could not have reached the bottom without touching several individuals -- their abundance surpassing the efforts of the imagination to conceive.” White settlers, like Indians, fed heavily on this abundant resource. Gibbs wrote his mother from Astoria, Oregon to report that salmon were “here in abundance. In fact we get hardly anything else & I don’t eat any except particular

cuts.” More, the negotiators, and other whites expected that Puget Sound’s fisheries would continue to supply not just the subsistence needs of Indians and whites, but an expanding commercial market as well. Gibbs fully expected a commercial fishery to develop, and he gave no indication that settlement or industrial development on Puget Sound or elsewhere in Western Washington would diminish this fishery. It was not until the 1890s that scientists began to caution that salmon and other stocks might not remain abundant forever.

14. Stevens and the other negotiators anticipated that Indians would continue to fish the inexhaustible stocks in the future, just as they had in the past. Stevens specifically assured the Indians that they would have access to their normal food supplies now and in the future. At the Point Elliott Treaty, Stevens began by speaking of subsistence. “[A]s for food, you yourselves now, as in time past, can take care of yourselves.” The question, however, was not whether they could now feed themselves, but rather whether in the future after the huge cessions that the treaties proposed the Indians would still be able to feed themselves. Stevens assured them that he intended that the treaty guarantee them that they could. “I want that you shall not have simply food and drink now but that you may have them forever.” The negotiators uniformly agreed on the abundance of the fisheries, the dependence of the Indians upon them, their commercial possibilities, and their future “inexhaustibility.” Stevens and Gibbs could both foresee and promote the commercial development of the territory, the creation of a commercial fishery by

whites, and the continuation of an Indian fishery, They did not see any contradiction between them.

15. For forty years following the adoption of the treaties, Indians continued to harvest fish for subsistence and trade as they had in years past, and local Indian agents encouraged their efforts. Twelve years after the treaties were negotiated, the Superintendent of Indian Affairs for Washington Territory reported that all the tribes lived by "farming, fishing and the chase." This system proved very durable. A special report by the Board of Indian Commissioners on Western Washington in 1874 predicted that Indians would continue to depend on fishing, logging, and wage labor, and any plan to consolidate the reservations should take this as well as the possibilities for agriculture into account. In 1880, the salmon fishery already formed one-third of the production of the West Coast fisheries, but it was as yet little developed in Puget Sound. "The whole Puget Sound region is very abundantly supplied with fish," the census reported, "but for want of a market the fisheries are little developed and has yet little commercial importance." Although there were now some Chinese, Italian, and Portuguese fishermen on the Sound, Indian peoples were still, twenty-five years after the treaties, the primary fishers on Puget Sound. The fisheries remained abundant. Until Indians were systematically deprived of their fishing rights and the fisheries began to decline in the late nineteenth and early twentieth centuries, the Indians remained self-supporting.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this *10* day of August 2006, at *Redwood City*, California.

*s/ Richard White*  
Richard White



THE HONORABLE RICARDO S. MARTINEZ  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

<p>UNITED STATES OF AMERICA, et al.,</p> <p style="text-align: right;">Plaintiffs,</p> <p>vs.</p> <p>STATE OF WASHINGTON, et al.,</p> <p style="text-align: right;">Defendants.</p>	<p>Case No.: C70-9213 Subproceeding No. 01-1 (Culverts)</p> <p>DECLARATION OF JOSEPH R. TAYLOR III IN SUPPORT OF PLAINTIFF-TRIBES' MOTION FOR SUMMARY JUDGMENT</p>
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I, Joseph E. Taylor III, hereby declare as follows:

1. I am currently Associate Professor & Canada Research Chair in History and Geography at Simon Fraser University. I have a Ph.D in History, awarded in 1996 from the University of Washington, and have been teaching that topic at the university level since 1996.

2. My fields of specialization and experience include history of the North American West, environmental history, United States 19th and 20th century social and cultural history, American colonial history, history of science, and colonial Latin American history. I have published numerous academic papers and books on the history of the American West, including Native American history and issues. My CV is attached to this declaration.

3. I was asked by counsel for Plaintiff Tribes in this sub-proceeding to investigate the status of salmon populations in western Washington as of 1854-1855; describe the size and scope of impacts on those populations from non-Indian development and settlement, if any, as of that time; describe the public perception and understanding of the status of salmon/fish populations in western Washington as of 1854-55; and, describe the 1854-1855 public attitude and expectation regarding the future of western Washington salmon/fish populations in the future given the expectation for increased settlement and development. I prepared a written report setting forth the results of that investigation. This declaration is a summary of portions of that report.

4. During 1854 and 1855, Washington Territorial Governor Isaac I. Stevens negotiated the treaties of Medicine Creek, Point-No-Point, Olympia, Point Elliott and Neah Bay. In 1854-1855, white settlement and its environmental impact on Puget Sound remained modest, and the fisheries appeared to Indians and whites alike to be inexhaustible. Indeed, as white settlers arrived in the Puget Sound region, they consistently noted the size, diversity, and centrality of salmon in Northwest life, and they speculated about how best to develop commercial fisheries in the region. To the settlers, Puget Sound's salmon stocks appeared inexhaustible, if properly cared for. In 1845, Samuel Crockett noted in his journal that the "great quantities of fish found in the pacific [sic] waters are beyond description: the Salmon is the most plentiful and valuable fish taken here though their [sic] are different kinds of other fish that are very good." White settlers imitated the Indians

they encountered, embracing salmon as a crucial food resource and as a source of profit. In 1854-1855, both Indians and non-Indians assumed that salmon would continue to fulfill their subsistence and trade needs in the future.

5. During the period of treaty negotiations, the number of white settlers remained small and their settlements widely-dispersed. In November, 1853, Colonel J.P. Anderson conducted a territorial census and recorded only 3,965 non-Indians living in the case area. There were at that late date still nearly twice as many Indians as non-Indians living in Washington Territory. And, because they were so few and so isolated from one another, by 1854-1855 white settlers on Puget Sound had had little discernable impact on the region's environment. White settlers were anxious to profit from the region's rich fisheries. They were eager, too, to exploit its game, soil, minerals and timber. But by 1854-1855, white industry remained very limited and localized, and its environmental impact was too modest to noticeably degrade salmon habitat and damage salmon fisheries. Trappers had not yet killed enough beavers to impact salmon habitat; farmers had altered only a tiny fraction of the area by 1855, and had had no discernible impact on salmon runs; miners had had only a minimal impact on salmon runs in the study area; loggers were suffering through an industry recession during 1854-1855, and had not yet seriously damaged salmon runs. Although trapping, farming, mining and logging had already altered human settlement patterns and initiated important environmental changes by 1854-1855, none of these activities had yet created perceptible disruptions in Indian economies or in the

health of salmon runs by the period of treaty negotiations.

6. In the years immediately preceding the treaty negotiations, Puget Sound salmon habitat remained healthy. Salmon harvests in 1854-1855 were larger than usual, and white settlers in those years continued to celebrate the abundance of the catch. Settlers like James Swan continued to feed heavily on salmon. Never did white observers worry that the salmon fishery they so revered would ever decline. In late 1853, George Suckley, who was sent to Washington Territory to survey fish resources, wrote his brother John that, "We have, in the Sound, Salmon, Cod, and many other fish, Clams of various kinds, some of which attain the length of a foot or more." In his official report to Congress, *The Natural History of Washington Territory . . .*, published in 1859, he went further:

Quite abundant as far south as San Francisco, we find these fish [salmon], as we proceed north, increasing in species and in numbers, until, in arriving at the Columbia river, and at the rivers near Vancouver's Island or the streams falling into Puget Sound, they form one of the most striking wonders of the region. There vast numbers of these fish, differing in anatomical peculiarities, species, and color, and changing much with age, sex, and condition, season of the year, or quality of the water, astonish by their number, and confuse with their variety.

While the arrival and activities of white settlers had begun to alter salmon habitats by 1854-1855, these

alterations had had no discernable impact on the size or stability of Pacific salmon populations; at the time of the treaty negotiations, Puget Sound's waters teemed with salmon.

7. During 1854-1855, white settlement had not yet damaged Puget Sound fisheries. During those years, Indians continued to harvest fish for subsistence and trade as they had in the past. Given the slow pace of white settlement and its limited and localized environmental impact, Indians had no reason to believe during the period of treaty negotiations that white settlers would interfere, either directly through their own harvests or indirectly through their environmental impacts, with Indian fisheries in the future. During treaty negotiations, Indians, like whites, assumed that their cherished fisheries would remain robust forever.

8. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 11 day of August 2006, at *Seattle*, Washington.

*s/Joseph E. Taylor III*  
Joseph E. Taylor III

THE HONORABLE RICARDO S. MARTINEZ  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  <div style="text-align: right;">Plaintiffs,</div>  vs.  STATE OF WASHINGTON, et al.,  <div style="text-align: right;">Defendants.</div>	Case No.: C70-9213 Subproceeding No. 01-1 (Culverts)  DECLARATION OF ROBERT THOMAS BOYD IN SUPPORT OF PLAINTIFF-TRIBES' MOTION FOR SUMMARY JUDGMENT
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I, Robert Thomas Boyd, hereby declare as follows:

1. I am currently employed as an anthropological consultant and professional writer. I also an adjunct associate professor in the Department of Anthropology at Portland State University. I have a Ph.D in Sociocultural Anthropology from the University of Washington, awarded in 1985.

2. My area of focus is Northwest Coast Native Americans (particularly Oregon and Washington), specializing in medical anthropology, ethnohistory, cultural ecology, culture contact and change, and demographic anthropology. I have published extensively on Native American anthropological issues in the Pacific Northwest and currently have book contracts with both the University of Washington Press and Columbia University Press. My CV is attached to this declaration.

3. I was asked by counsel for Plaintiff Tribes in this sub-proceeding to investigate the practices, if any, of Indian tribes in western Washington, at and before the treaties of 1854-55, intended to protect, preserve or improve the numbers of fish available for their harvest; and, the significance of any such practices in Indian life at that time. I prepared a written report setting forth the result of that investigation. This declaration is a summary of portions of that report.

4. The Puget Sound Indians with whom Isaac I. Stevens negotiated treaties in 1854 and 1855 – descendants of which make up the modern Nooksack, Lummi, Swinomish, Upper Skagit, Sauk-Suiattle, Tulalip, Stillaguamish, Suquamish, Muckleshoot, Puyallup, Nisqually, Squaxin, Skokomish, Port Gamble S’Klallam, Lower Elwha Klallam, Jamestown S’Klallam, Makah, Hoh and Quileute, and Quinault – relied heavily on the region’s abundant salmon fisheries. The peculiarities of the salmon life cycle helped shape the structure of the Puget Sound Indian societies that relied upon them. Salmon hatch in freshwater streams and mature at sea. When ready to reproduce, they congregate at the mouths of their natal rivers, then proceed *en masse* upstream to spawn and die. Because migrating salmon do not feed, and therefore cannot be caught using bait, Indians harvested them with tools like weirs; because salmon require clean gravel and cool water to spawn, Indian taboos discouraged disturbing stream beds and muddying waters during runs; because salmon migrating *en masse*, Indian religious ceremonies celebrated the first salmon of the run to encourage other fish to follow. In pre-treaty Puget Sound, the life

of the Indian was intimately connected to that of his most cherished commodity, the salmon.

5. Pre-treaty Puget Sound Indian societies efficiently harvested vast quantities of salmon. Indians took salmon wherever they could, by whatever means possible. At the same time, Indian societies developed effective tools that managed this vital resource and protected it from depletion. Tribal communities carefully regulated fishing activities with weir builders or social rank, for example, determining who could fish, when they could fish, and amounts taken. Tribal myths encouraged Indians to share their catch and refrain from harvesting more than they needed. In the S'Klallam "Stingy Father" tale, for instance, a father who keeps all of his salmon to himself while his family starves is turned to stone. Indian rituals even discouraged keeping food from guests and strangers. Salmon caught in village weirs were shared throughout the Indian community, each member taking a share of the catch.

6. Pre-treaty Indian fishers also mitigated the impact of their efficient fishing technologies on stocks. Although Indian weirs – fences stretched across tributary streams – could easily kill all of the migrating fish that encountered them, Indian management practices prevented it. Indians periodically lifted their weirs to permit migrating fish to move upstream or to clean the weirs. Myths explained why: The Green River myth "North Wind and Storm Wind" relates what happened when Cold Wind "stretched a fish-weir of ice across the Duwamish River. No fish could get up the river past this trap. Further up the valley the people starved. They could get no fish to eat . . . All the people were



killed.” Those who followed Cold Wind’s example could expect swift retribution. Other myths warned that upstream Indians might attack greedy downstream neighbors. A Quileute myth told of poisoning them with a salmon made of “snakes, lizards, frogs, toads, waterdogs.” Worse, other myths warned that the salmon themselves might take offense if the weirs were not opened. The Skokomish believed that if they failed to open their weirs the salmon would not return the following year. Such regulations of fishing technology helped pre-treaty Indians preserve salmon fisheries.

7. Indian taboos also helped preserve salmon habitat. Before salmon started running, rivers were to be kept clear. No rubbish or food scraps were to be tossed in the river, no canoes were to be bailed out in it. Menstruating women were not to swim in its waters. Such prohibitions sought to ensure that salmon would want to return to their natal streams. If Tribal members adhered to such roles, returning salmon would find clean streams running in clear, cool water – just the conditions they required to spawn. Violating the taboos risked disturbing spawning grounds and turning salmon away in the future. Fewer returning salmon would, of course, reduce Tribal catches.

8. Other pre-treaty Puget Sound Indian rituals honored the salmon, endowing the fish with supernatural qualities. The First Salmon ceremony was widespread among Puget Sound Indians in the pre-treaty period. During the ceremony, a ritualist or his assistants took the first fish and carried it in a special manner to an alter on which it was displayed to the assembled village. The first fish was usually

placed with its head pointing upstream so the rest of the salmon would continue upstream and not turn back to the sea. The first fish was treated as an honored guest of high rank; the ritualist sprinkled it with eagle down or red ochre or other ritual material, and made a formulaic speech of welcome followed by songs or chants appropriate to greet a visiting chief. The fish was cooked by the ritualist or an assistant to the accompaniment of prayers and songs. Then, each person was given a sacramental taste and the bones of the first fish were returned to the water. After the ceremony, villagers might begin to fish for themselves. The Indians of Puget Sound intended that such a ceremony would ensure the continued abundance of the salmon fishery on which they depended, encouraging the salmon to return year after year.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this *11* day of August 2006, at *Portland*, Oregon.

*s/Robert Thomas Boyd*  
Robert Thomas Boyd

The Honorable Ricardo Martinez  
 UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 AT SEATTLE

UNITED STATES OF AMERICA, et.al.  <div style="text-align: right;">Plaintiff,</div>  vs.  STATE OF WASHINGTON,  <div style="text-align: right;">Defendant</div>	Case No.: C70-9213 M Subproceeding No. 01-1  (CULVERTS)  DECLARATION OF KEITH LUTZ IN SUPPORT OF TRIBES' MOTION FOR SUMMARY JUDGMENT
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1. I, Keith Lutz, residing at 7812 Huetter Ct. SW, Olympia WA 98512, DECLARE UNDER PENALTY OF PERJURY:

2. I am over the age of eighteen, a United States citizen, and am competent to testify as to the matters here set forth. I make this affidavit on the basis of my personal knowledge, skill, experience, training, education, and review of the Tribal harvest data. This affidavit is made by me for the purpose explaining how I derived the following tables of information related to Tribal salmon harvests as part of *United States v. Washington*, 01-1 (Culverts).

3. For the past 21 years (1985-Present), I have been a Fisheries Biologist for the Northwest Indian Fisheries Commission working with the Tribes on harvest management issues. During my employment with the NWIFC, I have participated on several joint State/Tribal technical teams including the North Sound Herring Technical Team, Puget Sound Spring

Chinook Technical Team, and serve as a technical advisor to the Tribes during the PFMC meetings that are held coastwide. My education includes a Bachelor of Science (BS) degree in Fisheries from Humboldt State University with a minor in Oceanography, obtained in 1983.

4. Attached hereto and incorporated herein by this reference are Tables 1 through 9 and Figures 1 through 8. For these Treaty Catch Data tables, I accessed and compiled data from the Treaty Fish Ticket (TFT) database that is created and maintained by the Quantitative Services Division at the Northwest Indian Fisheries Commission. Data queries for this data set were generated in May 2006.

5. In general, for some years after the 1974 Boldt decision, Tribal landings steadily increased as they were allocated and were able to harvest a larger portion of the available harvest. The available harvest levels were augmented by State and Tribal hatcheries that went into production to supplement/replace wild fish production lost to degraded habitat. In more recent years, the available harvest levels have declined substantially due to various causes including, but not limited to, the loss of production (natural and hatchery), habitat degradation, and poor ocean survival.

6. I declare under penalty of perjury and upon personal knowledge that the foregoing is true and correct based on the databases and information provided as part of this court case.

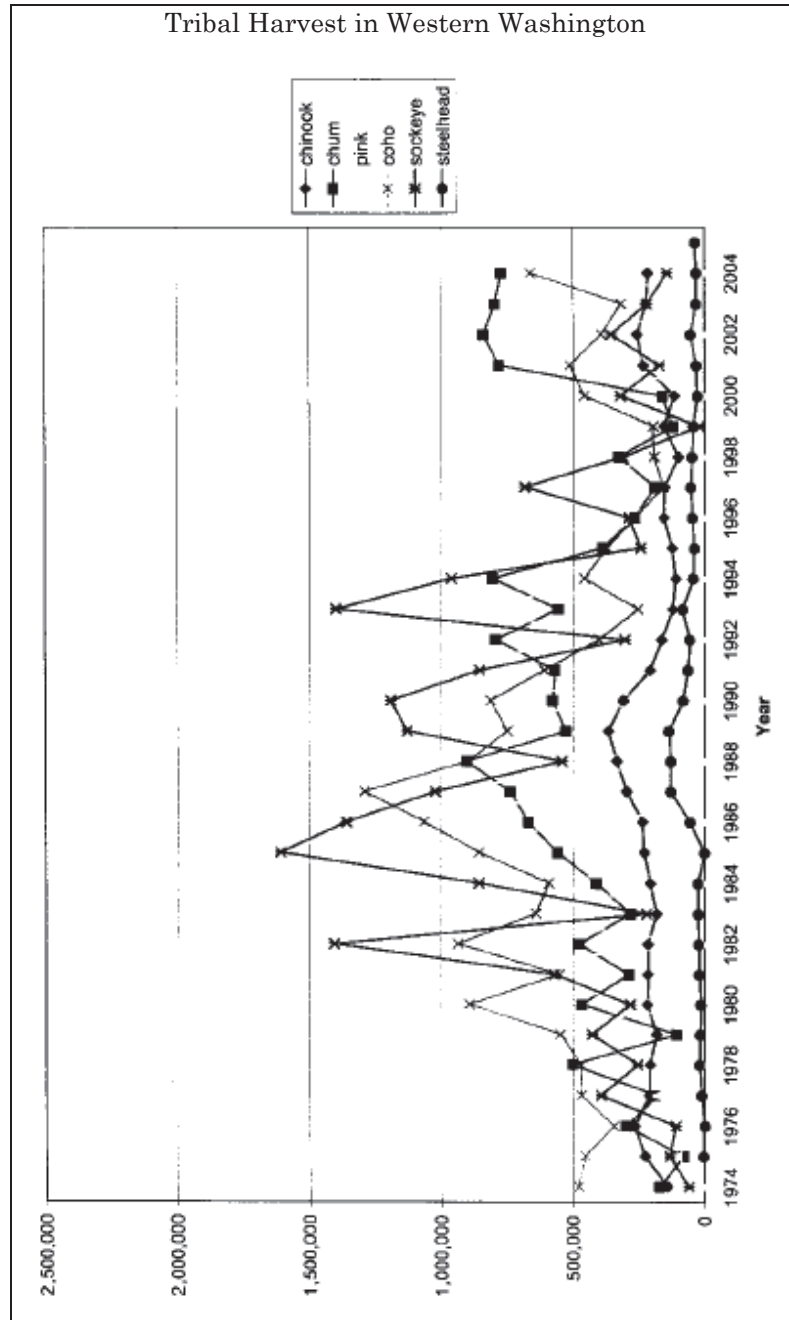
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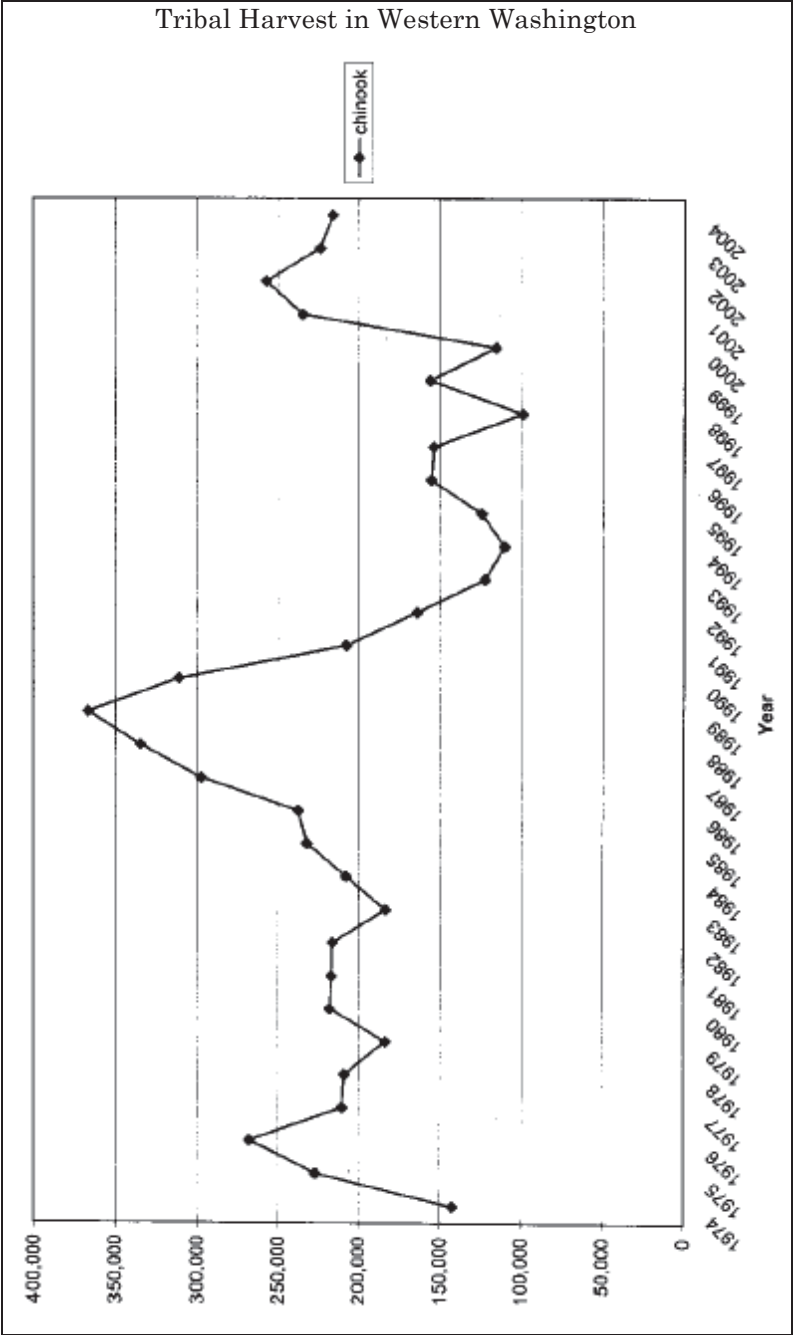
Name: *s/Keith Lutz*

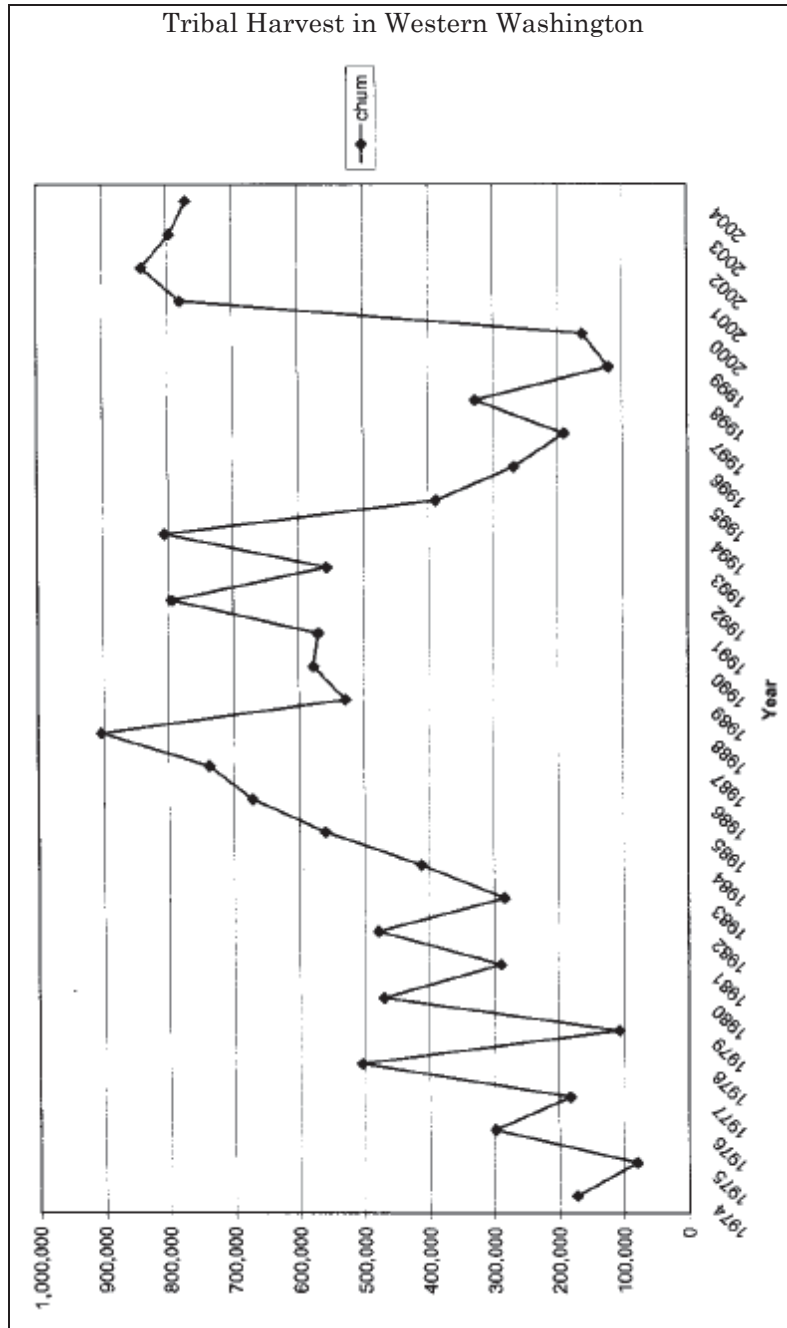
Keith Lutz

Table 1. Tribal harvest of salmon and steelhead in western Washington (Ocean, Coastal Rivers, Puget Sound and Puget Sound Rivers) from 1974-2004.

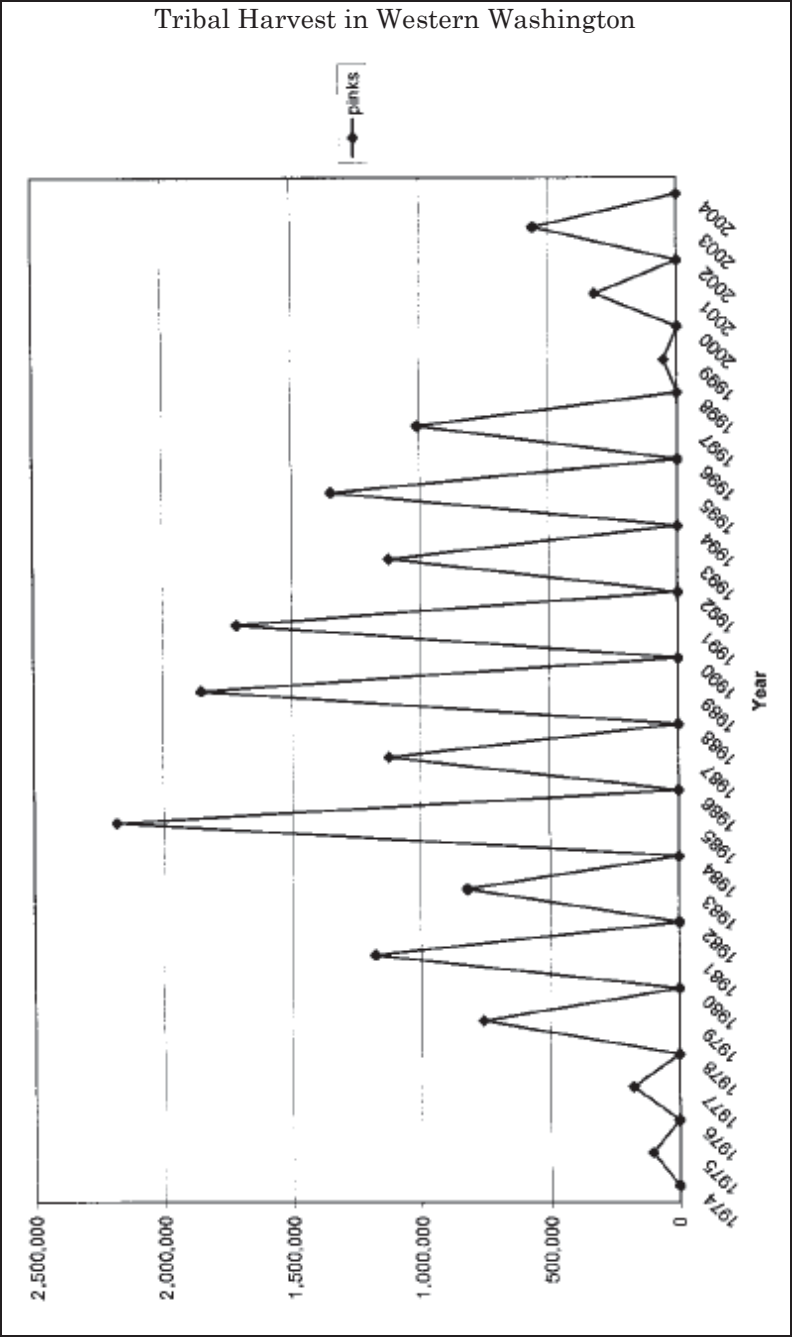
	chinook	chum	pink	coho	sockeye	steelhead	total
1974	142,714	173,059	25	479,997	59,857	4,885	860,537
1975	227,073	80,625	105,227	454,455	133,661	0 *	1,001,041
1976	267,965	298,825	42	345,912	110,508	12,066	1,035,318
1977	210,349	183,007	180,169	469,152	396,242	20,333	1,459,252
1978	209,115	504,147	74	471,518	256,254	18,101	1,459,209
1979	183,565	106,908	750,125	548,917	429,008	15,401	2,043,924
1980	218,011	470,279	332	883,498	284,805	20,802	1,867,727
1981	216,860	289,225	1,177,748	652,483	570,842	23,281	2,830,439
1982	216,293	478,372	78	836,605	1,407,535	25,206	3,064,089
1983	183,268	283,942	820,667	641,091	221,169	26,989	2,177,126
1984	207,977	412,433	82	592,627	857,194	2,368	2,072,681
1985	232,014	559,907	2,179,933	857,616	1,609,416	56,087	5,484,973
1986	237,628	671,256	114	1,066,712	1,360,916	128,596	3,466,224
1987	297,423	737,751	1,122,304	1,292,107	1,023,169	129,565	4,802,319
1988	334,603	904,012	68	896,837	543,379	136,544	2,815,443
1989	366,639	528,126	1,851,888	748,779	1,129,138	83,050	4,707,820
1990	310,958	577,487	304	812,293	1,193,777	63,749	2,958,558
1991	207,690	569,733	1,713,309	608,956	853,933	57,486	4,011,107
1992	164,118	784,400	123	402,031	304,446	85,321	1,750,439
1993	122,507	556,632	1,120,447	253,616	1,399,617	44,519	3,497,537
1994	110,827	804,961	218	457,513	961,112	40,759	2,375,188
1995	124,573	387,988	1,345,656	372,029	244,363	47,266	2,521,885
1996	155,524	267,912	80	264,747	288,045	53,379	1,029,667
1997	153,777	190,161	1,008,484	159,137	681,513	48,877	2,241,949
1998	99,264	327,036	515	192,494	311,884	43,472	974,665
1999	156,213	121,384	52,661	196,532	20,707	28,461	575,958
2000	115,892	161,324	350	456,302	320,922	33,783	1,088,573
2001	234,728	780,144	321,159	512,437	172,434	54,735	2,076,637
2002	257,521	838,831	328	393,906	366,799	34,496	1,981,981
2003	223,831	795,978	557,288	317,721	220,649	33,356	2,146,802
2004	216,143	770,452	726	661,513	145,067	37,956	1,831,957
total	6,404,863	14,626,407	14,320,502	17,309,522	17,868,561	1,411,870	71,941,725

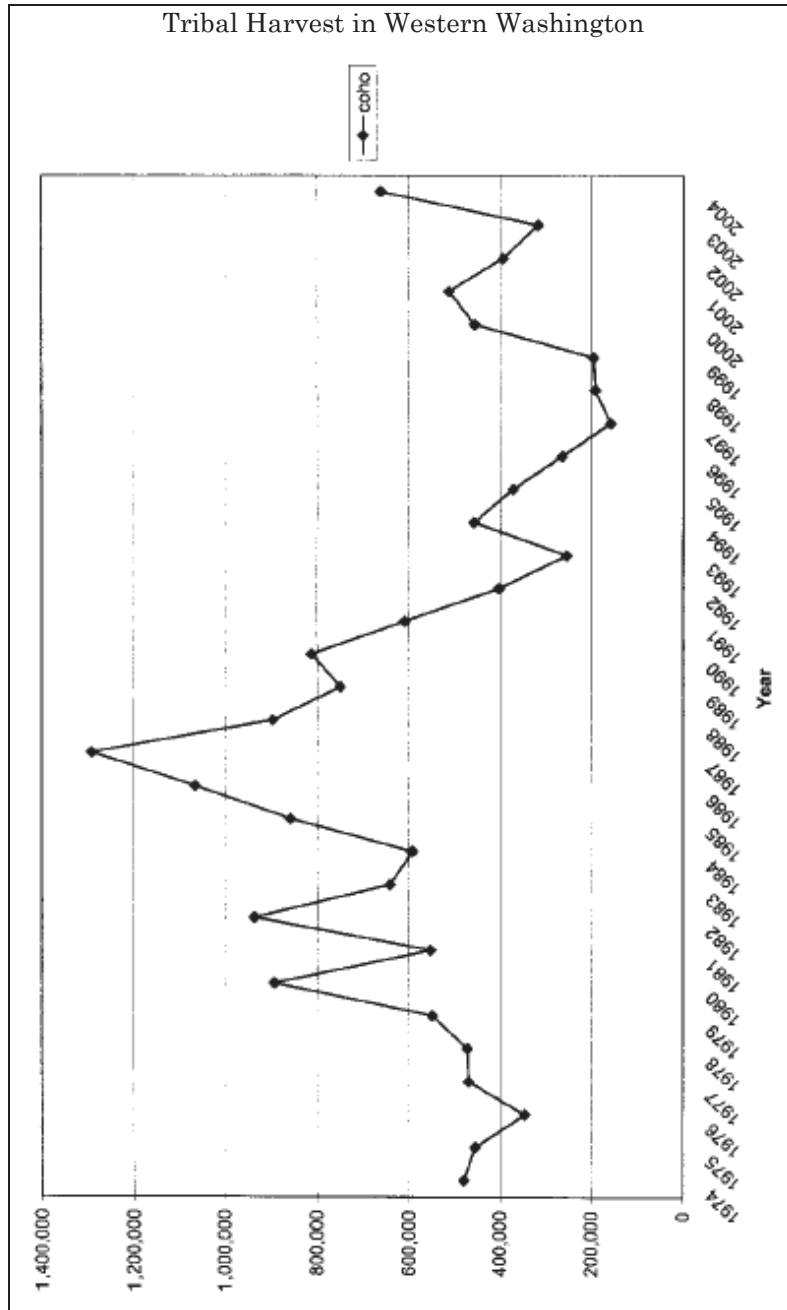


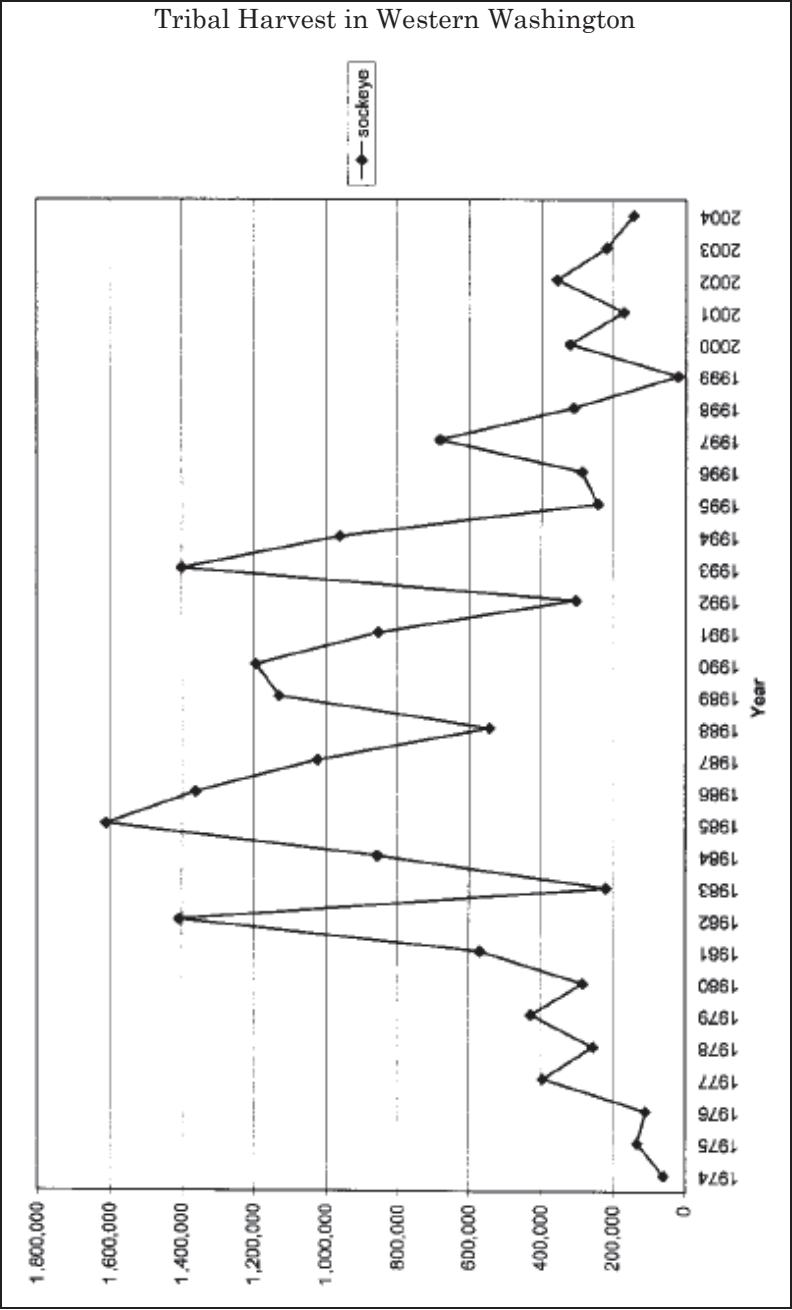












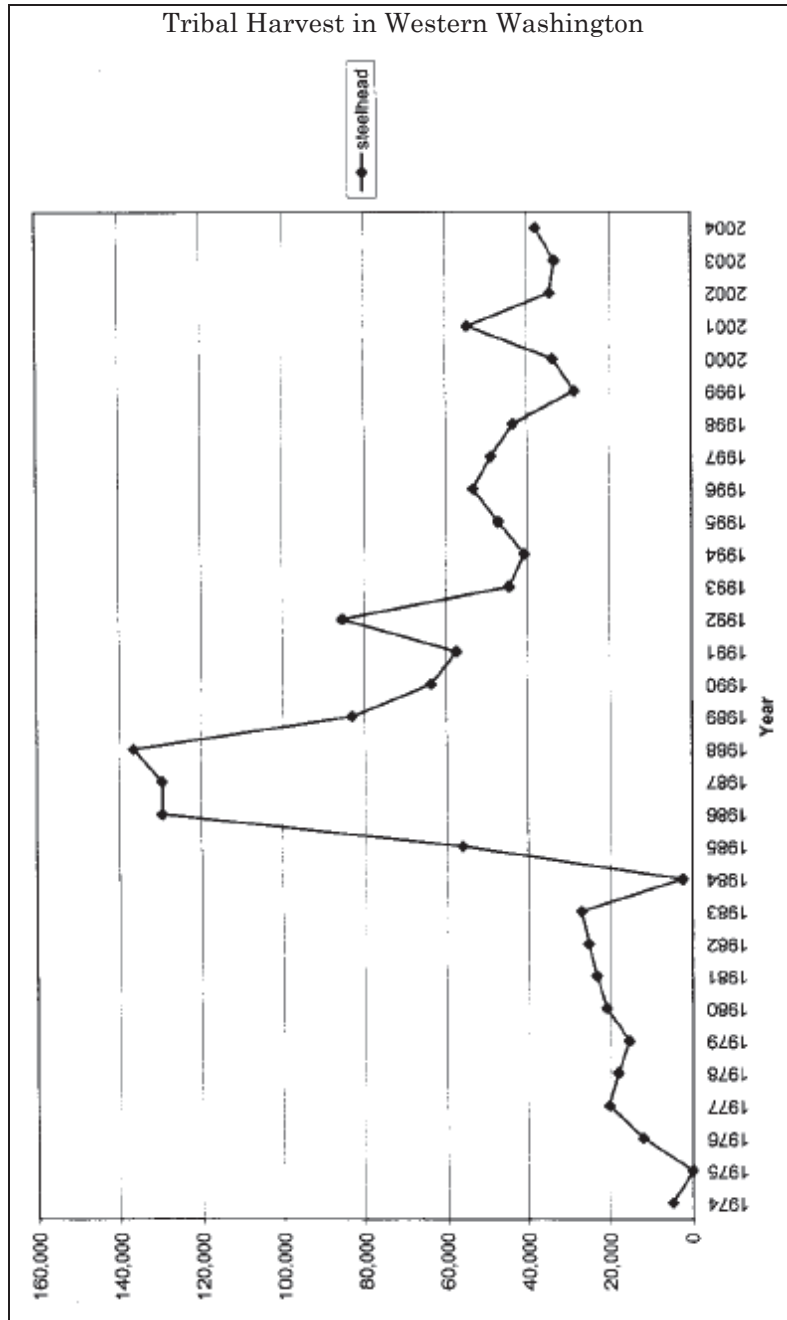


Table 2. Treat catch in Preterminal (Areas 4B, 5, 6, 6C, 7, 7A, 9). Data from NWIFC TFT database 5/2/06.

Preterminal Areas		Species					
Year	Sum of Number Fish	chhook	Chum	Pink	Coho	Sockeye	Grand Total
1979		22239	7284	509824	65484	392106	996937
1980		33784	115958	123	113282	191487	454634
1981		43950	8528	1012676	80801	537713	1683668
1982		51333	83847	20	136113	1369176	1640489
1983		48868	30681	762299	71317	186434	1099799
1984		40251	15624	11	61252	789625	906963
1985		41353	111156	1924599	159382	1539197	3775687
1986		57605	146463	89	133633	1348343	1666133
1987		66592	54816	758143	122120	959925	1961596
1988		76104	217186	24	69752	371951	735017
1989		87630	101273	1323004	138502	1118007	2768616
1990		66233	133609	154	119914	1175911	1495921
1991		47392	102979	1541498	97310	838033	2627212
1992		41465	183750	83	28423	289401	543122
1993		19892	86620	961001	20043	1361993	2449649
1994		14578	79142	196	15019	955767	1064702
1995		14531	40045	877431	19012	241907	1192926
1996		15558	32758	7	2932	222992	274247
1997		21098	30864	935260	9965	675487	1672674
1998		4397	52677	510	4373	305909	367866
1999		1891	7374	4526	2551	20215	36557
2000		2454	5652	335	3653	258788	270882
2001		10717	10207	125344	14097	162680	323045
2002		5839	61163	187	10456	299261	376906
2003		6043	42959	381979	11822	177751	620554
2004		33333	96131	639	46236	111733	288072
2005		14130	40618	197495	8075	137688	398006
Grand Total		869560	1899764	11317457	1555519	16039480	31711780

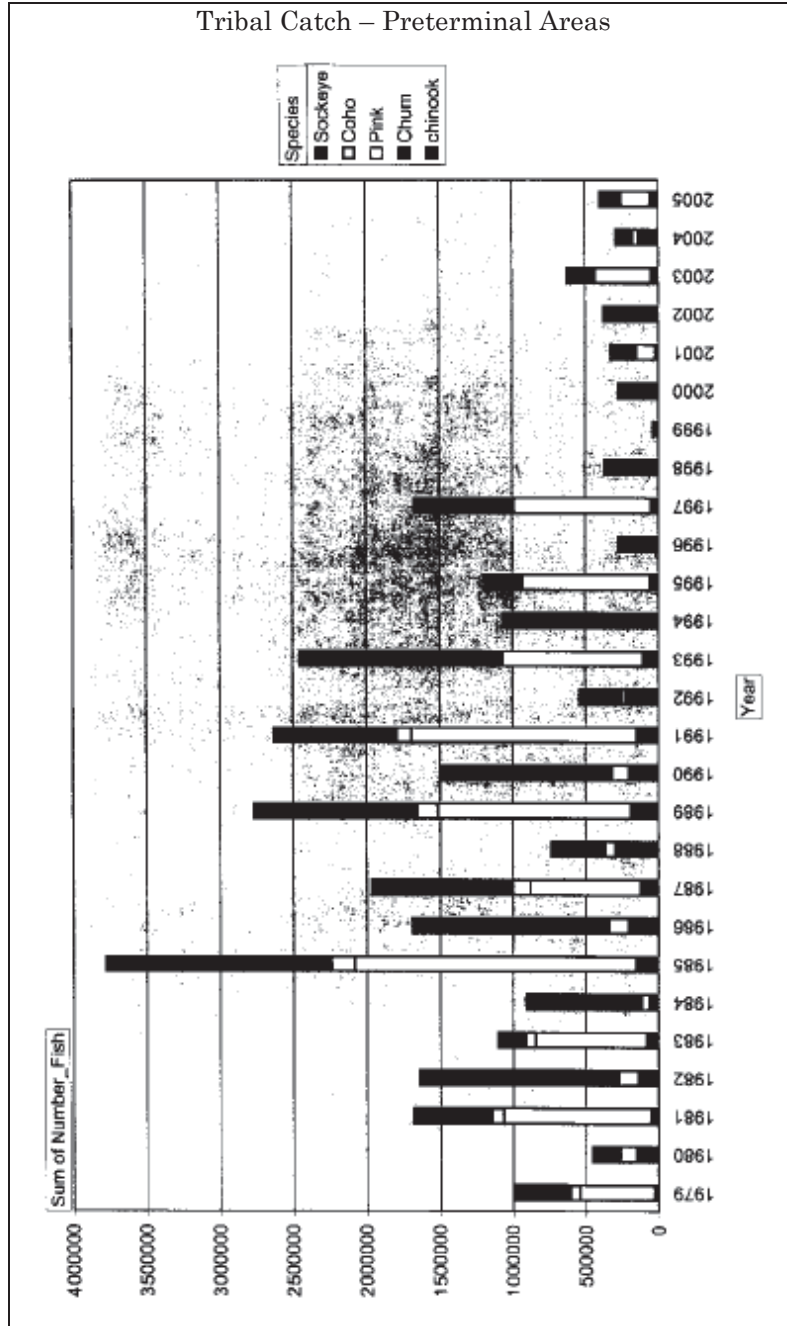


Table 3. Treaty catch in Strait of Juan de Fuca Terminal Areas (Areas 6B, 6D, 74B, 75A, 75C, 75E, 76A, 76B). Data from NWIFC TFT database 5/2/06.

Year	Sum of Number Fish	Species chinook	Chum	Pink	Coho	Sockeye	Grand Total
1979		111	98	7782	13376	42	21409
1980		86	624	8	16509		17229
1981		97	783	15	10530	8	11413
1982		254	1546		40575	67	42442
1983		157	168	10	19941		20276
1984		360	448		6273		7081
1985		39	383	2	10188	4	10616
1986		204	439		5582		6225
1987		330	911	2	9963		11208
1988		656	407		2399		3462
1989		5	161		5628		5794
1990		26	140		2806		2972
1991		2	28		1545		1576
1992		104	79		1409		1592
1993		32	31		181		244
1994		1	16		1540		1557
1995		2	27		3057		3086
1996		2	7		2377		2386
1997			11		214		225
1998		1	21		3567		3589
1999					3013		3013
2000					5441		5441
2001			44		5765		5809
2002			122		5226		5348
2003			93		1905		2000
2004		2	416		2535		2951
2005			237		2745		2982
Grand Total		2473	7221	7819	184290	121	201924

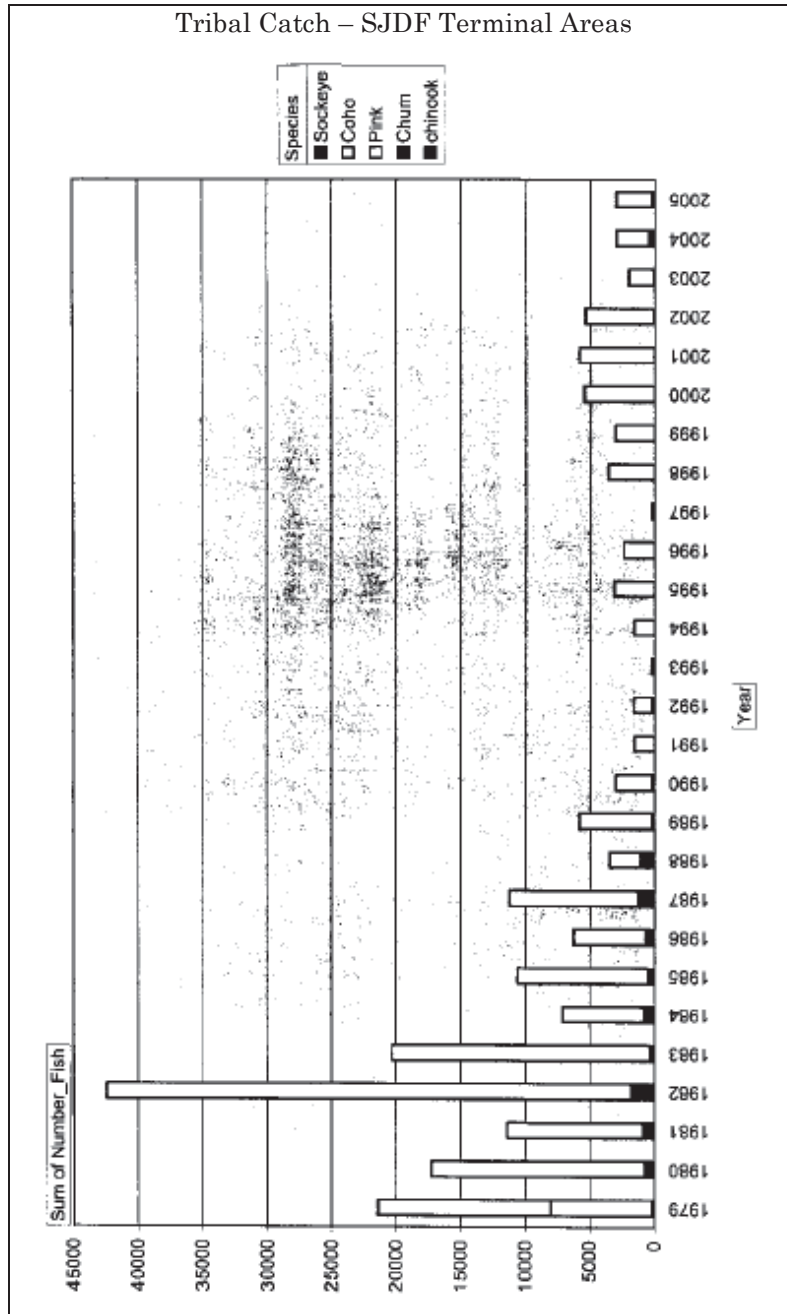




Table 4. Treaty catch in Skagit Terminal Areas (Areas 8, 78C, 78D, Baker R.). Data from NWIFC TFT database 5/2/06.

Sum of Number Fish		Species					Grand Total
Year	Chinook	Chum	Pink	Coho	Sockeye		
1979	6661	11199	145328	15366	518	179072	
1980	9105	50432	10	29580	40	89167	
1981	10234	31162	101632	12620	175	155823	
1982	11477	36514		22227	286	70504	
1983	6103	26094	6244	12619	171	51231	
1984	1755	976		1632	17	4580	
1985	6853	38133	144297	7778	22	197083	
1986	3431	111394		28595	33	143453	
1987	3233	8648	311768	9898	418	333965	
1988	2699	25243		11576	61	39579	
1989	6011	7806	348981	7295	81	370176	
1990	1657	82487	1	11735	27	95907	
1991	2490	43403	120971	2790	196	169850	
1992	1065	43547		3594	14	48220	
1993	994	29056	138691	810	298	169849	
1994	81	102002		716	87	102898	
1995	2791	20877	393798	2759	37	420262	
1996	46	25521		488		26055	
1997	975	1135	36735	949	91	39885	
1998	82	11039	1	8267	106	19495	
1999	26	9597	31019	5719		46363	
2000	53	14998	2	11149	9	26211	
2001	37	12434	174854	15918	32	203275	
2002		46209		7687		53896	
2003	44	10724	142133	17756		170657	
2004	20	8653		32539	1645	42857	
2005	1740	14800	17797	17900	144	52381	
Grand Total	79665	824085	2114262	300162	4508	3322682	

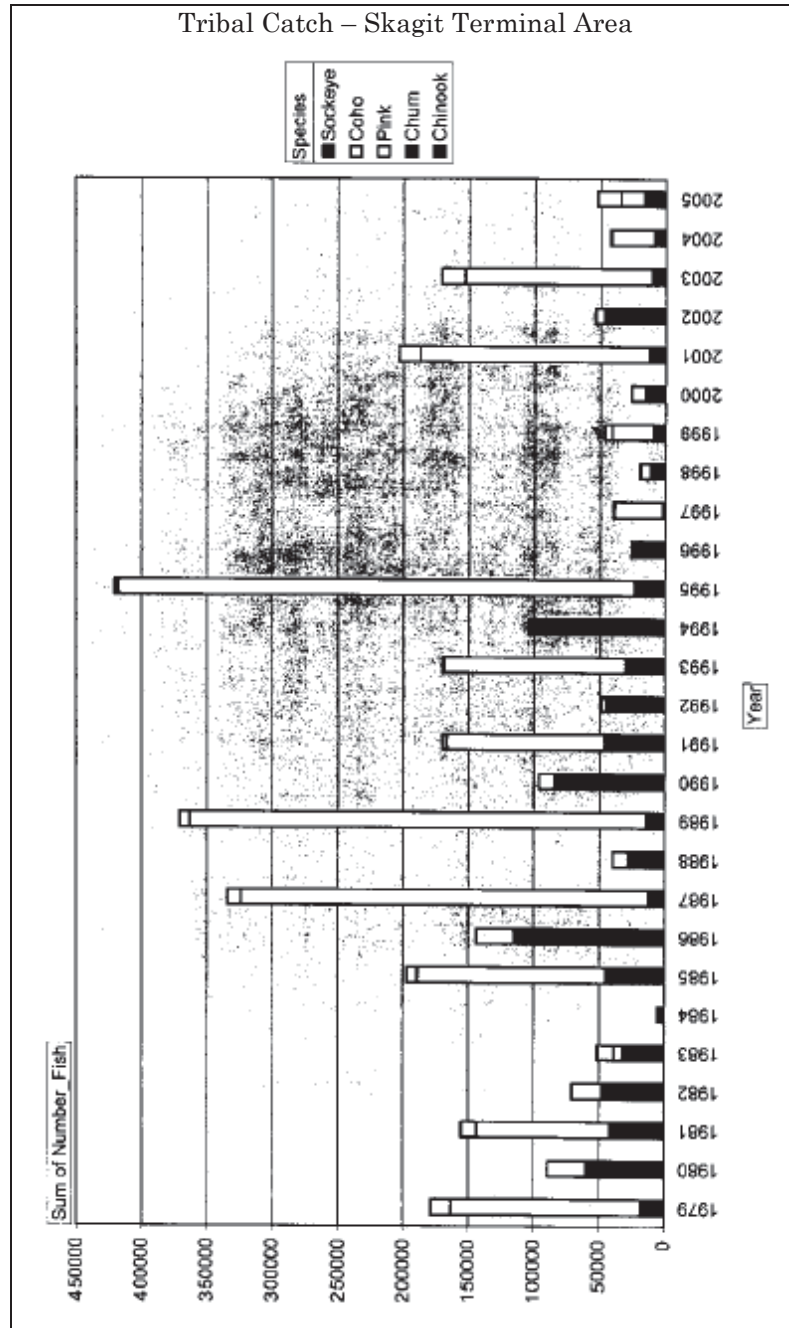


Table 5. Treaty catch in Nooksack/Samish Terminal Areas (Areas 7B, 7C, 7D, 7E, 83D, 83F). Data from NWIFC TFT database 5/2/06.

Sum of Number Fish	Species					Grand Total
Year	Chinook	Chum	Pink	Coho	Sockeye	
1979	46469	25625	29694	100839	9880	212507
1980	63993	18389	12	82836	2433	167663
1981	43689	40753	12578	66885	5015	168920
1982	37310	45553		90465	3560	176868
1983	30887	38229	2210	85505	741	157572
1984	56687	49908	5	63398	919	170911
1985	56828	57212	1795	76530	5747	198112
1986	37106	53434	3	92771	1120	184434
1987	28958	54563	2917	110494	469	195401
1988	28931	72024	2	87616	1459	190032
1989	22817	62185	3679	67087	257	156035
1990	45261	47915	5	59247	930	153358
1991	18621	47829	4979	28556	1729	101714
1992	10549	25286	5	33673	393	69906
1993	16135	32791	625	42764	187	92502
1994	18793	41497	3	41061	31	101375
1995	19913	43064	3606	26116	46	92745
1996	17254	13038		21133	9	51434
1997	15773	6250	516	5609	734	28882
1998	15362	4772		15086	4	35224
1999	33496	6132	1434	36755	10	77827
2000	21805	4111		34171	7	60094
2001	37885	6639	9507	57177		111208
2002	22633	1425		30729	245	55032
2003	16873	5715	1204	31754	74	55620
2004	12738	44003		59540	53	116334
2005	13648	9873	339	25653	57	49570
Grand Total	788414	858215	75118	1473450	36109	3231306

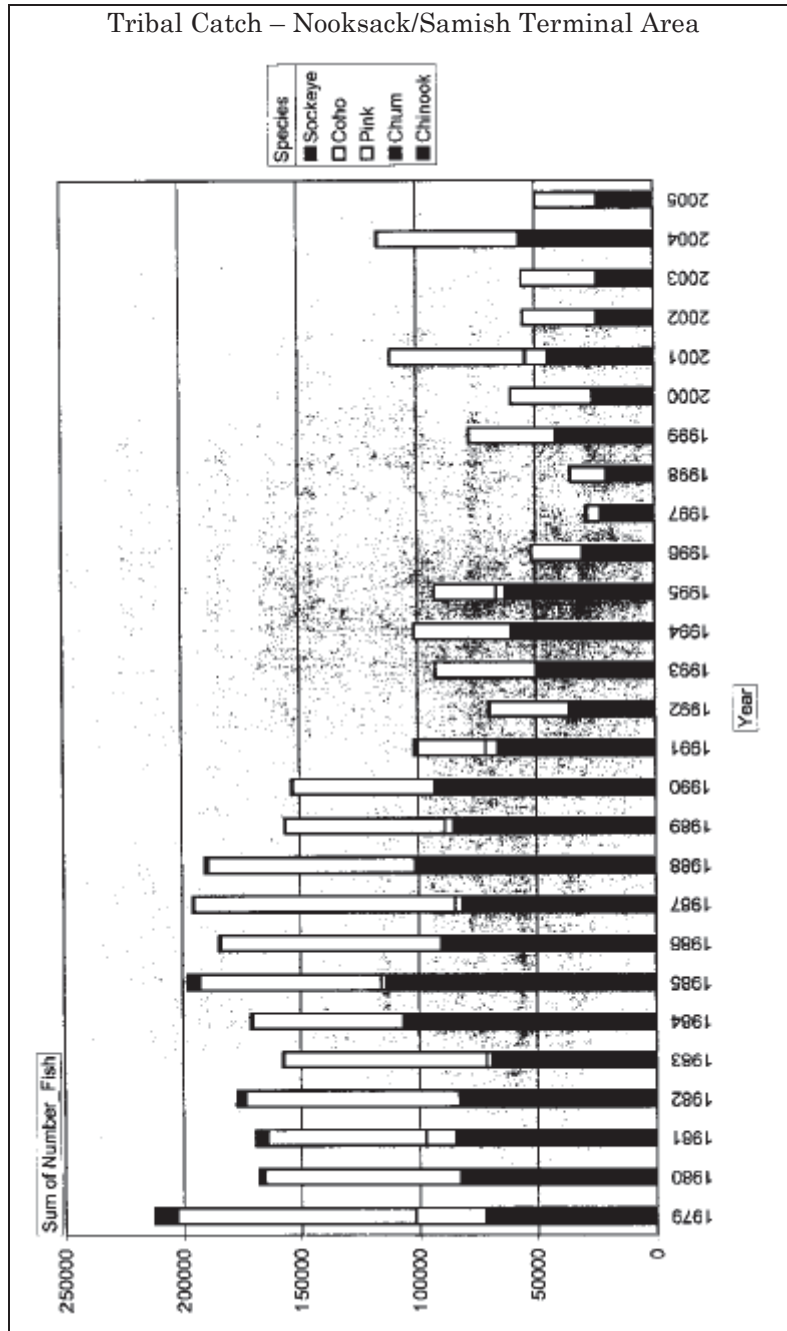


Table 6. Treaty catch in Stillaguamish/Snohomish Terminal Areas (Areas 8A, 8D, 78G, 78F). Data from NWIFC TFT database 5/2/06.

Sum of Number Fish Year	Species Chinook	Chum	Pink	Coho	Sockeye	Grand Total
1979	11257	2421	28508	37489	101	79776
1980	20632	23624	4	117991	206	162457
1981	16157	25054	33284	71164	41	145680
1982	10914	43974	12	38625	139	93864
1983	12288	10352	25331	38909	56	86936
1984	9740	24918		23746	1	58405
1985	8722	50478	92510	70692	4	222406
1986	11692	49467		89140		150289
1987	4025	78519	21199	119434	7	223184
1988	7966	153065	17	78954	26	240028
1989	9282	62245	112417	86801	204	270949
1990	9105	69222	80	94116	5	172528
1991	5614	63999	34760	67924	17	172314
1992	3885	74954	21	75714	1	154575
1993	4013	103047	9633	31462		148155
1994	4641	114119		78653		197413
1995	8702	33586	52344	46995	33	141660
1996	11327	42706	43	30226		84302
1997	8302	5716	34178	24917	15	73128
1998	7068	63374		23566		94008
1999	14441	25552	12027	17843	95	69958
2000	6047	13926		85445		105418
2001	3905	8240	3354	59966		75465
2002	1975	6694		48573		57242
2003	7030	35193	7231	8322		57776
2004	4440	70811		79116	364	154731
2005	8567	24160	21017	35472	171	87387
Grand Total	229737	1279416	487950	1581255	1486	3579844

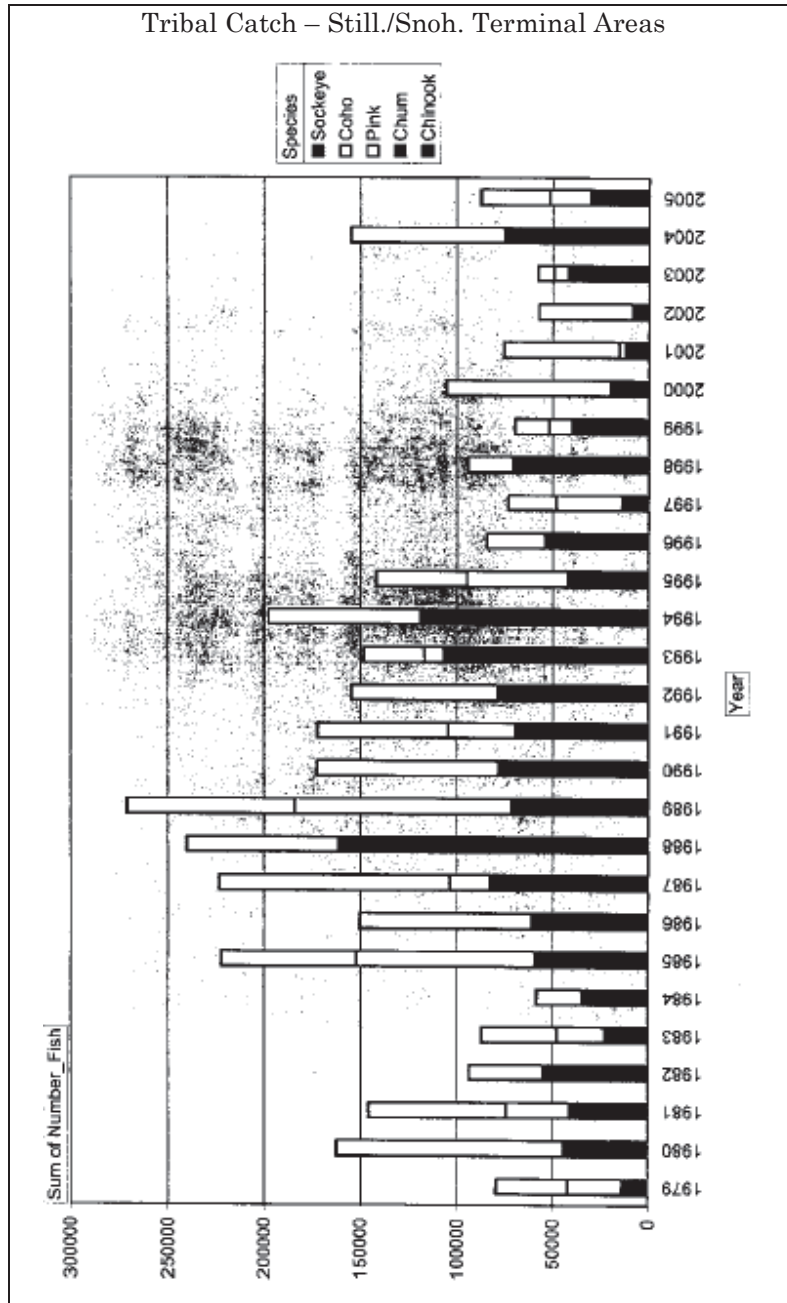


Table 7. Treaty catch in South Sound Terminal Areas (Areas 10, 10A-G, 11, 11A, 13, 13B, 13C, 13D-K, 80A, 80B, 80C, 81A, 81B, 81C, 83A, 83B, 83C, 83D, 83E, 83F, 83H). Data from NWIFC TFT database 5/2/06.

Sum of Number Fish		Species					Grand Total
Year	Chinook	Chum	Pink	Coho	Sockeye		
1979	26647	31518	22127	209488	2662	292442	
1980	31611	161633	8	324330	68985	586577	
1981	26147	102284	8501	176635	1957	315524	
1982	21701	126216		329618	14484	492029	
1983	45251	86303	5178	285300	31730	453762	
1984	40494	129035	14	270492	57823	497855	
1985	35816	109308	3700	337699	4106	490629	
1986	23042	97508		412559	5614	538723	
1987	40052	162983	4973	644909	11730	864647	
1988	49677	192445	7	477955	126420	846504	
1989	51015	110855	22531	266611	1739	452751	
1990	64096	131678	3	323457	3670	522904	
1991	30949	95779	2326	164476	302	293832	
1992	31508	141078	1	128832	293	301712	
1993	24457	101706	1312	61065	88	189628	
1994	31985	112003		255438	6	399432	
1995	33702	78422	4053	154981		271158	
1996	26659	47690		65072	57015	198436	
1997	12107	13472	88	76732	19	102418	
1998	15067	35262		59228		109557	
1999	21038	16507	64	17630	11	55250	
2000	16684	40265		188963	52529	298541	
2001	21566	137682	566	143840	2406	306060	
2002	18429	69223	64	118500	26966	233202	
2003	15368	104078	2861	115517		237824	
2004	25890	223331		216125	17524	482870	
2005	26023	91720	1769	137982		257494	
Grand Total	806981	2749984	80146	5963434	488219	10088764	

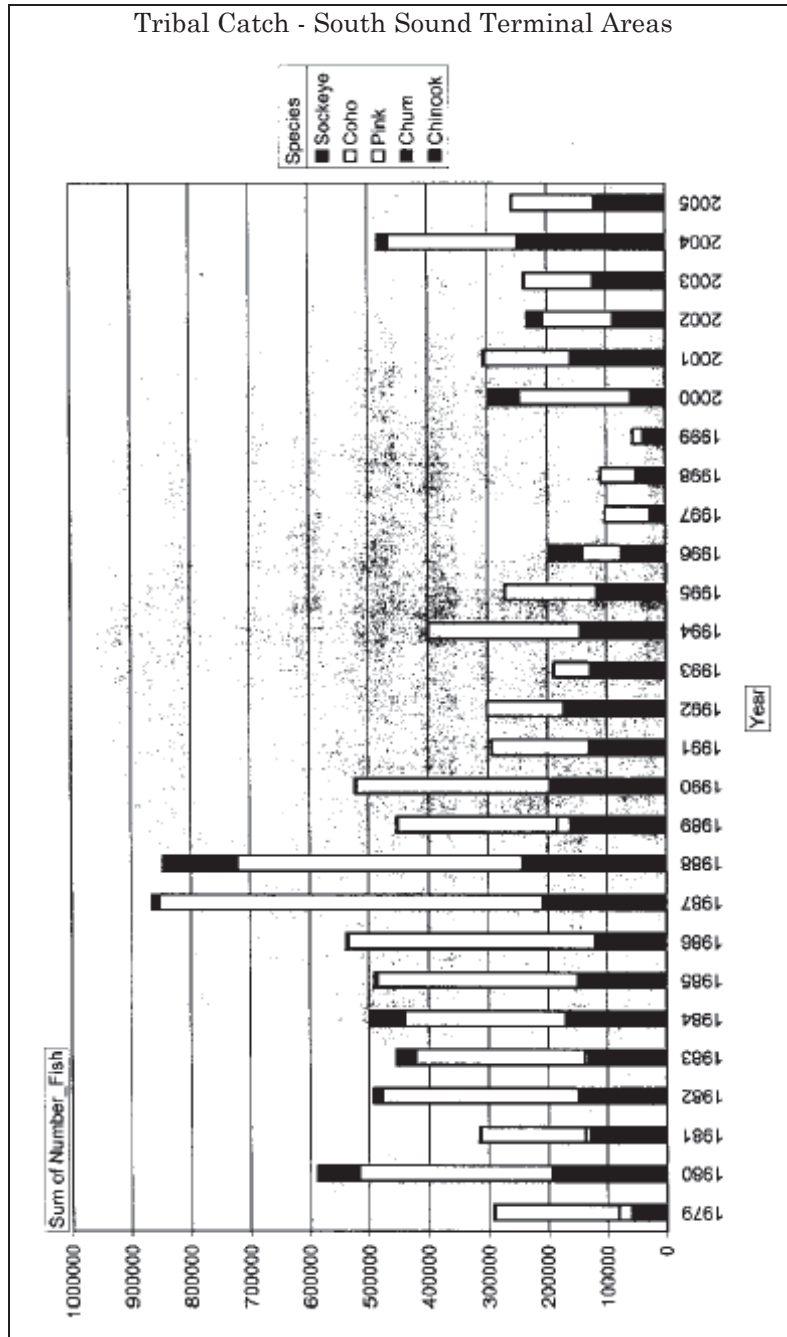




Table 8. Treaty catch in Hood Canal Terminal Areas (Areas 12, 12A, 12B, 12C, 12C, 12D, 82A-J.) Data from NWIFC TFT database 5/2/06.

Year	Species					Grand Total
	Chinook	Chum	Pink	Coho	Sockeye	
1979	5873	44904	1129	33210	149	85265
1980	6814	80185		107030	108	194137
1981	11040	87847	932	30637	4	130260
1982	5977	107805		66841	28	180651
1983	3924	79337	181	33382	5	116629
1984	9019	180282	1	34852	1	224155
1985	9715	181386	1189	33343		225633
1986	11942	204063		59858		275963
1987	15123	347066	2829	75846	6	440870
1988	13985	215770		8017		237772
1989	17366	203115	26817	30762	14	277074
1990	7906	126291		34796		168993
1991	11395	203561	676	19176	2	234810
1992	594	274598		3865		279057
1993	967	191185	9	3013		195174
1994	320	287906		31315		319541
1995	37	159232	459	9211		168939
1996	7	31981		3508		35496
1997	18	119919		8125		128062
1998	98	7348		19027		26473
1999	7610	12430	12	4491		24543
2000	8301	11800		19213		39314
2001	3665	11752	200	5832		21449
2002	3862	16783		5049		25684
2003	450	34374		21830		56654
2004	3494	163391		70909		237794
2005	4937	31280		52373		88590
Grand Total	164429	3415391	33434	825611	317	4439182

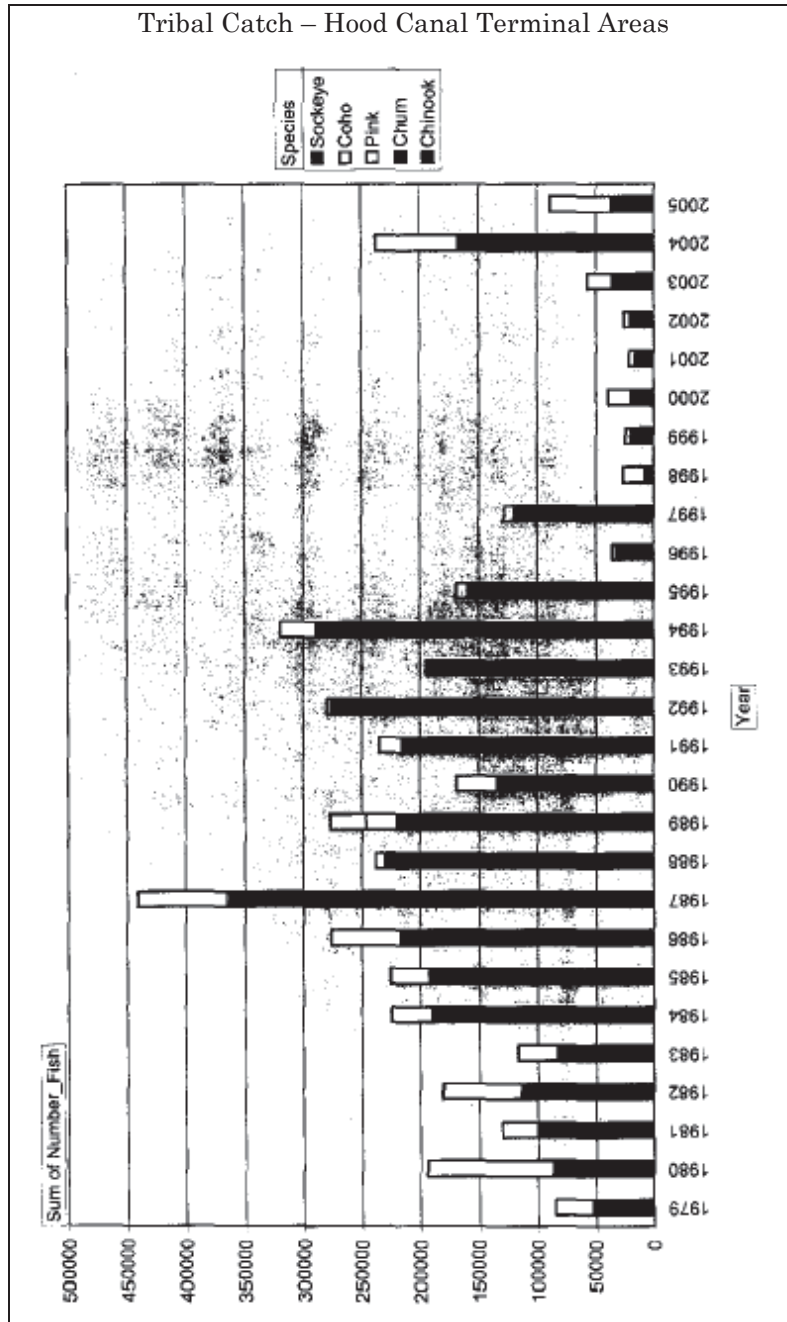


Table 9. Treaty catch of Sockeye in preterminal areas (4B, 5, 6, 6C, 7, 7A, 9) assumed to be primarily Fraser River origin and terminal area (10, 10A-G, 11, 11A, 13, 13B, 13C, etc.) assumed to be Lake Washington or other US origin stocks.

	CAN Origin (1)	US Origin (2)
1979	392,106	2,662
1980	191,487	68,995
1981	537,713	1,957
1982	1,369,178	14,494
1983	186,434	31,730
1984	789,625	57,823
1985	1,539,197	4,106
1986	1,348,343	5,614
1987	959,925	11,730
1988	371,951	126,420
1989	1,118,007	1,739
1990	1,175,911	3,670
1991	838,033	302
1992	269,401	293
1993	1,361,983	88
1994	955,767	6
1995	241,907	
1996	222,992	57,015
1997	675,487	19
1998	305,909	
1999	20,215	11
2000	258,788	52,629
2001	162,680	2,406
2002	299,261	26,986
2003	177,751	
2004	111,733	17,524
2005	137,688	
total	16,039,480	488,219

(1) Stocks in this category are predominantly Fraser River stocks that are of Canadian origin. This category is known to include a small amount of inter-mingled US origin (Baker River, Lake Washington, Misc.) stocks but their numbers are considered minor in comparison.

(2) Stocks in this category are predominantly Lake Washington stocks that are of US origin. There are other minor US origin stocks that may not be accounted for in this table.

THE HONORABLE RICARDO MARTINEZ  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  <div style="text-align: right;">Plaintiffs,</div>  vs.  STATE OF WASHINGTON, et al.,  <div style="text-align: right;">Defendants</div>	Case No.: C70-9213 Subproceeding No. 01-1 (Culverts)  DECLARATION OF RONALD McFARLANE IN SUPPORT OF PLAINTIFF-TRIBES' MOTION FOR SUMMARY JUDGMENT
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I, Ronald McFarlane, hereby declare as follows:

1. I am over the age of eighteen, a United States citizen, and am competent to testify as to the matters here set forth. I make this affidavit on the basis of my personal knowledge, skill, experience, training, education, review of the State's culvert databases. This affidavit is made by me for the purpose explaining how I derived the following information related to state-owned culverts as part of United States v. Washington, 01-1 (Culverts).
  
2. For the past 8 years (1998-Present). I have been the Geographic Information System (GIS) Technician for the Northwest Indian Fisheries Commission. I have also been a GIS instructor at the Grays Harbor College for 6 years (2000-2005), teaching Introduction to GIS, Cartography, ARCINFO, Arcview, GIS Special Topics, and GIS Work Co-op.
  
3. My education includes an Associate in Applied Science in GIS from Grays Harbor College. My degree

included classes in programming languages for ARCINFO and ARCVIEW, GIS theory, cartography, Microsoft Access, and wildlife management.

4. I was requested by counsel for Plaintiff Tribes in this sub-proceeding to examine certain State databases that contain information regarding the location and fish passage status of culverts owned by the State Departments of Transportation (WDOT), Fisheries and Wildlife (WDFW), Parks and Recreation (WDP), and Natural Resources (DNR). Specifically, I was asked, using my experience in to GIS, to apply standard GIS protocols to data in the databases to determine the numbers of fish-blocking State culverts within the *United States v. Washington* “Case Area.”

5. I utilized the following state-managed databases to generate the information related to state-owned culverts: Shapefile format, dated 3/27/06 (culverts.shp) for WDFW/WDOT, Shapefile format, dated 5/10/06 (DNR\_Culverts.shp) a separate Excel spreadsheet supplied listing 152 repaired WDNR culverts in the ease area, (“Copy of DNR update of culverts for 1st 2nd set(2)”, a separate database table listing WDOT culvert repairs (WSDOT\_FX.dbf), dated 3/27/06 and a separate Excel spreadsheet for WDP, dated 7/10/06 (culvert info-all.xls). All spatial data was projected to the same projection coordinate system prior to analysis.

6. All of the data used in generating my conclusions was provided to me by John Sledd, attorney for various plaintiff-tribes. To the best of my knowledge, all of my conclusions are based on the State’s databases and information provided by the State as part of this court case.

7. All of the data analysis I used are standard protocols used by GIS professionals, as described below in paragraphs 11, 12, and 13; however, due to a lack of some information (primarily metadata), I made some assumptions based on my experience, which are discussed below in paragraphs 11(f), 12(f), and 13(e):

#### 8. **WDFW /WDOT Conclusions.**

After performing the data analysis described below on the WDFW/WDOT culvert data, I conclude from that data that there are 3,340 WDFW/WDOT culverts in the case area. 1,113 culverts are identified as barriers with fish present. Of the 1,113 fish barrier culverts, 806 are classified as "Repair Required," 237 as "Limited Gain," 67 as "Undefined," and 3 are not defined. 49 culverts in 43 sites are classified as "fixed." Of the 1,113 fish barrier culverts, none appear to be duplicates of the WDP culvert dataset and 7 of the culverts could be duplicates of the DNR culvert dataset.

#### 9. **WDNR Conclusions**

After performing the data analysis described below on the DNR culvert data, I conclude from that data that there are 5,302 DNR culverts in the case area. 665 of the 5,302 WDNR culverts are marked with identifiers that show the streams are used by fish and that the culverts are barriers. Although the main dataset for WDNR did not have a field for "repaired," a separate WDNR spreadsheet was supplied by John Sledd showing 152 repaired WDNR culverts. Of these, only 82 culverts readily matched the main WDNR dataset. 26 of these 82 culverts are marked as in fish bearing streams and 13 are still shown as barriers, despite their presence in the repair spreadsheet. Of the 665 fish barrier culverts, none appear to be duplicates of

the WDP culvert dataset and 7 of the culverts could be duplicates of the WDFW/WDOT culvert dataset.

#### 10. **WDP Conclusions**

After performing the data analysis described below on the WDP culvert data, I conclude from that data that there are 436 WDP culverts in the case area. 85 of the 436 WDP culverts in the case area are marked with identifiers that show they are used by fish and that they are barriers. None of the 436 WDP culverts are marked as repaired. None of these culverts appear to be duplicates of the WDNR culvert database or of the WDFW/WDOT culvert database.

#### 11. **WDFW/WDOT Analysis Performed**

- (a) I received the main and supplemental WDFW/WDOT data from John Sledd in Shapefile format, dated 3/27/06 (culverts.shp).
- (b) I converted the data to Coverage format.
- (c) I clipped the data to the case area, Washington Water Resource Inventory Areas (WRIAs) I-23.
- (d) I Snapped the culvert points to DNR 1:24000 scale stream layer (March 06) at a distance of 80 feet (based upon the scale accuracy of +/-40 feet for the hydrography data).
- (e) I generated a count of records matching the data breakout.
- (f) Note: Metadata was provided, dated August 2005.
  - (i) Scale accuracy of the data is +/-100 feet per the metadata.

- (ii) Fish use was determined by the records (Fish use value of “Yes”), not by checking against a spatial dataset of fish distribution.
  - (iii) Barrier status was determined by the records (barrier field value of “Yes”).
- (g) WDOT Repaired List (WSDOT\_FX.dbf, dated 3/27/06)
- (i) 132 repairs statewide
  - (ii) 64 match site ids for the WDFW/WDOT culvert database for the case area. The breakout is as follows:
    - 1) 3 do not have fish presence
    - 2) 2 have unknown fish presence
    - 3) Of the 59 remaining:
      - a. 4 are defined as “Require Repair.”  
Note all 4 of these show a repair year of 2005 - It is unclear whether they have been fixed and are not yet in the database, the: repairs were inadequate, or some other possibility.
      - b. 1 is defined as “Limited Gain.”
      - c. 2 are defined as “Undefined”
      - d. 9 are defined as “OK”
      - e. 43 are defined as “Fixed”
- (h) 28 match site ids for the WDFW/WDOT fish way database for the case area. All are defined as barrier - “No”.



**12. WDNR Analysis Performed**

- (a) I received the main and supplemental DNR data from attorney John Sledd in a Shapefile format, dated 5/10/06 (DNR\_Culverts.shp).
- (b) I converted the data to Coverage format.
- (c) I clipped the data to the case area (WRIAs 1-23).
- (d) I Snapped the culvert points to DNR I :24000 scale stream layer (March 06) at a distance of 80 feet (based upon the scale accuracy of +/-40 feet for the hydrography data).
- (e) I generated a count of records matching the data breakout.
- (f) Note: Metadata was provided, dated September 2002.
  - (i) Scale accuracy of the data is +/-40 feet per the metadata.
  - (ii) Fish use was determined by the records provided in the database (anadflg or resflg value of 1), not by checking against a spatial dataset offish distribution.
  - (iii) Barrier status was determined by the records provided in the database (barrier field value of 20 or 30).

**13. WOP Analysis Performed**

- (a) I received the Parks data from attorney John Sledd in an Excel spreadsheet format, dated 7/10/06 (culvert info-all.xls).
- (b) I converted it to Access database format, extracted the culvert records, and then separated the

data into those records with specific spatial locations and those with general locations.

- (c) For the records with specified locations:
  - (i) I converted the data to ESRI coverage format. ESRI is Environmental Systems Research Institute, Inc. ("ESRI")
  - (ii) I projected the data to the State-plane coordinate system.
  - (iii) I clipped the data points to Water Resource Inventory (WRIAs) 1-23, which essentially corresponds to the case area.
  - (iv) I snapped the culvert points to DNR 1:24000 scale stream layer (March 06) at a distance of 80 feet (based upon the scale accuracy of +/-40 feet for the hydrographic data).
  - (v) I generated a count of records matching the data breakout.
- (d) For the records without specific locations:
  - (i) A manual check was performed to determine if the specified park was in the case area or not.
  - (ii) For those records that fell within the case area, I generated a count of records matching the data breakout.
- (e) Note: as metadata was not provided with the data set several assumptions were made.
  - The spatial coordinate systems for the records with specific locations were assumed to be using the North American datum of 1927. This is ESRI's default datum for the Geographic Coordinate System when a datum is not

specified. The WGS84 datum could have been used if I knew the data was collected using a GPS Unit with the default datum, but without metadata about collection. I just let the program decide the default datum.

- Fish use was determined by the records, not by checking against a spatial dataset of fish distribution.
- Barrier status was determined by the records provided in the spreadsheet.
- Other fields were difficult to use without more information (i.e., what does a repair status of “ok” mean for a record where barrier is “Yes”?)
- Scale accuracy of the data. is not identified.

14. Pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this *13th* day of August 2006, at *Oakville*, Washington.

*s/Ronald L. McFarlane*  
Ronald McFarlane

The Honorable Ricardo Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT  
SEATTLE

UNITED STATES OF AMERICA, et al.,  Plaintiff,  v.  STATE OF WASHINGTON,  Defendant.	NO. C70-9213M Subproceeding No. 01-1  (CULVERTS)  DECLARATION OF LOU BAKER
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I, Lou Baker, declare as follows:

1. I am the Roadway Operations Supervisor for the Washington State Department of Transportation (“WSDOT”). I have held this position or its equivalent for four years and I have worked for the WSDOT as a Transportation Planning Specialist for a total of eight years. In all, I have worked for WSDOT since 1989. My duties include updating and distributing the State Highway Log Planning Report, updating the Roadway Classification Log, Horizontal and Vertical alignment Report and Road Life (Contract History) Report. I also supervise field and office personnel. The statements in this declaration are based on my personal knowledge.

2. A centerline line measures the length of a highway and does not take into consideration

the number of lanes. A one-mile length of four lanes measures the same as one-mile length of two lanes, etc. Both equal one centerline mile. A centerline mile is a linear measure of a State Route in 1/100th mile increments.

3. I have worked for 13 years updating the State Highway Log through contracts and field checks. The State Highway Log is a report which lists all State Routes from beginning to end in 1/100th mile increments and includes features on and along the route (number of lanes, roadway width, intersections, structures, traffic control, illumination, speed limit, special use lanes for example). A field check is physically inventorying a State Route, or section thereof, by driving the route in a vehicle equipped with a distance Measuring Instrument (DMI). A DMI is a highly calibrated odometer which is linked through a sensor to the transmission, which sends pulses to the DMI and the DMI reads out the mileage to 1/1000th of a mile (1/100th for WSDOT purposes). Contracts give lengths in engineering stations, which are 100 feet. I calculate the number of stations in the contract area and then convert the length in feet to length in miles.

4. The following is a table containing the centerline miles of state highways from 1974 to present. Each year on the table is representative of the year on the State Highway Log cover, which until this year's publication (2005B) contained the totals of the prior year (i.e., 2003 Highway Log represented data thru 12/31/2002).

Year	Centerline Miles	Year	Centerline Miles
1974	6912	1991(Post RJT)	7012
1975	6906	1992	7020
1976	6916	1993	7048
1977	Unavailable	1994	7047
1978	6920	1995	7052
1979	6919	1996	7053
1980	6888	1997	7059
1981	6888	1998	7066
1982	6888	1999	7063
1983	6941	2000	7061
1984	6960	2001	7061
1985	6972	2002	7063
1986	6973	2003	7063
1987-89	Unavailable	2004	7049
1990	6996	2005	7046
1991(Pre RJT)	6998	2005B	7046

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 1st day of September 2006.

*s/Lou Baker*  
LOU BAKER

THE HONORABLE RICARDO S. MARTINEZ  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF  
AMERICA, et al.,  
  
Plaintiffs,  
  
vs.  
  
STATE OF  
WASHINGTON, at al.,  
  
Defendants.

Case No.: C70-9213  
Subproceeding No. 01-1  
(Culverts)

DECLARATION OF JOHN  
C. SLEDD IN SUPPORT OF  
PLAINTIFF-TRIBES' REPLY  
TO STATE OPPOSITION TO  
TRIBES' MOTION FOR  
SUMMARY JUDGMENT

I, John C. Sledd, hereby declare as follows:

1. I am an attorney and of counsel to the law firm of Kanji & Katzen, PLLC. I represent the undersigned Plaintiff-Intervenor tribes in this sub-proceeding. I make this declaration in that capacity.

2. Attached to this declaration at pages 3 through 13 are true and correct copies of selected pages of the Plaintiff-Intervenor Tribes' Answers and Responses to Washington's Third Discovery Requests in this Sub-proceeding.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 11th day of October, 2006, at Seattle, Washington.

s/ JOHN C. SLEDD  
John C. Sledd, WSBA # 19270

*[original page 1]*

HONORABLE RICARDO S. MARTINEZ  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF  
AMERICA, et al.,  
Plaintiff,

v.

STATE OF  
WASHINGTON, et al.  
Defendants.

Civil No. C70-9213

Sub-Proceeding No. 01-01  
(Culverts)

PLAINTIFF-INTERVENOR  
TRIBES' ANSWERS AND  
RESPONSES TO  
WASHINGTON'S THIRD  
DISCOVERY REQUESTS

TO: STATE OF WASHINGTON, Defendant

AND TO: FRONDA WOODS, Attorney of Record  
for Defendant

AND TO: STEVE E. DIETRICH, Attorney of  
Record for Defendant

AND TO: PHILIP M. FERESTER, Attorney of  
Record for Defendant

COME NOW, the Plaintiff-Intervenor Tribes,  
and answer and respond to Defendant State of  
Washington's Third discovery requests pursuant to  
Fed. R. Civ. P. 26, 29, 33 and 34, the corresponding  
Local Civil Rules for the United States District Court  
- Western District of Washington ("LCR"), and the  
proposed Scheduling Order for this subproceeding.



*[original page 12]*

NISQUALLY: No, not to the best of our knowledge. This answer applies to the

Nisqually Tribe's portion of the case area only.

PORT GAMBLE S'KLALLAM: Yes

JAMESTOWN S'KLALLAM: Several state-owned culverts and one state-owned dam have been identified to impact salmonid runs.

LOWER ELWHA KLALLAM: Culverts on all ownerships (federal, state, county, municipal and private) are a significant factor limiting salmon production within the Lower Elwha Tribes usual and accustomed area. Culverts generally do not result in outright fish kills, rather when they are blockages they act to reduce the overall freshwater productive capacity of some watersheds.

SAUK-SUIATTLE: No additional information beyond that provided by Skagit River System Cooperative.

NOOKSACK:

HOH: Yes.

MAKAH: Yes

SQUAXIN ISLAND:

SKOKOMISH:

QUINAULT:

YAKAMA:

INTERROGATORY NO. 82: If your answer to Interrogatory No. 81 is yes, please identify the

particular state-owned culvert or culverts and run involved, describe the nature of

*[original page 13]*

the destruction or threatened destruction, and please explain why you believe the culvert or culverts to be state-owned.

ANSWER: In addition to the tribe-specific responses provided below, we assume all culverts identified as state-owned barriers to fish passage by the WSDOT, WDFW, and WDNR in their respective ongoing culvert inventories are indeed state-owned and block fish passage and, therefore, threaten any fish runs whose waters of origin are located upstream from the culvert barrier, which attempts to migrate through any such culvert, or whose habitat is affected by any such culvert.

NWIFC:

SKAGIT RIVER SYSTEM COOPERATIVE:

POINT NO POINT TREATY COUNCIL: Not applicable.

LUMMI:

PUYALLUP: See response to Interrogatory No. 81. Again, the culvert under HWY SR 162, and all the other culverts running under SR highways, affects all runs of fish. The nature of the destruction or threatened destruction is blockage of fish passage. The culverts are state-owned because they run under SR's. (Note that the SR 99 culvert was fixed two years ago.)

SWINOMISH:

## UPPER SKAGIT:

SUQUAMISH: SR 305 just southwest of Suquamish Way (WRIA 150296, fall chum & coho), SR 305 just northwest of Lemolo/Totten intersection (WRIA 150293, fall chum & coho), SR 305 between Delate Road and Stenbom Lane (WRIA 150291, fall chum & coho),

*[original page 17]*

addition to these structures, bridges and box culverts on Morse Creek, Bear Creek, and an unnamed tributary to the Pysht River are undersized resulting in habitat degradation. On lands owned by Washington DNR known blocking culverts have been identified on forest lands in the Twin River, Clallam River, and Salt Creek watersheds.

SAUK-SUIATTLE: No additional information beyond that provided by Skagit River System Cooperative.

## NOOKSACK:

HOH: Lost Creek Box Culvert (WRIA # 20.0440) under Highway 101 which existed as a concrete box culvert from about 1931 to 1999. In 1999 the culvert was replaced by a bridge that restored coho and steelhead access to above the highway.

MAKAH: Brownes Creek, a tributary to the Hoko River (Straits of Juan de Fuca), was severely impacted during winter 1999 by a debris flow and subsequent culvert failure at a lower State road crossing. Floodwater and debris from upstream (Crown Pacific Land) clogged a State Owned (DNR) culvert on the 5000 Road on DNR property. The culvert was located under 45 to 50 feet of fill and was

approximately 7 feet in diameter. No additional water relief culverts were present within the deep fill. Stream gradient along this section of Brownes Creek varies between 4 and 20%. The culvert was undersized to pass the 100-year flow, sediment, and wood transport, but was especially undersized to pass debris flow material in a landslide prone area within commercial tree farms.

*[original page 18]*

After the culvert plugged during the storm event, the area behind the culvert filled with water, sediment and debris to an approximate volume of 500,000 ft<sup>3</sup>. Initially, this pounded water behind the blocked culvert and fill dam began pour over the 45-50 foot fill surface like a waterfall. However, soon after, the culvert and road fill failed, similar to a dam break event, sending a wall of water scouring downstream. The water height of this event decreased downstream from an initial height of 40 feet to 10 to 15 feet at the confluence of Brownes Creek with the Hoko River.

This debris flow significantly affected local fish populations in both Brownes Creek and the Hoko River. Brownes Creek contains runs of Chinook and Coho Salmon and Steelhead and Cutthroat Trout. The Hoko River additionally contains runs of Chum Salmon. Both Chinook and Chum salmon in the Hoko River Watersheds are “depressed” at low levels. Most if not all salmonids present in Brownes Creek during the culvert failure were killed, including adults, juveniles, and eggs. Dead fish were visible. Due to the dramatic changes in channel configuration, channel instability, fine sediment deposition, wood load, and

overall habitat integrity, Brownes Creek and the area downstream along the Hoko River have struggled to produce healthy numbers of salmon post-impact. This situation continues to this day, but recovery is occurring slowly.

The State of Washington and DNR provided no initial help or responsibility for mitigating this severe impact on fish habitat. The culvert crossing was never replaced, but some of the remaining culvert fill was pulled back out of the stream crossing. Inactions by other stakeholders to mitigate the impacts or restore the channel, lead the Makah Tribe to

*[original page 19]*

search for funding to restore this important public and Tribal resource, Brownes Creek. Using both Federal and State (SRFB) salmon funding and subsequent cooperation effort from Crown Pacific, the Makah Tribe initiated a rehabilitation project during Summer 2003. See question 132.

SQUAXIN ISLAND:

SKOKOMISH:

QUINAULT:

YAKAMA:

REQUEST FOR PRODUCTION NO. 46: If your answer to Interrogatory No. 81 is yes, please produce all documents supporting your contention.

ANSWER: Culvert inventories and accompanying culvert data developed by the WSDOT, WDFW, and WDNR are already in the State's possession.

NWIFC:

SKAGIT RIVER SYSTEM COOPERATIVE:

POINT NO POINT TREATY COUNCIL: We are unaware of any such documents.

LUMMI:

PUYALLUP: Please refer to previous responses. We have no other documentation at this time but will obtain photos and visual description of the SR 162 culvert when water levels and fish presence permit photographic depiction.

*[original page 46]*

obtain fish for ceremonial and subsistence needs, including the opportunity to obtain fish for these purposes from traditional sources or through traditional methods.

INTERROGATORY NO. 108: If your answer to Interrogatory No. 107 is yes, please identify the culvert or culverts, Tribe or Tribes, and ceremonial or subsistence fishery involved, and please explain why you believe the culvert or culverts to be state-owned.

ANSWER: N/A.

INTERROGATORY NO. 109: Do you have any evidence of actual fish killed at or as a result of a state-owned culvert? If the answer is yes, please identify the exact location of the fish kill, including stream, WRIA number, and river mile. Please explain why you believe the culvert to be a state-owned culvert.

ANSWER:

NWIFC:

SKAGIT RIVER SYSTEM COOPERATIVE:  
Yes we have evidence of fish kill. Red Cabin Creek at Highway 20, Tributary to the Skagit River in WRIA 3, river mile unknown, near the town of Hamilton. We believe the culvert is state owned because it is under State Highway 20.

POINT NO POINT TREATY COUNCIL: No.

LUMMI:

*[original page 47]*

PUYALLUP: No, not in the sense of physical evidence, post-mortem or necropsy documents, “smoking gun” photos, etc.

SWINOMISH: No additional information beyond that supplied by the Skagit River System Cooperative (formerly Skagit System Cooperative) in its responses to this Interrogatory.

UPPER SKAGIT:

SUQUAMISH: Yes. SR 305 just SW of Johnson Road crossing, WRIA 150290 (Bjorgen creek) RM 0.4 has been the scene of fish killed at a State-owned culvert. Dead chum and coho salmon have been observed at the downstream end of this culvert during annual spawner ground survey work conducted by Suquamish Fisheries staff.

STILLAGUAMISH:

NISQUALLY: No.

PORT GAMBLE S'KLALLAM: Yes. As a result of stream channel drying and isolation of juvenile coho from upstream perennial habitat in Marple Creek by a State-owned culvert, there has been direct mortality

of salmon. Please see the answer to Interrogatory No. 82. Marple Creek lies in WRIA 17, and the State Highway 101 crossing lies at 20 approximately RM 0.2. This event occurs each year that the stream dries below Highway 101. Often, when stream drying is not complete, piscivorous birds and raccoons will easily prey on juvenile coho isolated in individual pools by stream drying.

JAMESTOWN S'KLALLAM: No.

*[original page 48]*

LOWER ELWHA KLALLAM: Culverts do not generally result in fish kills, rather they limit the ability of fish to complete their life histories and may result in reductions in fish production within certain watersheds. The Brownes Creek culvert failure discussed in Interrogatory number 83 is an example of a catastrophic culvert failure.

SAUK-SUIATTLE: No additional information beyond that provided by Skagit River System Cooperative.

NOOKSACK:

HOH: No state owned culverts have been assessed by the state or Hoh Tribe as being the direct cause of debris flows killing fish or incubating eggs nor had we witnessed fish mortalities at the Lost Creek culvert perched outfall.

MAKAH: See # 82 above.

SQUAXIN ISLAND:

SKOKOMISH:

QUINAULT:



YAKAMA:

INTERROGATORY NO. 110: For each of the plaintiff-intervenor Tribes, please state, for each year from 1995 forward, the Tribal government's total dollar expenditures, including expenditures for business enterprises owned by the Tribe.

ANSWER: Objection. This Interrogatory is not reasonably calculated to discover relevant evidence and is vague, ambiguous, and overbroad. Many Tribal governmental

*[original page 118]*

ANSWERS AND RESPONSES dated this 27th day of May, 2005.

RAAS, JOHNSEN & STUEN, P.S.  
OFFICE OF SPECIAL COUNSEL

DANIEL A. RAAS, WSBA #4970  
Counsel for the Lummi Indian Tribe  
Tribal Coordinating Counsel

KANJI & KATZEN, PLLC

PHILLIP E. KATZEN, WSBA #7835  
Co-Counsel for the Suquamish, Jamestown, Lower  
Elwha, Pt. Gamble Bands of S'Klallams, Nisqually,  
Nooksack, Sauk-Suiattle, Skokomish, Squaxin Island,  
Stillagaumish, and Upper Skagit Tribes  
Tribal Coordinating Counsel

MORISSET SCHLOSSER AYER et al.

MASON D. MORISSET, WSBA #273

Counsel for the Tulalip Tribe

Tribal Coordinating Counsel

#### VERIFICATION

The undersigned, as Tribal Coordinating Counsel, and attorney for Plaintiff Tribe, Lummi Indian Nation, certifies to the best of his knowledge, information and belief, formed after a reasonable inquiry that the responses and objections are: (1) consistent with the Federal Rules of Civil Procedure and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already in the case, the amount in controversy and the importance of the issues at stake in the litigation.

DATED this 27th day of May, 2005.

KANJI & KATZEN, PLLC

PHILLIP E. KATZEN, WSBA #7835

Co-Counsel for the Hoh, Suquamish, Jamestown, Lower Elwha, Pt. Gamble Bands of S'Klallams, Nisqually, Nooksack, Sauk-Suiattle, Skokomish, Squaxin Island, Stillagaumish, and Upper Skagit Tribes Tribal Coordinating Counsel

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The Honorable Ricardo Martinez

UNITED STATES DISTRICT COURT WESTERN  
DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et.al.   Plaintiff,  vs.  STATE OF WASHINGTON,  Defendant	Case No.: C70-9213 M Subproceeding No. 01-1  (CULVERTS)  STIPULATION RE: TREATY AND NON- TREATY HARVEST DATA
---	--

This Stipulation sets forth the parties' agreement regarding the use of three tables and fourteen figures for use as joint exhibits in this Subproceeding. This Joint Stipulation has been prepared, reviewed, and stipulated to by the parties for the sole purpose of presenting certain basic fisheries harvest data for use only in *United States v. Washington*, Case No. C70-9213 M, Subproceeding No. 01-1 (Culverts), U.S. District Court, Western District of Washington. Accordingly, these exhibits are limited to fisheries data available at the time of this sub-proceeding and are subject to revision.

**TREATY HARVESTS 1974-2007 and TREATY/  
NON-TREATY HARVESTS 1974-2003**

Attached hereto and incorporated herein by this reference are true and correct copies of Tables 1-3 and Figures 1-14 summarizing Treaty and Non-Treaty harvest data. Table 1 summarizes tribal

harvest in each of the years 1974 through 2007 in the United States v. Washington case area (ocean, coastal rivers,<sup>1</sup> Puget Sound, and Puget Sound rivers combined), and in the Willapa Bay watershed. Tribal harvest data is listed separately for each species (Chinook, Chum, Pink, Coho, Sockeye, and Steelhead). Table 1 also provides an all species total for each year. Figures 1-7 were also prepared to correspond to the data shown in Table 1. Table 2 and graphs corresponding to the data in that table (Figures 8-14) show combined treaty and non-treaty commercial and sport harvests for all salmonid species from 1974-2003. Table 3 provides treaty catch of US origin versus Canadian sockeye stocks in Puget Sound determined by applying an assumed percentage to total catch for each year. For Canadian origin stocks, the assumed percentage was determined by totaling the treaty sockeye landings in pre-terminal areas (4B, 5, 6, 6C, 7, 7A, and 9) and dividing by the total.

## SOURCE OF DATA

Treaty and non-treaty commercial data in the attached Tables 1-3 were obtained from the Washington Department of Fish and Wildlife (WDFW) Commercial Licensing/Fish Ticket System (LIFT). The LIFT database is compiled by the

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<sup>1</sup> The *United States v. Washington* “case area” includes Washington watersheds that drain into Puget Sound, Grays Harbor, and the Pacific Ocean north of Grays Harbor. *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974); *United States v. Washington*, 459 F. Supp. 1020, 1097 (W.D. Wash. 1977). The Willapa Bay watershed is not within the case area.

WDFW in its regular course of business and is also maintained by the Quantitative Services Division of the Northwest Indian Fisheries Commission in its Treaty On-line Catch Accounting System (TOCAS). For the sport catch, the data was compiled from the WDFW Sport Catch database that is maintained by WDFW in its regular course of business. Information from the LIFT and Sport Catch databases is obtained routinely by state and tribal fisheries managers and scientists on an ongoing basis for fisheries management. The parties stipulate that the compilations contained in each of these tables and figures are true, accurate, and complete.

WDFW obtains the LIFT information from fish receiving tickets ("fish tickets"). The fish tickets used by both treaty and non-treaty fishers are used to record their catch in Washington State. Fish ticket contents for Treaty and non-Treaty fishers are defined by Ch. 220-69 of the Washington Administrative Code. The fish ticket must show the name or ID number of the fisher and fish buyer, date of landing, catch area, the individual number and total weight of each species caught, and other specific information. Treaty and non-Treaty fish ticket data are collected by WDFW and are routinely used by state, tribal, and federal regulators to manage fisheries. For example, fish ticket data are basic inputs for computer models used by state, tribal, and federal regulators to estimate the size of fish populations, to determine maximum allowable harvests, and to decide when any specific fishery must be closed to prevent over-harvest.

The Sport Catch database is derived from sport catch estimates provided by catch record cards, angler

surveys, and other methods of estimating sport catch in various locations and seasons throughout the state. This database is recognized by the State to be the best source of sport catch accounting that is currently available for the state of Washington and is routinely utilized by State, tribal, and federal fisheries managers and scientists.

Combined treaty and non-treaty sport and commercial harvest data of salmon and steelhead in the United States v. Washington Case Area and the Willapa Bay watershed include the following areas: Ocean, Coastal Rivers, Puget Sound and Puget Sound rivers from 1974-2003. Commercial catch includes ceremonial and subsistence catch but not test fisheries. Table 2, which includes sports catch, only goes to 2003 because 2004 and later sport catch estimates are considered preliminary by state fisheries managers and are subject to annual revisions.

The data and methods used in preparing the aforementioned tables and figures are what scientists would reasonably utilize and rely upon in fisheries management.

Signed this 24th day of September, 2009.

Presented by:

By: JOHN C. SLEDD, WSBA # 19270  
(by SJS per phone / email authorization)  
Coordinating Counsel  
Kanji & Katzen, PLLC  
Attorney for the Hoh, Jamestown S'Klallam, Lower  
Elwha Klallam, Nisqually, Port Gamble  
S'Klallam, Sauk-Suiattle, Skokomish, Squaxin  
Island, Stillaguamish and Suquamish Tribes

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Coordinating Counsel  
Morisset, Schlosser & Jozwiak  
Attorney for the Tulalip Tribes

By: DANIEL A. RAAS, WSBA # 4970  
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Coordinating Counsel  
Raas, Johnsen & Stuen  
Attorney for the Lummi Nation

By: TIM WEAVER, WSBA # 3364  
(by SJS per email authorization)  
Coordinating Counsel  
Attorney for the Yakama Nation

By: ALIX FOSTER, WSBA # 4943  
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Coordinating Counsel  
Attorney for the Swinomish Indian Tribal  
Community

By: /s/ SAMUEL J. STILTNER, WSBA # 7765  
Attorney for the Puyallup Tribe

By: BRIAN C. GRUBER, WSBA # 32210  
(SJS per phone / email authorization)  
Attorney for the Makah Indian Tribe



THE STATE OF WASHINGTON, et al., Defendants

By: FRONDA WOODS, WSBA # 18728  
(by SJS per email authorization)  
Assistant Attorney General  
Washington Attorney General's Office

THE UNITED STATES OF AMERICA

By: PETER C. MONSON  
United States Department of Justice  
(by SJS per phone / email authorization)

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties required to be served in this subproceeding whose names appear on the official service list as registered in the Court CM/ECF system.

By: s/Samuel J. Stiltner  
WSBA: # 7765

Table 1

Tribal harvest of salmon and steelhead in western and Puget Sound Rivers)				
YEAR	CHINOOK	CHUM	PINK	COHO
1974	91,006	173,059	25	463,647
1975	126,854	79,427	105,164	442,662
1976	156,710	298,652	42	341,618
1977	147,927	182,524	180,136	468,003
1978	163,525	503,599	74	469,006
1979	141,292	103,769	760,071	541,711
1980	191,021	465,746	332	889,663
1981	179,168	285,629	1,177,398	547,963
1982	180,574	473,382	78	930,687
1983	168,619	279,545	820,343	637,242
1984	181,452	403,509	68	582,857
1985	197,212	554,309	2,177,039	848,482
1986	178,692	663,659	113	1,023,625
1987	215,103	720,804	1,117,032	1,283,953
1988	239,931	889,485	67	880,889
1989	272,212	521,221	1,850,177	737,879
1990	249,115	570,984	301	806,175
1991	161,514	562,781	1,712,768	597,096
1992	132,372	778,892	121	399,307
1993	108,261	544,616	1,118,774	251,772
1994	89,067	793,891	214	450,734
1995	97,655	381,117	1,344,707	368,125
1996	95,080	260,790	54	263,320
1997	83,019	189,636	1,008,435	157,898
1998	73,023	318,678	515	188,857
1999	120,097	119,160	51,934	192,417
2000	84,230	156,069	349	446,770

Table 1

Washington (Ocean, Coastal Rivers, Puget Sound from 1974-2007.			
SOCKEYE	STEELEHEAD		TOTAL
58,984	4,885		791,572
133,657	0	*	887,764
110,492	12,066		919,580
396,125	14,386		1,389,101
256,253	17,734		1,410,191
429,004	15,089		1,990,936
284,757	20,696		1,852,215
569,880	22,729		2,782,767
1,407,535	24,771		3,017,027
219,993	25,437		2,151,179
851,099	1,744		2,020,729
1,574,557	25,996		5,377,595
1,357,347	93,618		3,317,054
997,568	80,968		4,415,428
519,377	82,275		2,612,024
1,126,586	47,363		4,555,438
1,193,441	47,121		2,867,137
849,898	32,220		3,916,277
300,665	58,405		1,699,762
1,397,235	31,180		3,451,838
960,166	30,013		2,324,085
243,350	31,072		2,466,026
287,262	30,467		936,973
680,717	21,369		2,141,074
311,621	39,578		932,272
20,694	24,674		528,976
320,390	26,226		1,034,034

202a

YEAR	CHINOOK	CHUM	PINK	COHO
2001	147,550	752,144	319,279	501,374
2002	150,522	839,450	277	387,861
2003	130,664	786,594	551,798	312,432
2004	166,327	929,308	699	653,737
2005	141,595	348,376	240,525	432,485
2006	148,072	764,032	368	325,596
2007	150,941	802,513	315,311	278,945
	CHINOOK	CHUM	PINK	COHO
Total	5,160,402	16,497,316	14,854,588	18,104,788

203a

SOCKEYE	STEELEHEAD		TOTAL
170,408	38,847		1,929,602
356,883	23,292		1,758,285
220,617	23,280		2,025,485
149,640	32,056		1,931,767
141,038	28,598		1,332,617
541,322	26,261		1,805,651
5,494	30,937		1,584,141
SOCKEYE	STEELEHEAD		TOTAL
18,444,055	1,065,454		74,126,602

Table 2. Combined treaty and  
harvest of salmon and steelhead

<b>Year</b>	<b>Chinook</b>	<b>Chum</b>	<b>Pink</b>	<b>Coho</b>
1974	913,602	462,444	1,238	2,549,666
1975	989,386	213,915	1,421,505	2,291,454
1976	1,043,705	825,348	2,006	2,894,444
1977	859,266	472,636	2,367,132	2,178,130
1978	737,079	1,293,591	1,791	1,910,228
1979	706,153	127,386	4,798,855	1,924,361
1980	702,906	1,013,373	1,061	2,048,024
1981	594,642	539,696	4,170,967	1,508,231
1982	613,397	1,114,581	198	1,992,064
1983	506,034	563,531	1,964,556	1,421,980
1984	456,012	782,471	155	1,143,208
1985	486,288	1,139,368	4,334,788	1,722,685
1986	487,278	1,229,457	169	2,102,617
1987	497,554	1,421,891	2,130,652	2,434,595
1988	541,131	1,787,225	196	1,669,579
1989	601,939	913,844	3,549,140	1,600,387
1990	561,095	1,108,503	775	1,842,303
1991	398,973	1,098,512	3,395,166	1,464,164
1992	395,784	1,519,972	692	839,803
1993	346,044	1,166,521	2,200,800	572,608
1994	194,587	1,373,922	257	531,884
1995	218,871	764,192	2,844,973	608,813
1996	228,959	814,559	109	497,194
1997	200,530	430,656	1,930,980	344,022
1998	141,422	852,712	1,071	363,051
1999	196,819	261,118	90,383	278,442
2000	160,029	311,546	446	637,912
2001	273,197	1,619,791	1,022,066	955,396
2002	329,346	2,017,876	534	631,026
2003	274,840	1,604,562	1,499,998	635,927
<b>Total</b>	<b>14,656,868</b>	<b>28,845,199</b>	<b>37,732,659</b>	<b>41,594,198</b>

non-treaty sport and commercial  
in western Washington.

<b>Sockeye</b>	<b>Steel-head</b>	<b>Other</b>	<b>Jacks</b>	<b>Un-known</b>	<b>Salmon and Steelhead</b>
2,520,066	59,949	3,343	9,195	0	6,519,503
1,675,446	30,005	244	12,169	0	6,634,124
1,317,346	44,176	981	14,218	0	6,142,224
1,885,160	86,204	1,165	9,944	0	7,859,637
1,388,854	74,356	1,252	12,025	0	5,419,176
1,797,991	84,146	824	10,003	226	9,449,945
594,533	73,967	454	8,652	189	4,443,159
1,316,997	68,466	617	7,906	240	8,207,762
2,876,640	67,088	16,443	6,948	159	6,687,518
398,350	73,258	26,776	13,528	483	4,968,496
1,700,355	86,994	46,120	10,379	856	4,226,550
2,942,290	82,456	4,207	8,986	0	10,721,068
2,737,831	154,837	4,175	8,624	44	6,725,032
1,963,584	134,313	7,752	9,137	313	8,599,791
857,240	129,082	80,014	0	2,747	5,067,214
2,241,557	87,962	6,433	0	1,617	9,002,879
2,168,579	72,291	0	0	2,605	5,756,151
1,826,983	71,833	0	0	1,830	8,257,461
618,894	102,953	0	0	1,432	3,479,530
2,730,185	59,649	0	0	1,172	7,076,979
1,839,074	71,356	0	0	1,377	4,012,457
406,723	61,999	0	0	708	4,906,279
390,404	62,628	0	0	1,703	1,995,556
1,365,531	37,626	0	0	574	4,309,919
540,721	65,158	0	0	1,242	1,965,377
20,870	51,640	0	3	301	899,576
613,750	57,289	0	0	161	1,781,133
255,985	88,982	0	0	212	4,215,629
534,898	50,623	0	0	1,909	3,566,212
311,607	59,302	0	0	262	4,386,498
<b>41,838,444</b>	<b>2,250,588</b>	<b>200,800</b>	<b>141,717</b>	<b>22,362</b>	<b>167,282,835</b>

Table 3

Presumed Tribal harvest of sockeye salmon in western Washington (Ocean, Coastal Rivers, Puget Sound and Puget Sound Rivers) from 1979-2005				
Year	Total Tribal Sockeye Harvest	Tribal Sockeye Harvest Presumed to be of Canadian Origin <sup>(1)</sup>	Tribal Sockeye Harvest Presumed to be of US Origin <sup>(2)</sup>	% of Tribal Sockeye Harvest Presumed to be of Canadian Origin
1979	429,004	392,106	36,898	91.40%
1980	284,757	191,487	93,270	67.25%
1981	569,880	537,713	32,167	94.36%
1982	1,407,535	1,369,176	38,359	97.27%
1983	219,993	186,434	33,559	84.75%
1984	851,099	789,625	61,474	92.78%
1985	1,574,557	1,539,197	35,360	97.75%
1986	1,357,347	1,348,343	9,004	99.34%
1987	997,568	959,925	37,643	96.23%
1988	519,377	371,951	147,426	71.61%
1989	1,126,586	1,118,007	8,579	99.24%
1990	1,193,441	1,175,911	17,530	98.53%
1991	849,898	838,033	11,865	98.60%
1992	300,665	289,401	11,264	96.25%
1993	1,397,235	1,361,993	35,242	97.48%
1994	960,166	955,767	4,399	99.54%
1995	243,350	241,907	1,443	99.41%
1996	287,262	222,992	64,270	77.63%
1997	680,717	675,487	5,230	99.23%
1998	311,621	305,909	5,712	98.17%
1999	20,694	20,215	479	97.69%



Year	Total Tribal Sockeye Harvest	Tribal Sockeye Harvest Presumed to be of Canadian Origin <sup>(1)</sup>	Tribal Sockeye Harvest Presumed to be of US Origin <sup>(2)</sup>	% of Tribal Sockeye Harvest Presumed to be of Canadian Origin
2000	320,390	258,788	61,602	80.77%
2001	170,408	162,680	7,728	95.47%
2002	356,883	299,261	57,622	83.85%
2003	220,617	177,751	42,866	80.57%
2004	149,640	111,733	37,907	74.67%
2005	141,038	137,688	3,350	97.62%

<sup>(1)</sup> Stocks in this category are predominantly Fraser River stocks that are of Canadian origin. This category is known to include a small amount of intermingled US origin (Baker River, Lake Washington, Misc.) stocks but their numbers are considered minor in comparison.

<sup>(2)</sup> Stocks in this category are predominantly Lake Washington. There are other minor US origin stocks that may not be accounted for in this table.

Figure 1. Tribal Salmon and Steelhead Harvest in Western Washington

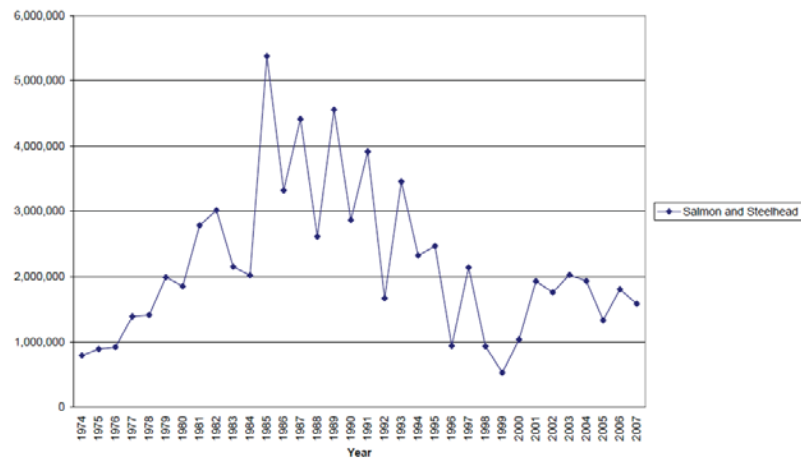


Figure 2. Tribal Chinook Harvest in Western Washington

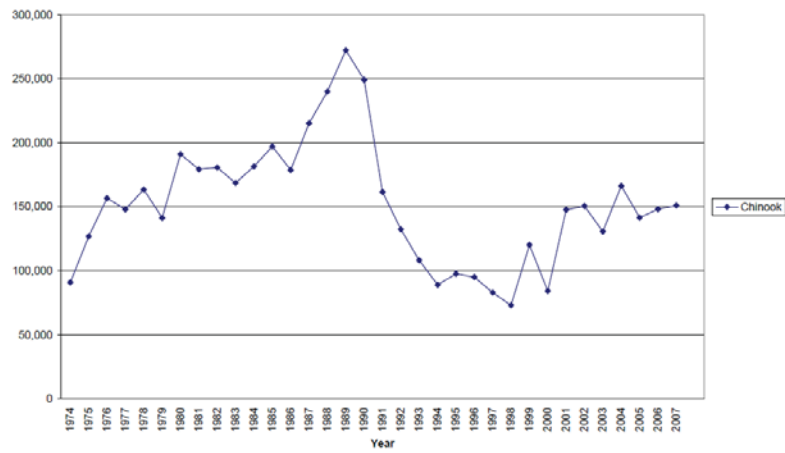


Figure 3. Tribal Chum Harvest in Western Washington

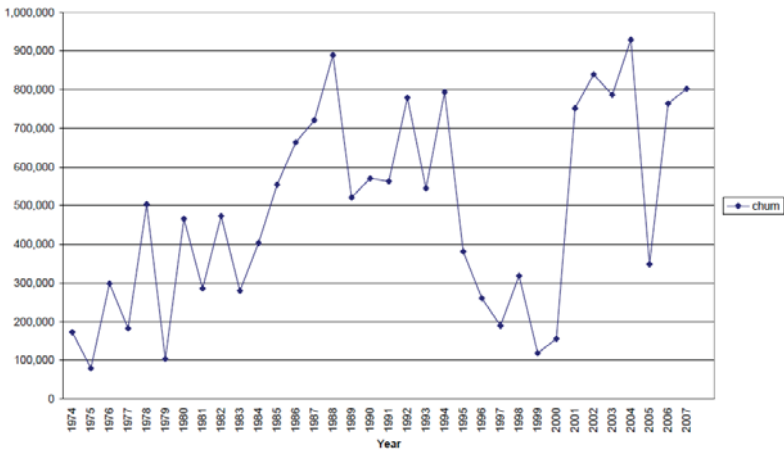


Figure 4. Tribal Pinks Harvest in Western Washington

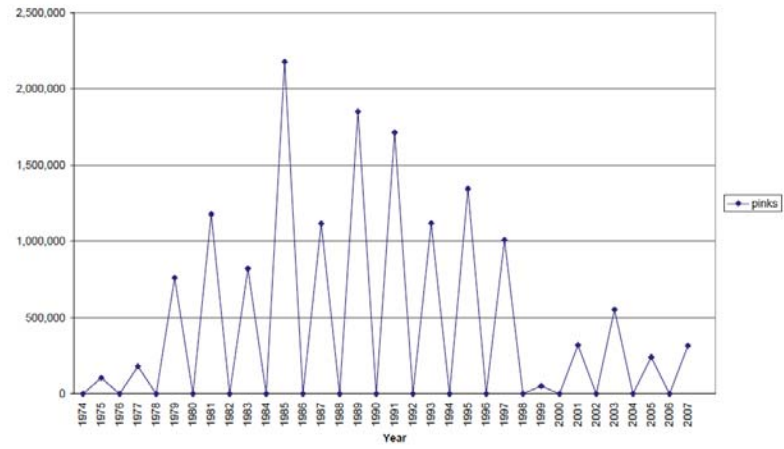


Figure 5. Tribal Coho Harvest in Western Washington

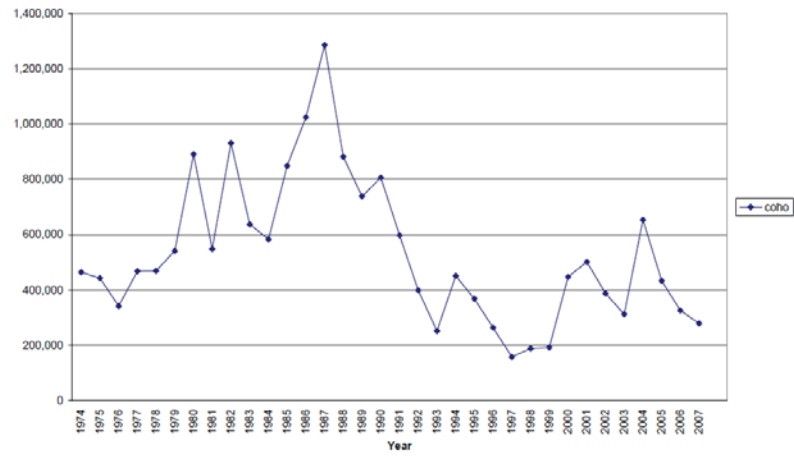
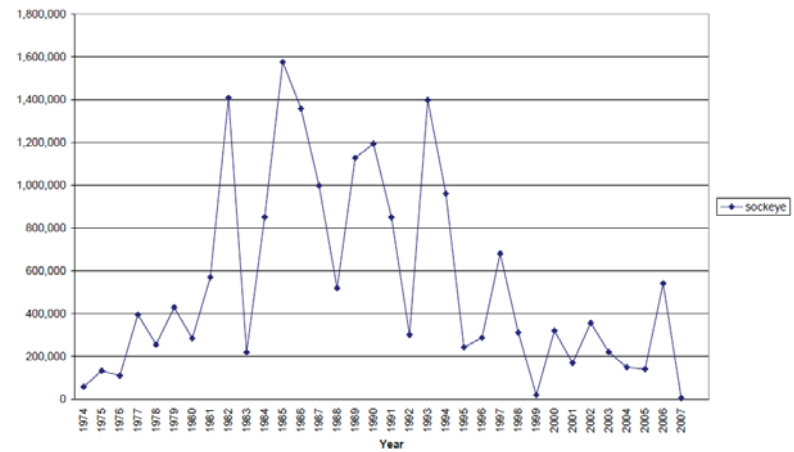


Figure 6. Tribal Sockeye Harvest in Western Washington



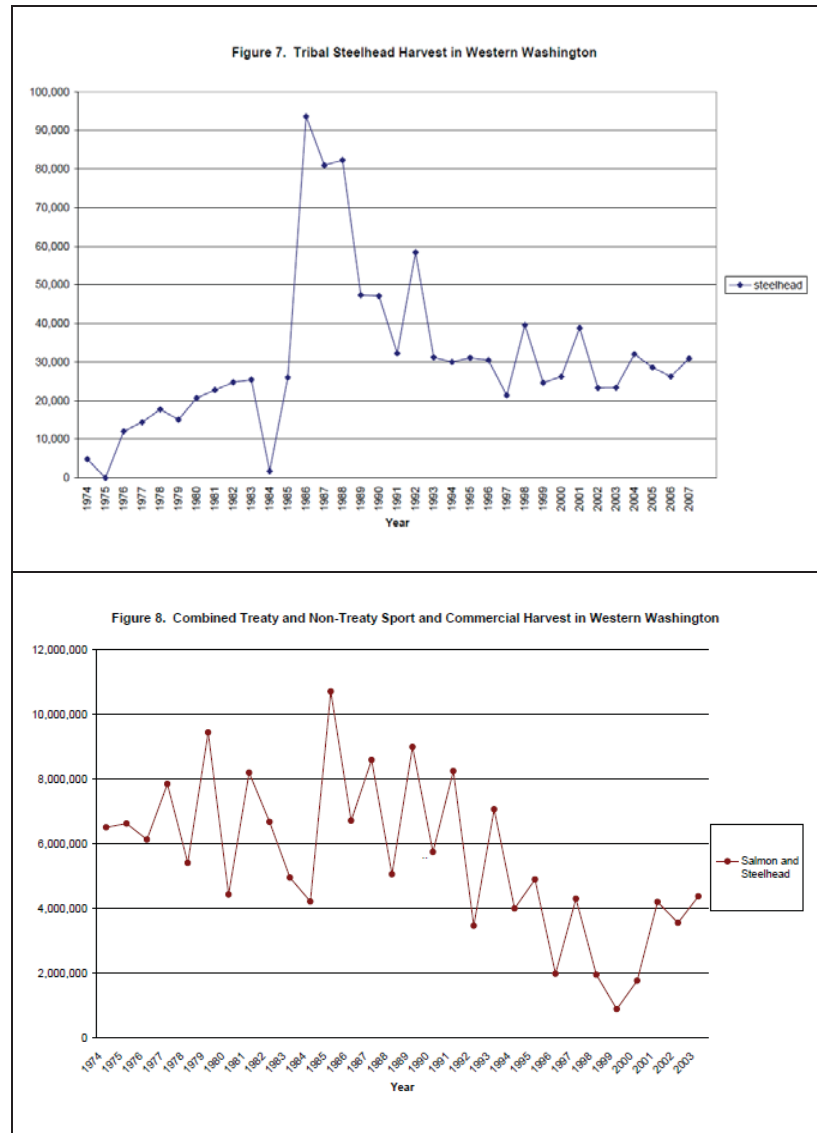


Figure 9. Combined Treaty and Non-Treaty Sport and Commercial Harvest in Western Washington

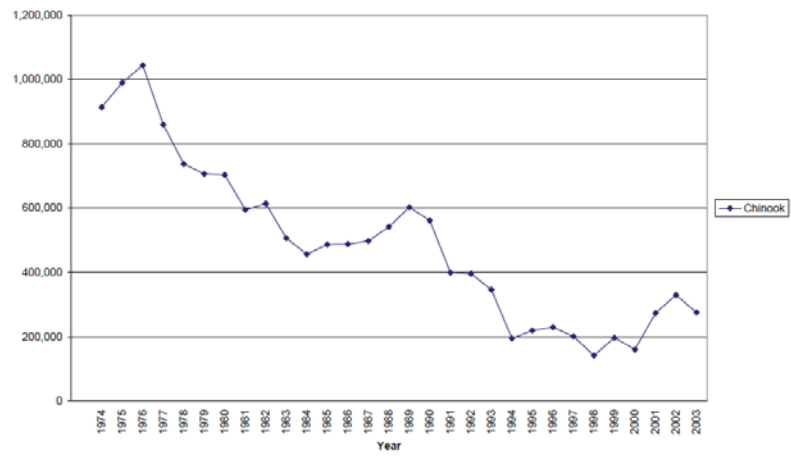
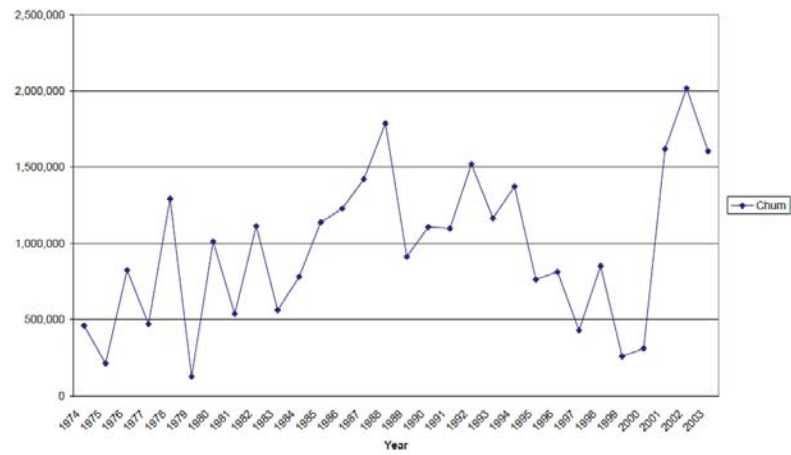


Figure 10. Combined Treaty and Non-Treaty Sport and Commercial Harvest in Western Washington



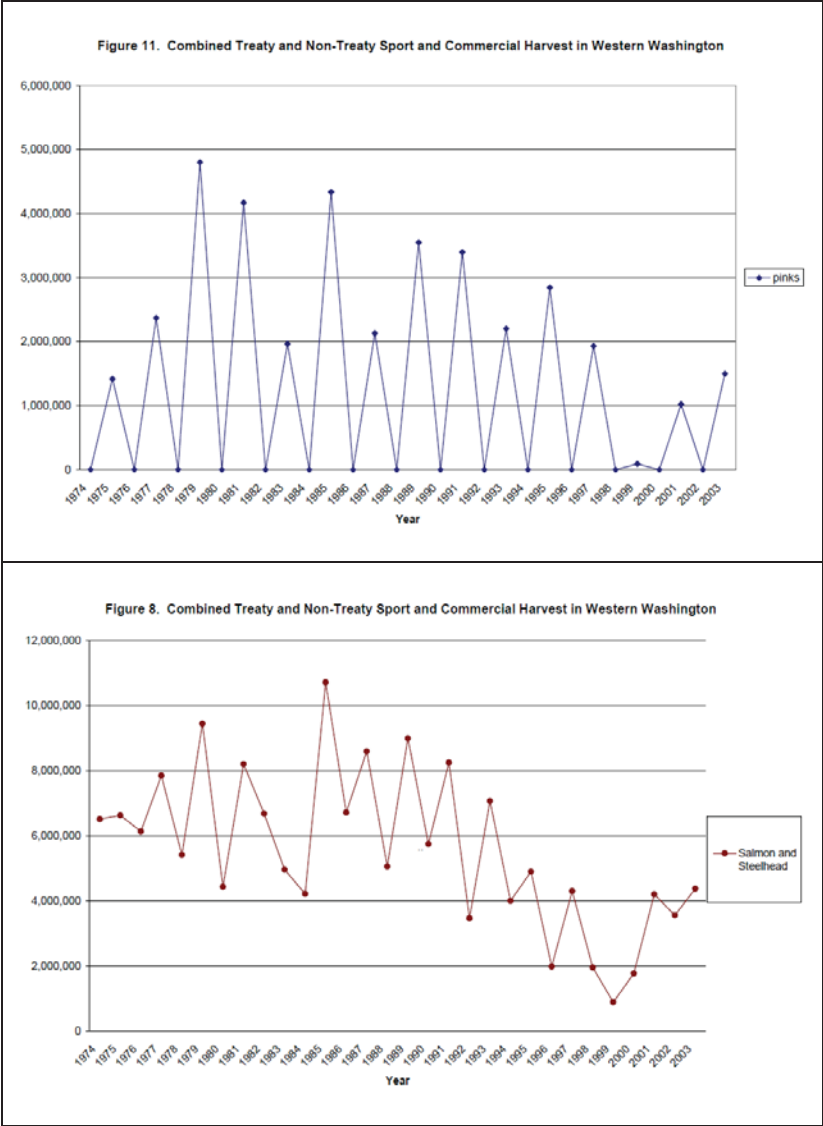


Figure 13. Combined Treaty and Non-Treaty Sport and Commercial Harvest in Western Washington

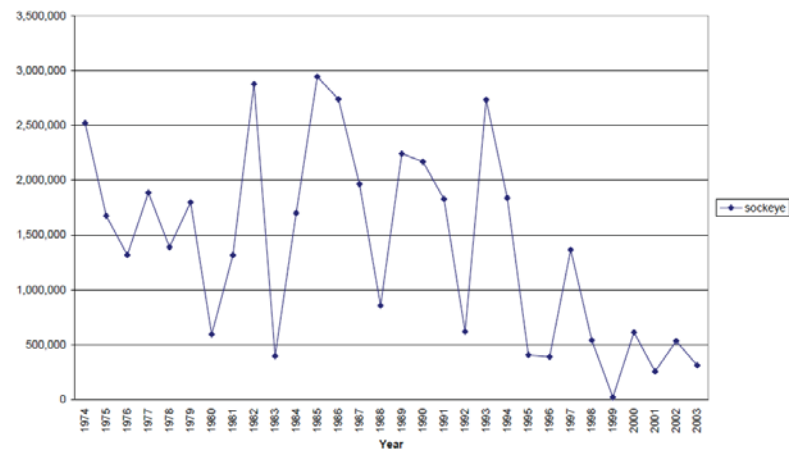
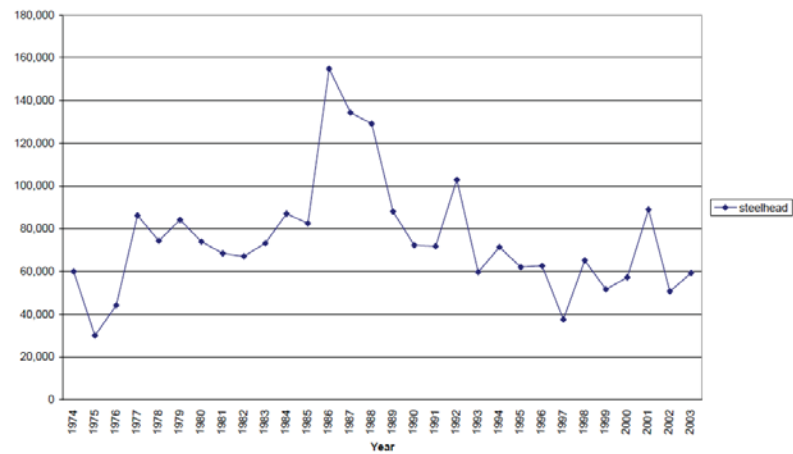


Figure 14. Combined Treaty and Non-Treaty Sport and Commercial Harvest in Western Washington





The Honorable Ricardo Martinez  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  <div style="text-align: right;">Plaintiffs,</div>	CASE NO. CV 9213RSM Subproceeding No. 01-1
v.  STATE OF WASHINGTON, et al.,  <div style="text-align: right;">Defendants.</div>	DECLARATION OF YVONNE M. MARSH

I, Yvonne M. Marsh declare as follows:

1. I am a Paralegal Specialist for the United States Department of Justice, Environment and Natural Resources Division, Indian Resources Section. I have been employed with the Federal Government since 1981 and have been with the Indian Resources Section since approximately 1993. I have been assigned to work in the *United States v. Washington, Culverts* Subproceeding and to assist attorney, Peter Monson, in the *United States v. Washington* cases.
2. This declaration attaches and authenticates certain documents that the United States relies upon in its supplemental brief.
3. The documents obtained (and their current Internet addresses) are as follows:

- a. Exhibit 1 is a true and correct copy of the cover page and pages 151, 176, and 231 of *the Status Review Update for Pacific Salmon and Steelhead Listed Under the Endangered Species Act — Pacific Northwest* (NMFS 2010), available on NOAA's website at <http://www.nwr.noaa.gov/Publications/Biological-Status-Reviews/upload/SR-2010-all-species.pdf>.
- b. Exhibit 2 is a true and correct copy of the cover page and pages 1:3 and 3:8 of the *Fish Passage Barrier and Surface Water Diversion Screening Assessment and Prioritization Manual* (WDFW 2009), available on WDFW's website at <http://www.wdfw.wa.gov/publications/00061/wdfw00061.pdf>.
- c. Exhibit 3 is a true and correct copy of pages 7:2 and 7:3 of the *WSDOT Hydraulics Manual* (WSDOT 2010), available on WSDOT's website at <http://www.wsdot.wa.gov/publications/manuals/fulltext/M23-03/Chapter7.pdf>.
- d. Exhibit 4 is a true and correct copy of pages 42 and 43 of the *Fish Passage Barrier Inventory Progress Performance Report* (DOT/DFW 2012), which is available on WSDOT's website at <http://www.wsdot.wa.gov/NR/rdonlyres/EBE727F4-30DF-4C12-A9A3-30FB5D897EC5/0/2012FishPassRpt.pdf>.
- e. Exhibit 5 is a true and correct copy of pages A:42, A:44, and A:46 of the *Finding of No Significant Impact 1-405 Bellevue to Lynnwood Improvement Project* (Federal Highway Administration 2011), available on WSDOT's website at . . . [sic . . . just ended]

*[Original page 1]*

**Status review update for Pacific salmon and steelhead listed under the Endangered Species Act**

**Pacific Northwest<sup>1</sup>**

Michael Ford (ed.), Tom Cooney, Paul McElhany, Norma Sands, Laurie Weitkamp, Jeffrey Hard, Michelle McClure, Robert Kope, Jim Myers, Andrew Albaugh, Katie Barnas, David Teel, Paul Moran and Jeff Cowen\*

Northwest Fisheries Science Center  
Conservation Biology Division

\*Operations, Management and Information Division

December 10, 2010

Cite as: Ford MJ (ed.), Cooney T, McElhany P, Sands N, Weitkamp L, Hard J, McClure M, Kope R, Myers J, Albaugh A, Barnas K, Teel D, Moran P, Cowen J. 2010. Status review update for Pacific salmon and steelhead listed under the Endangered Species Act: Northwest. Draft U.S. Department of Commerce, NOAA Technical Memorandum NOAA-TM-NWFSC-XXX.

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<sup>1</sup> An equivalent report for California is available: Williams, T.H., S.T. Lindley, B.C. Spence, and D.A. Boughton. Draft (December 2010). Status review update for Pacific salmon and steelhead listed under the Endangered Species Act: Southwest. Draft U.S. Department of Commerce, NOAA Technical Memorandum NOAA-TM-SWFSC-XXX.

*[Original page 151]*

### **Puget Sound Chinook salmon: Updated Risk Summary**

All Puget Sound Chinook populations are well below the TRT planning range for recovery escapement levels. Most populations are also consistently below the spawner-recruit levels identified by the TRT as consistent with recovery. Across the ESU, most populations have declined in abundance somewhat since the last status review in 2005, and trends since 1995 are mostly flat. Several of the risk factors identified by Good et al. (2005) are also still present, including high fractions of hatchery fish in many populations and widespread loss and degradation of habitat. Many of the habitat and hatchery actions identified in the Puget Sound Chinook recovery plan are expected to take years or decades to be implemented and to produce significant improvements in natural population attributes, and these trends are consistent with these expectations. Overall, the new information on abundance, productivity, spatial structure and diversity since the 2005 review does not indicate a change in the biological risk category since the time of the last BRT status review.

### **References**

- Good TP, Waples RS, Adams P (2005) Updated status of federally listed ESUs of West Coast salmon and steelhead. U.S. Dept. Commer., NOAA Tech. Memo. NMFS-NWFSC-66., p. 598.
- Myers, J. M., R. G. Kope, G. J. Bryant, D. J. Teel, L. J. Lierheimer, T. C. Wainwright, W. S. Grant, F. W. Waknitz, K. Neely, S. Lindley, R. S. Waples.

1998. Status review of Chinook salmon from Washington, Idaho, Oregon, and California. U.S. Dept. of Commerce, NOAA Tech. Memo., NMFS-NWFSC-35, 443 p.

Puget Sound Technical Recovery Team (PSTRT). April 30, 2002. Planning ranges and preliminary guidelines for the delisting and recovery of the Puget Sound Chinook Salmon Evolutionarily Significant Unit. [http://www.nwfsc.noaa.gov/trt/Puget\\_docs/trtpopesu.pdf](http://www.nwfsc.noaa.gov/trt/Puget_docs/trtpopesu.pdf) 20pp.

Ruckelshaus, M.H., K.P. Currens, W.H. Graeber, R.R. Fuerstenberg, K. Rawson, N.J. Sands, and J.B. Scott. 2006. Independent populations of Chinook salmon in Puget Sound. NOAA Technical Memorandum NMFS-NWFSC-78. 145pp.

Sands, N. J. 2009. A user's guide to the abundance and productivity (A & P) tables as developed for Puget Sound Salmon. From the Puget Sound Technical Recovery Team (PSTRT) Abundance and Productivity (A & P) Workgroup. Fourth draft, 20 April, 2009. (Available from N. J. Sands, Northwest Fisheries Science Center, 2725 Montlake Blvd. E., Seattle, WA 98112.)

Sands, N. J. 2007. Estimating missing age data for Pacific salmon cohort run reconstruction using the "age engine." Draft, 28 September, 2007. (Available from N. J. Sands, Northwest Fisheries Science Center, 2725 Montlake Blvd. E., Seattle, WA 98112.)

Shared Strategy 2007. Puget Sound Recovery Plan. Adopted by NMFS January 19, 2007. <http://www.nwr.noaa.gov/Salmon-Recovery-Plann>

ing/Recovery-Domains/PugetSound/PS-Recovery-Plan.cfm

*[Original page 176]*

### **Hood Canal summer chum salmon: Updated Risk Summary**

The spawning abundance of this ESU has clearly increased since the time of listing, although the recent abundance is down from the previous 5-years. While spawning abundances have remained relatively high compared to the low levels in the early 1990's, productivity has decreased significantly for the last 5 brood years, being lower for brood years 2002-2006 than any previous 5-year average since 1971. This is a concern for future production. Since abundance is increasing and productivity is decreasing, this suggests that improvements in habitat and ecosystem function is needed. Diversity is increasing from the low values seen in the 1990s due both to the reintroduction of spawning aggregates and the the *[sic]* more uniform relative abundance between populations; this is a good sign for viability in terms of spatial structure and diversity. Spawning survey data shows that the spawning distribution within most streams has been extended further upstream as abundance has increased (WDFW and PNPTT 2007. Overall, the new information considered does not indicate a change in the biological risk category since the time of the last BRT status review.

### **References**

Good TP, Waples RS, Adams P (2005) Updated status of federally listed ESUs of West Coast salmon and steelhead. U.S. Dept. Commer., NOAA Tech. Memo. NMFS-NWFSC-66., p. 598.

- Hood Canal Coordinating Council. 2007. Hood Canal & Eastern Strait of Juan de Fuca Summer Chum Salmon Recovery Plan. Adopted by NMFS May 24, 2007. <http://fwww.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Puget-Sound/HC-Recovery-Plan.cfm>
- Johnson, O. W., W. S. Grant, R. G. Kope, K. Neely, F. W. Waknitz, and R. S. Waples. 1997. Status review of chum salmon from Washington, Oregon, and California. U.S. Dept. Commer., NOAA Tech. Memo. NMFS-NWFSC-32.
- Sands, N.J. 2009. A user's guide to the abundance and productivity (A & P) tables as developed for Puget Sound Salmon. From the Puget Sound Technical Recovery Team (PS TRT) Abundance and Productivity (A & P) Workgroup. Fourth draft, 20 April, 2009. (Available from N. J. Sands, Northwest Fisheries Science Center, 2725 Montlake Blvd. E., Seattle, WA 98112.)
- Sands, N.J. K. Rawson, K.P. Currens, W.H. Graeber, M.H. Ruckelshaus, R.R. Fuerstenberg,<sup>4</sup> *[sic]* and J.B. Scott. 2009. Determination of Independent Populations and viability Criteria for the Hood Canal summer Chum salmon Evolutionarily Significant Unit. NOAA Technical Memorandum NMFS-NWFSC-101. 71 pp.
- Washington Department of Fish and Wildlife and Point No Point Treaty Tribes (WDFW and PNPTT). 2000. Summer Chum Salmon Conservation Initiative. Washington Department of Fish and Wildlife and Point No Point Treaty Tribes, Olympia, WA. 423 pages + appendices. Available at <http://wdfw.wa.gov/fish/chum/library/>

Washington Department of Fish and Wildlife (WDFW) and Point No Point Treaty Tribes (PNPTT). 2003. Report on summer chum salmon stock assessment and *[sic . . . just ended]*

*[Original page 231]*

### *Summary*

For all but a few putative demographically independent populations of steelhead in Puget Sound, estimates of mean population growth rates obtained from observed spawner or redd counts are declining—typically 3 to 10% annually—and extinction risk within 100 years for most populations in the DPS is estimated to be moderate to high, especially for *draft* populations in the *putative* South Sound and Olympic MPGs. Collectively, these analyses indicate that steelhead in the Puget Sound DPS remain at risk of extinction throughout all or a significant portion of their range in the foreseeable future, but are not currently in danger of imminent extinction.

### **Status and Trends in the Limiting Factors and Threats Facing ESU/DPS**

The Biological Review Team identified degradation and fragmentation of freshwater habitat, with consequent effects on connectivity, as a primary limiting factor and threat facing the Puget Sound steelhead DPS. In the three years since listing, the status of this threat has not changed appreciably.

### **Hatchery releases**

Hatchery releases of steelhead in Puget Sound have remained relatively constant over the last 20 years, although releases of Chinook and coho have declined (Figure 104).



The Honorable Ricardo S. Martinez  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  Plaintiffs,	NO. C70-9213 Subproceeding No. 01-1 (Culverts)
v.	DECLARATION OF
STATE OF WASHINGTON,	PAUL J. WAGNER IN
Defendant.	SUPPORT OF STATE OF WASHINGTON'S SUP- PLEMENTAL BRIEFING

I, PAUL J. WAGNER, declare as follows:

1. I am a Branch Manager of the Washington State Department of Transportation (WSDOT) Environmental Services Office and manage the fish passage barrier correction program. This supplemental declaration is based on the best information available and provides an update on new and relevant facts which have arisen since my testimony in October 2009 for WSDOT's fish passage efforts.

2. For many years, WSDOT has recognized the need to provide fish passage at stream crossings. This recognition has continued to be manifested through the practical application of resources to salmon restoration, including barrier remediation. WSDOT has worked to correct fish passage barriers as part of highway improvement projects and through a separate dedicated-fund fish passage correction program.

3. WSDOT's efforts with fish passage have recently been recognized by the U.S. Federal Highway Administration (FHWA) as national examples of excellent environmental work. In October 2010, the FHWA presented WSDOT's fish passage program with the national Exemplary Ecosystem Award. In August 2011, I received FHWA's National Environmental Excellence Award for Leadership. This is presented to one person every two years and the award cited "coordination with WDFW resulting in the correction of over 250 culverts, improving over 800 miles of stream habitat to date" in the justification.

4 Since November 2010, WSDOT has also worked extensively with the National Marine Fisheries Service (NMFS), the Army Corps of Engineers, and FHWA to develop a programmatic process for ESA section 7 consultation on transportation projects. This includes an expedited approach for ESA compliance for fish passage restoration projects. NMFS issued a Biological Opinion signifying the completion of this consultation in November 2012.

### **FINANCIAL INVESTMENT**

5. WSDOT continues to invest and make progress on fish barrier removal through its dedicated-fund program. Since October 2009, WSDOT has invested approximately \$30 million dollars for the inventory, prioritization, and correction of high priority fish passage barriers. This \$30 million investment funded 19 stand-alone fish passage projects with costs ranging from \$191,270 to \$6,750,667 per correction. Another 12 projects have

been constructed and funded as a part of other transportation projects.

6. WSDOT funds staff at Washington Department of Fish and Wildlife (WDFW) and coordinates with WDFW to inventory and prioritize fish barriers for correction. WSDOT has invested about \$3.8 million for fish passage barrier inventory and prioritization since October 2009. In the 11-13 biennium, the funding for inventory and prioritization work is approximately \$1.7 million dollars.

### **CULVERT INVENTORY**

7. The fish passage barrier inventory has changed in scope several times since its inception. Streams are dynamic and proper conditions to assess fish passage are not always present. WSDOT continues its effort to keep the inventory information current and updated.

8. Beginning in the 09-11 biennium, WSDOT and WDFW started to reassess 357 culverts thought to have the highest likelihood of becoming barriers to evaluate their current status. Additionally, inventory crews revisit sites previously identified as barriers and reassess sites to ensure the information previously collected is accurate. This effort and dedication by WSDOT and WDFW results in the number of fish passage barriers being dynamic as barriers are being added and removed from the barrier list. Following the reassessments, WDFW records show as of July 2012, a statewide total for WSDOT of 1,988 fish passage barriers. Of those, 1,519 have significant habitat gain (at least 200 meters of potential fish habitat upstream). In the *United States v. Washington* Case Area, there are 1,000 barrier

culverts relevant to the case, of which 817 are barriers with significant habitat gain.

### **FISH BARRIERS REMOVED**

9. When a fish passage barrier is identified and scheduled for correction, WSDOT works with WDFW to pick the best alternative for correcting the barrier. Culvert designs are based on the latest edition of WDFW's *Design of Road Culverts for Fish Passage Manual*. Where feasible, WSDOT prefers to use the most highly regarded design methodologies, which are stream simulation or a bridge, to correct culvert barriers. Through dedicated projects aimed at high priority fish barrier corrections, along with the corrections that are part of other highway improvement projects, WSDOT has corrected 31 barriers since October 2009. See Exhibit A. Twenty four of the 31 barrier corrections used either the stream simulation design or a bridge. The average cost of these 24 correction equaled \$1,827,168 per correction. Twenty four of the 31 barrier corrections were located in the *United States v. Washington* Case Area. Collectively, the 31 barrier corrections improved fish access to more than 150 miles of potential habitat – which included 64 miles of potential habitat in the Case Area. Additionally, since October 2009, WSDOT conducted extensive work on three culvert projects on SR 520 near Lake Washington. These corrections are expected to be completed in the summer of 2013.

10. WSDOT continues to make progress by investing in a prioritized approach because the habitat benefits of correcting individual culverts are not equal. As WSDOT moves down the prioritization

list, the amount of potential habitat that can be recovered through corrections will rapidly decline. Most of the habitat benefit can be obtained from the correction of a subset of barriers. As Exhibits B and C illustrate, the remaining 817 culvert barriers with significant habitat gain in the case area, over 50% of the potential habitat benefit is derived from correcting about 20% of the culverts.

I declare under the penalty of perjury that the foregoing is true and correct.

SIGNED at Olympia, Washington this 31st day of January, 2013.

*s/Paul J. Wagner*  
PAUL J. WAGNER

**EXHIBIT A – WSDOT Barrier Correction**

<b>WSDOT Region</b>	<b>Road</b>	<b>Site Id</b>	<b>Project Type</b>	<b>Mile Post</b>	<b>Stream</b>	<b>Tribto</b>
1	SR 542	990606	Bridge	38.98	Chain-up Cr	NF Nooksack R
1	SR 542	991060	Stream Simulation	16.07	unnamed	Nooksack R
3	SR 305	990709	Stream Simulation	9.6	unnamed	Liberty Bay
3	US 101	991252	No Slope	335.02	unnamed	Hood Canal
3	SR 305	991742	Stream Simulation	9.88	Bjorgen Cr	Liberty Bay
4	US 101	992821	No Slope	3.3	unnamed	Columbia R
6	US 2	997498	No Slope	296.35	Deadman Cr	Little Spokane R
6	SR 27	998530	Stream Simulation	40.69	unnamed	Pine Cr
1	SR 548	990429	Stream Simulation	4.67	Terrell Cr	Birch Bay
1	SR 520	994119	Stream Simulation	5.81	unnamed	Yarrow Cr
1	SR 520	994459	Stream Simulation	4.48	unnamed	Lk Washington
1	SR 520	998987	No Slope	4.81	unnamed	Lk Washington
1	US 2	07.0939 0.40	Dam Removal	23.08	Wagleys Cr	Skykomish R
1	SR 20	AR11	Bridge	75.75	Red Cabin Cr	Skagit R
3	US 101	990032	Stream Simulation	102.14	unnamed	S Branch Big Cr
3	US 101	990729	Stream Simulation	100.9	unnamed	S Branch Big Cr
3	US 101	992493	Stream Simulation	68.99	unnamed	Lower Salmon Cr
3	I-5	999532	Stream Simulation	85.81	unnamed	Dry Cr
4	SR 105	990307	Bridge	16.57	Norris SL	Willapa R

**Projects Completed Since June 2010.**

WRIA	WSDOT Fund- ing	Cost*	Project Year	Linea l Gain (m)	Linea l Gain (mi)	PI	Spawn -ing Area (m <sup>2</sup> )	Rear- ing Area (m <sup>2</sup> )
01	DI	1,286,196	2010	276	0.2	14.63	370	491
01	TP		2010	188	0.1			
15.0291	DI	2,887,452	2010	2,803	1.7	24.15	2,135	7,364
16.0218	OT		2010	210	0.1	12.24	617	268
15.0290	DI	3,546,564	2010	1,520	0.9	17.21	2,387	1,793
24	OT	49,698	2010	1,400	0.9	21.23	0	19,968
55.0051	TP		2010	92,225	57.3			
34	TP		2010	7,500	4.7			
01.0089	DI	1,553,230	2011	11,313	7.0	26.44	2,767	52,518
08	TP		2011	522	0.3	6.36	501	528
08.0257	TP		2011	2,391	1.5	14.8	888	985
08	TP		2011	1,051	0.7			
07.0939	DI	687,462	2011	15,105	9.4	50.82	4,785	45,461
03.0343	OT	3,610,665	2011	14,000	8.7			
22.0059	DI	1,071,041	2011	7,870	4.9	25.82	2,643	19,327
22.0059	DI	844,713	2011	1,202	0.7	17.97	13	2,895
24.0106	DI	1,505,251	2011	4,606	2.9	14.46	857	7,163
23	TP		2011	1,620	1.0			
24	OT	2,801,399	2011	2,500	1.6			

WSDOT Region	Road	SiteId	Project Type	Mile Post	Stream	Tribto
1	SR 9	931684	No Slope	2.65	unnamed	Great Dane Cr
1	SR 530	990151	Stream Simulation	42.99	Fortson Cr	NF Stillagua-mish R
1	SR 167	991486	Stream Simulation	25.65	Panther Cr	Springbrook Cr
1	SR 520; WB on-ramp	994234	Stream Simulation	5.95	Yarrow Cr	Lk Washington
1	SR 520	991736	Stream Simulation	6.04	Yarrow Cr	Lk Washington
1	SR 520; WB on-ramp	994227	Stream Simulation	5.95	Yarrow Cr	Lk Washington
1	I-90	08.0183 1.60	Stream Simulation	18.83	EF Issaquah Cr	Issaquah Cr
3	SR 112	990304	Stream Simulation	47.1	Nelson Cr	Lyre R
3	SR 112	991730	Stream Simulation	25.6	unnamed	Pysht R
4	US 97	990052	Bridge	21.35	Butler Cr	E Prong Little Klickitat R
4	I-5	994301	Fishway	81.77	China Cr	Chehalis R
6	SR 21	990096	Stream Simulation	172.85	Curlew Cr	Kettle R

\*Cost from the Transportation Executive Information

\*\*Site 994234 is the most DS feature on Yarrow Creek.  
the potential habitat gain for these features are not



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WRIA	WSDOT Fund- ing	Cost*	Project Year	Lineal Gain (m)	Lineal Gain (mi)	PI	Spawn- ing Area (m <sup>2</sup> )	Rear- ing Area (m2)
08	TP		2012	200	0.1			
05.0254	DI	1,824,066	2012	1,030	0.6	12.92	860	1,391
09.0006	TP	6,750,667	2012	5,992	3.7			
08.0252	TP		2012	6,418	4.0	22.08	1,682	13,826
08.0252	TP		2012	**	**	23.18	*	*
08.0252	TP		2012	**	**	23.18	*	*
08.0183	DI	3,146,699	2012	12,900	8.0	46.85	25,294	39,818
19.0032	DI	1,985,457	2012	4,684	2.9	11.29	2,243	2,334
19	DI	983,588	2012	3,347	2.1	20.31	1,644	4,003
30.0140	DI	2,722,498	2012	22,067	13.7	7.46	20,754	19,275
23.0870	TP	191,270	2012	8,289	5.2	14.61	2,842	14,839
60.0288	TP	435,422	2012	23,909	14.9			

30,113,428

**TOTALS: 257,138 159.8**

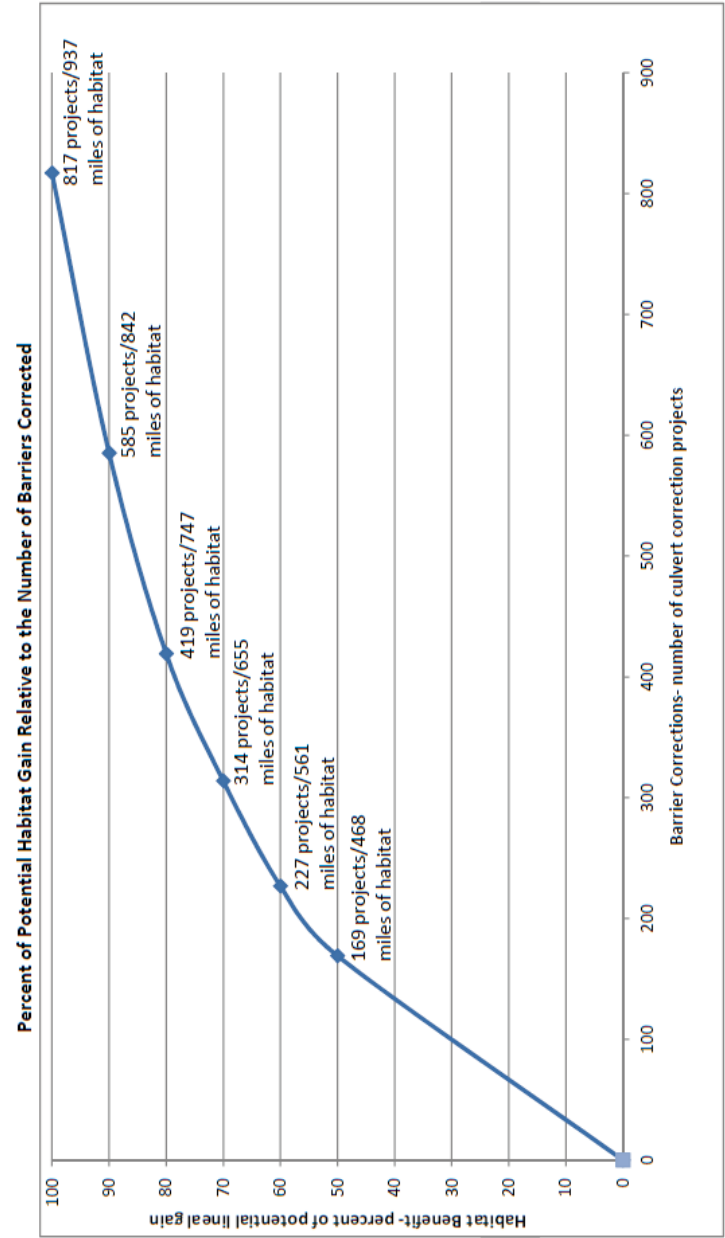
**73,282 254,247**

System (TEIS) on 1/17/2013.

Sites 991736 and 994227 are upstream and therefore included in the total.

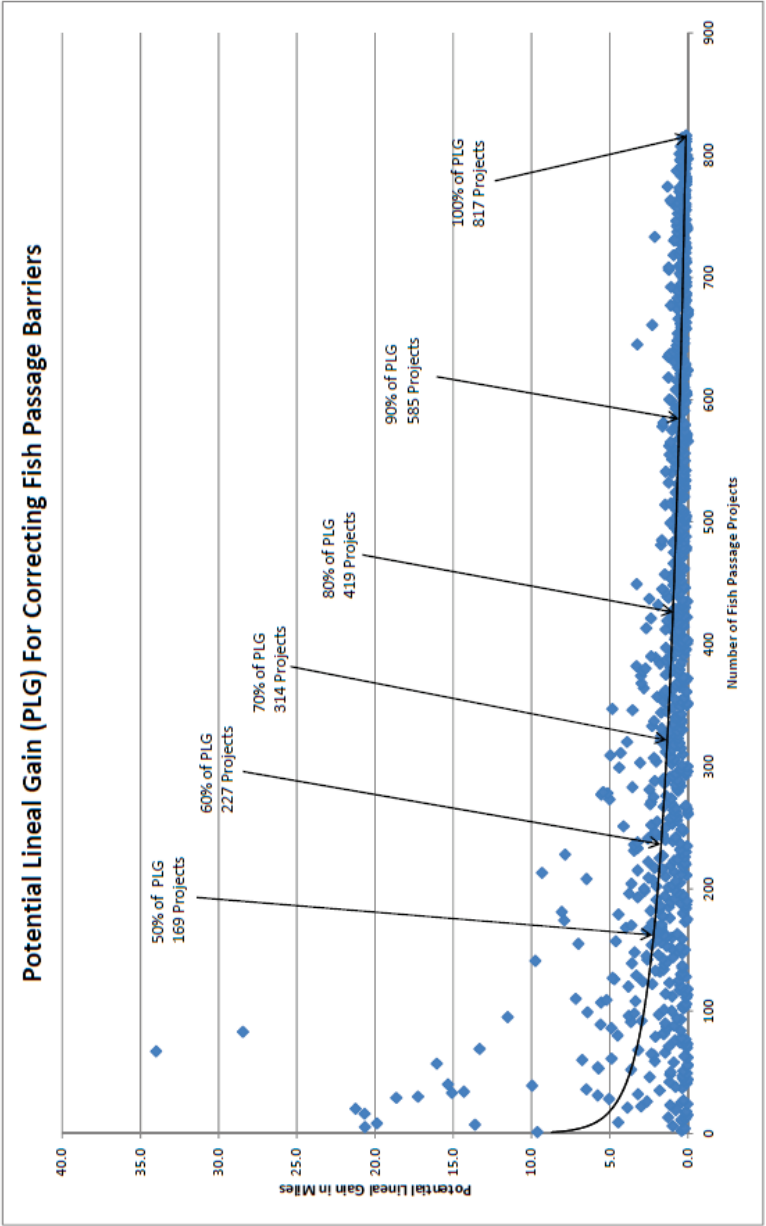
**EXHIBIT B**

Figure\_. Graph showing the relationship between fixing barrier culverts relevant to the culvert court case and the present of potential habitat gain realized using a prioritization process. The amount of habitat upstream of each culvert barrier is quite variable. Most of the habitat is opened by fixing a subset the culverts (i.e. over 50% of the habitat comes from about 20% of the culverts). There is a diminishing habitat contribution benefit from fixing the lower priority culverts.



**EXHIBIT C**

Plot showing the potential lineal gain for each fish passage barrier using the barrier culverts in the file AnadromousCaseArea09-12.xlsx sorted by the PI and showing upstream WSDOT barriers being corrected in conjunction with downstream barrier in the same system. The number of barrier corrections and the potential lineal gain is based upon estimate for the remaining 817 barrier culverts with significant habitat gain relevant to the court case. All culverts are not the same. By prioritizing barrier correction, about 20% of the barrier corrections provide over 50% of the potential habitat benefit.



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, et al.,  <div style="text-align: right;">Plaintiff,</div>	CASE NO. CV 9213RSM Subproceeding No. 01-1
v.  STATE OF WASHINGTON, et al.,  <div style="text-align: right;">Defendant.</div>	DECLARATION OF ALIX FOSTER

I, ALIX FOSTER, declare as follows:

1. I am an attorney for the Swinomish Indian Tribal Community (SITC), a plaintiff herein.

2. This declaration describes my actions since the Court's January 11, 2013 Order Dkt. 733) to obtain information from the State and attaches and authenticates certain documents that the Tribes rely upon in their supplemental brief.

3. Pursuant to the Public Records Act (PRA), Ch.42.56 RCW, SITC sent separate requests to the Washington Departments of Transportation (WSDOT), Natural Resources (WDNR) and Fish and Wildlife (WDFW) and the Washington Parks and Recreation Commission (Parks) on January 16, 2013. Generally speaking, SITC sought records regarding the State's efforts to correct culverts in the case area since discovery closed in this action. On January 18 and 23, 2013, respectively, WDNR and WDFW produced their current culvert inventory databases. WSDOT, WDFW, and Parks have produced other

records in response to the requests, but no agency has fulfilled the request and each has told us it cannot do so by February 1, 2013.<sup>1</sup>

4. On January 24, 2013, I suggested to Mr. Shorin, WDFW Counsel, that the parties attempt to stipulate to certain updated admitted facts. On January 29, 2013, after receiving no response, I emailed my request to all opposing counsel. The next day, Mr. Tomisser, lead counsel for the State, emailed that it was “too close to [February 1] . . . to switch to an approach based on stipulations.”

5. WSDOT and WDNr publish to their respective websites annual reports summarizing their culvert correction efforts. As of January 31, 2013, neither website had published a copy of a 2013 annual report summarizing the agency’s efforts in 2012.

6. The exhibits to my declaration that are listed in the attached table are true and correct copies of excerpts of Washington State publications posted on Washington State websites or produced by

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<sup>1</sup> WSDOT failed to produce anything at all for 13 days and then produced approximately 1,700 pages of documents within 48 hours of the Court’s February 1 deadline. WDFW failed to produce anything at all for 7 days, produced its database on January 23, released only 3 additional documents in the following week, and then produced over 1,800 pages of documents within 48 hours of the deadline. Parks failed to produce anything at all for 9 days, produced 12 documents on January 25, and has not produced anything since. WDNr initially produced its database on January 18 and did not produce anything again until today when it provided additional layers for its database.

Washington State agencies under the PRA in response to SITC's PRA requests.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this *1st* day of February, 2013, in La Conner, Washington.

*s/Alix Foster*  
Alix Foster



[Original page 26]

# Improving our products, services and relationships

Washington Department of Fish and Wildlife –  
Habitat Program



Presented by David Price and Jeff Davis  
House Agriculture and Natural Resources Committee  
January 16, 2013

240a

*Original page 27]*



[Original page 31]

## A Citizen's Guide to the Washington State

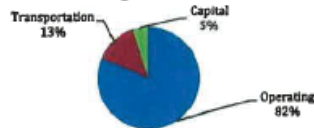


## 2012 Transportation Budget

[Original page 32]

### HOW BIG IS THE OVERALL STATE BUDGET?

As of the close of the 2012 Legislative Session, the State of Washington will spend a total of \$74.5 billion for the 2011-13 biennium. That is an average of just over \$101 million per day during the two-year spending period. This \$74.5 billion includes amounts from three different budgets, which are plans of how the state will spend the money. The relative size of each of the three state budgets is shown in the following chart:



**2011-13 State Budgets  
(Dollars in Billions)**

Operating Budget	\$60.9
Transportation Budget	\$9.9
Capital Budget*	\$3.7
<b>Total</b>	<b>\$74.5</b>

\*Excludes Capital Re-appropriations (approximately \$2.1 billion).

Sources: Winsum and Buildsum budget development systems for the 2012 Session.

- The budget that pays for the day-to-day operations of state government (including federal funds and dedicated funds) is called the **Operating Budget (\$60.9 billion)**.
- The budget that pays for transportation activities, such as designing and maintaining roads and public transit, is called the **Transportation Budget (\$9.9 billion)**. This budget includes amounts appropriated for both transportation operating activities (\$3.1 billion) and transportation capital activities (\$6.8 billion).
- The budget to acquire and maintain state buildings, public schools, higher education facilities, public lands, parks, and other assets is called the **Capital Budget (\$3.7 billion)**.

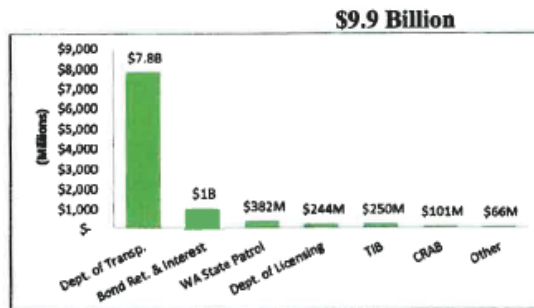
Budget-related materials frequently refer to the Near General Fund-State ("NGF-S"), which is the largest state fund; it represents more than half of the \$60.9 billion operating budget.



[Original page 33]

## HOW ARE TRANSPORTATION FUNDS SPENT BY AGENCY?

### 2011-13 Transportation Budget by Major Agency



(See Page 19 for description of TIB and CRAB)

### Washington Department of Transportation

The Washington Department of Transportation's (WSDOT) biennial budget is split approximately 82% for capital expenditures and 18% for operating expenditures. Operating programs and activities include maintenance of the state highway system, traffic services, ferry operations and security, highway traffic enforcement, traveler information, aviation services and transportation planning and research. Capital programs and activities include highway preservation and improvement projects, ferry boats and terminal preservation and rail line or car purchases and improvements.

*[Original page 34]*

## **Transportation Revenue Forecast Council**

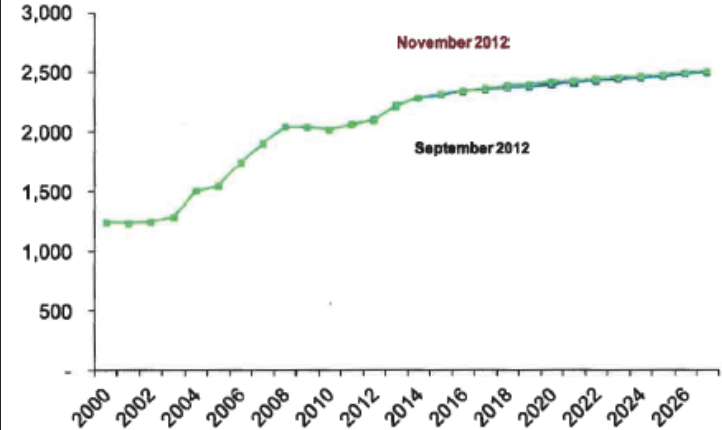
### **November 2012 Transportation Economic and Revenue Forecasts**

#### **Volume I: Summary**

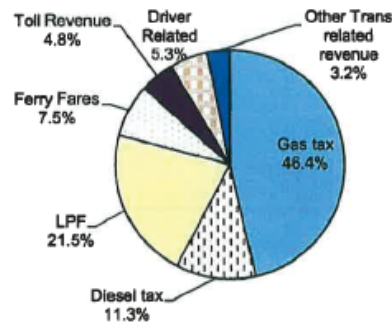
[Original page 35]

In FY 2010, transportation revenues were \$2.014 billion which was a decline of 1% over the prior fiscal year as the economy struggled from the recession. In FY 2011, transportation revenues increased slightly to \$2.06 billion or 2.3% growth over FY 2010. In FY 2012, transportation revenues are up again minimally to \$2.09 billion or 1.7% annual increase. In FY 2013, transportation revenues are projected to be \$2.216 billion, which represents an annual increase of 5.6% and a 0.1% revision from the September forecast. Overall during the 10-year horizon, transportation revenues are projected to be \$23.16 billion with an average growth rate of 1.2% each year.

**Figure 1 Total Transportation Revenues Comparison**  
November vs September 2012 forecasts  
millions of dollars



**Figure 2 Revenue by Source**  
2011-13 biennium (\$4.315 billion)



[Original page 36]

**LEAP Transportation Document 2012-2C as developed  
March 14, 2012  
2003 Nickel Account and 2005 Transportation  
Partnership Account Projects  
Highway Improvements Program (I)  
(Dollars in Thousands)**

Route	BLN	Project	Leg Dist	Prior	2011-13	2013-15	2015-17	2017-19	2019-21	2021 +	Total
112	311236A	SR 112/Neah Bay to Selkirk - Roadside Safety Improvements	24	6,599	0	0	0	0	0	0	6,599
		2005 Transportation Partnership Account - State		1,879	0	0	0	0	0	0	1,879
		Motor Vehicle Account - Federal		5,358	0	0	0	0	0	0	5,358
		Motor Vehicle Account - State		43	0	0	0	0	0	0	43
<b>Environmental - Fish Barrier Removal &amp; Channel Debris</b>											
101	310141H	US 101/Black River (Site #2) - Stabilize Slopes	24	1,247	496	7,875	0	0	0	0	9,618
		2005 Transportation Partnership Account - State		1,247	496	7,175	0	0	0	0	8,918
		Motor Vehicle Account - Federal		0	0	700	0	0	0	0	700
109	310918A	SR 109/Medger River Bridge - Replace Bridge	24	769	0	0	0	0	0	0	769
		2005 Transportation Partnership Account - State		769	0	0	0	0	0	0	769
500	15303UG	SR 500/Black River (Site #2) - Stabilize River Bank	39	3,234	16	0	0	0	0	0	3,250
		2005 Transportation Partnership Account - State		3,234	16	0	0	0	0	0	3,250
500	153037K	SR 500/Black River Bank Erosion - Rebuild Roadway	39	2,793	2,207	223	10	0	0	0	5,233
		2005 Transportation Partnership Account - State		2,793	2,207	223	10	0	0	0	5,233
542	154229G	SR 542/Neah River - Reduct River and Bridge Roadway	42	11,664	1,300	1,438	2,247	0	0	0	16,649
		2005 Transportation Partnership Account - State		11,557	1,299	1,438	2,247	0	0	0	16,541
		Motor Vehicle Account - Federal		2	0	0	0	0	0	0	2
998	099955P	Fish Passage Barriers (TPA)	99	105	1	0	0	0	0	0	106
		2005 Transportation Partnership Account - State		7,240	13,297	18,479	5,351	269	0	0	44,627
		Motor Vehicle Account - Federal		5,304	8,748	2,346	3,062	269	0	0	19,729
		Motor Vehicle Account - Local		1,914	4,148	15,813	2,243	0	0	0	24,118
		Motor Vehicle Account - State		0	12	0	0	0	0	0	12
		Motor Vehicle Account - State		22	389	311	46	0	0	0	768
<b>Environmental - Noise Walls &amp; Noise Mitigation</b>											
005	100528P	I-5/5th Ave NE to SR 92nd St - Noise Wall	46	8,791	238	34	1	0	0	0	9,064
		2005 Transportation Partnership Account - State		8,791	238	34	1	0	0	0	9,064
005	300518C	I-5/Quanta Dr E Trailside - Add Noise Wall	22	348	1,620	0	0	0	0	0	1,968
		2005 Transportation Partnership Account - State		348	1,619	0	0	0	0	0	1,967
		Motor Vehicle Account - Local		0	1	0	0	0	0	0	1
005	300518D	I-5/14th Ave Thompson Pt - Add Noise Wall	22	926	1,801	0	0	0	0	0	2,727
		2005 Transportation Partnership Account - State		926	1,801	0	0	0	0	0	2,727
005	800524H	I-5/Reddon St to E Shady St - SR I-5, Wetlands - Noise Wall	43	8,213	190	0	0	0	0	0	8,403
		2005 Transportation Partnership Account - State		8,213	190	0	0	0	0	0	8,403



UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF  
AMERICA, et al.

Plaintiff,

v.

STATE OF  
WASHINGTON, et al.,

Defendant.

CASE NO. CV 9213RSM  
Subproceeding No. 01-01

DECLARATION OF  
KEITH LUTZ

I, KEITH LUTZ, declare as follows:

1. I re-aver and incorporate ¶¶ 1-4 of my Aug. 11, 2006 Declaration (“Dec.”) (Dkt. 299).

2. Using the methods described in Dec. ¶ 4, final Tribal harvest data 2008-2011 was:

	Chinook	chum	pink	Coho
2008	207,446	569,829	758	337,604
2009	184,881	355,560	1,946,714	508,356
2010	284,493	546,781	1,714	322,852
2011	285,147	621,129	2,280,645	379,952
TOTAL	961,967	2,093,299	4,229,831	1,548,764

	sockeye	steelhead	total
2008	46,043	37,564	1,199,244
2009	12,107	44,027	3,051,645
2010	1,242,303	48,369	2,446,512
2011	218,612	49,086	3,834,571
TOTAL	1,519,065	179,046	10,531,972

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

*s/Keith Lutz*

Keith Lutz

Date: *1-31-13*

At: *Lacey, WA*

The Honorable Ricardo S. Martinez  
 UNITED STATES DISTRICT COURT  
 WESTERN DISTRICT OF WASHINGTON  
 AT SEATTLE

UNITED STATES OF  
 AMERICA, et al.,  
  
 Plaintiffs,  
  
 v.  
 STATE OF  
 WASHINGTON,  
  
 Defendant.

NO. C70-9213  
 Subproceeding No. 01-1  
 (Culverts)  
  
 DECLARATION OF  
 JEFFREY P. KOENINGS,  
 PH.D., IN LIEU OF  
 DIRECT TESTIMONY

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I, JEFFREY P. KOENINGS, Ph.D., declare as follows:

1. I currently hold a position with the Washington State Recreation and Conservation Office. The Recreation and Conservation Office manages grant programs and supports several boards whose work relates to fish conservation and outdoor recreation. I focus on international fisheries issues. I represent the States of Washington and Oregon on the Pacific Salmon Commission established under the Pacific Salmon Treaty between the United States and Canada. I have over 30 years of professional experience with salmon fisheries issues in western North America. My resumé is attached (Exhibit A).

2. I hold a Bachelor of Science in Fisheries, a Master of Science in Water Resources, and a Doctor of Philosophy in Natural Resources, all from the University of Michigan. I pursued post-doctoral studies as a National Science Foundation Post-Doctoral Fellow at the University of North Carolina at Chapel Hill.

3. After completing post-doctoral work, I spent over 20 years working for the Alaska Department of Fish and Game. I began my career as a research scientist studying the productivity of coho and sockeye salmon populations in freshwater

habitat, and the marine survival of coho and sockeye salmon. Because of my statewide responsibilities, I became an expert in the relationship between the flow of nutrients in aquatic ecosystems and fish production throughout Alaska. I have published peer-reviewed research in leading international journals, book chapters, and symposium proceedings.

4. As my career progressed, I moved into the management and policy arenas. I managed Alaska's hatcheries program, and then its commercial fisheries program. For eleven years, I worked on issues related to Alaska's role under the U.S./Canada Pacific Salmon Treaty. I represented the State of Alaska on technical bodies established under the Treaty, and I advised Alaska decision-makers on related policy matters. I also served as Alaska's non-voting representative on the Pacific Fishery Management Council, a body that manages ocean fisheries between three and 200 miles off the coasts of Washington, Oregon, and California under federal law. Because Chinook salmon from the Puget Sound, Washington Coast, and Columbia River watersheds migrate to and are caught to varying degrees in fisheries in Southeast Alaska, I became familiar with Pacific Northwest salmon fisheries issues.

5. In late 1998, I was selected as the Director of the Washington Department of Fish and Wildlife (WDFW). I held that position for ten years, from January 1999 to December 2008. As WDFW Director, I managed a biennial budget of \$340 million and a staff of 1,700 talented, dedicated people. I oversaw fisheries management in Washington and nearby ocean waters, I worked with Oregon officials to adopt concurrent regulations for Columbia River

fisheries, and I ran one of the largest hatchery systems in the world. Throughout that time, I worked extensively with tribal fishery co-managers on salmon harvest regimes, production of hatchery-origin salmon, and recovery planning and habitat actions to restore salmon. I was, and still am, deeply involved in salmon issues in the Pacific Northwest.

**I. Salmon Abundance in the  
*United States v. Washington* Case Area  
And Factors That Affect It**

6. The *United States v. Washington* Case Area is home to six species of Pacific salmon, including steelhead. Section 1.1 of Joint Exhibit 2a prepared for the 1973 trial in *United States v. Washington*<sup>1</sup> describes their general life histories. Salmon are “anadromous.” These iconic Northwest species move throughout our entire aquatic ecosystem—beginning life in inland freshwater spawning streams, migrating down major river systems, sheltering along estuaries and coastlines, finally heading out to marine waters and then repeating their journey homeward—to complete their life cycle. Adverse or beneficial conditions anywhere along the path have dramatic effects on adult salmon abundance. Because of these effects, salmon hatcheries were established decades ago throughout the Pacific Northwest to stabilize the abundance of adult salmon, primarily to support fisheries, without much thought to the effects on wild

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<sup>1</sup> Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington (May 14, 1973). (Excerpts attached as Exhibit B.)

salmon populations. The presence of hatchery-origin and wild salmon mixed together in many fisheries complicates harvest management, as managers strive to catch the hatchery fish while minimizing the incidental catch of wild fish that are now listed as threatened or endangered under the federal Endangered Species Act (ESA).

7. Pacific salmon populations from California to southern British Columbia have declined substantially over the past century. Many factors have contributed to the decline. Some, such as cyclic ocean conditions, are natural phenomena. Others, such as water pollution, are human-caused. The factors contributing to salmon population declines are summarized in an attached excerpt from the *Washington Statewide Strategy to Recover Salmon: Extinction is Not An Option—Summary* (September 1999) (Exhibit C), and at pages 5-45, 5-46, and 5-60 of the December 2008 Biological Opinion that the National Marine Fisheries Service (NOAA Fisheries) prepared in connection with the Pacific Salmon Treaty (attached as Exhibit D). The relative importance and effect of these factors, known as the “four H’s” (harvest, hatcheries, hydroelectric power, and habitat), varies from species to species and watershed to watershed. Within the habitat “H,” culverts that block fish passage can be a factor, but they are just one among many. For example, in its listing determinations under the federal Endangered Species Act, NOAA Fisheries has identified seven major habitat-related factors limiting salmon recovery statewide. Major limiting factors are the main attributes that must be addressed in recovery. Among the seven factors, we have made the most

progress, on average, in addressing fish passage issues. See Page 29, *2008 State of Salmon in Watersheds* (Exhibit E, Bates No. F0013133.)

8. In the early 1990s, the salmon's plight drew renewed public attention as federal Endangered Species Act listings began to occur in the Columbia River Basin. Just what was the condition of wild salmon in Washington? To answer that question, the Western Washington Treaty Tribes and the Washington Departments of Fisheries and Wildlife completed a Salmon and Steelhead Stock Inventory (SASSI) in 1992. State and tribal biologists sought to determine how many individual salmon and steelhead stocks there are in Washington, and the status of each. They defined a "stock" as "The fish spawning in a particular lake or stream(s) at a particular season, which fish to a substantial degree do not interbreed with any group spawning in a different place, or in the same place at a different season." Chinook salmon from Issaquah Creek are a SASSI "stock," for example. The 1992 SASSI became part of the basic information that policy makers used for salmon recovery efforts during the next decade.

9. During the 1990s, NOAA Fisheries conducted a systematic review of all salmon populations in California, Oregon, and Washington to determine whether they should be considered for listing as threatened or endangered under the federal Endangered Species Act. NOAA Fisheries developed a policy for identifying an "evolutionarily significant unit" of salmon (ESU) that would fit the ESA statutory definition of a "species." Steelhead salmon were grouped into "distinct population segments" for the same purpose. An ESU or "distinct population



segment” (DPS) may be broader than a “stock” as defined by SASSI, and may include several stocks.

10. Between 1994 and 1999, NOAA Fisheries identified dozens of Pacific salmon ESUs, reviewed the status of each and the factors affecting survival and abundance, and published the findings in the Federal Register. NOAA Fisheries conducted further reviews between 2003 and 2005. In 2008, the U.S. Fish and Wildlife Service initiated a review of the status of Lake Sammamish kokanee, a land-locked form of sockeye salmon. Here is a summary of the current Endangered Species Act status of anadromous salmon ESUs and steelhead DPSs in the *United States v. Washington* Case Area:

ESU or DPS	ESA Status	Federal Register Cite
<b>Chinook Salmon</b>		
Puget Sound Chinook	Threatened	63 Fed. Reg. 11482 (March 9, 1998) (proposed listing)  64 Fed. Reg. 14308 (March 24, 1999) (final listing)  70 Fed. Reg. 37160 (June 28, 2005) (reaffirmed listing)
Washington Coast Chinook	Not listed	63 Fed. Reg. 11482 (March 9, 1998)
<b>Coho Salmon</b>		
Puget Sound/ Strait of Georgia Coho	Species of Concern	69 Fed. Reg. 19975 (April 15, 2004)

Olympic Peninsula Coho	Not listed	60 Fed. Reg. 38011 (July 25, 1995)
<b>Chum Salmon</b>		
Puget Sound/ Strait of Georgia Chum	Not listed	63 Fed. Reg. 11774 (March 10, 1998)
Hood Canal Summer Run Chum	Threatened	63 Fed. Reg. 11774 (March 10, 1998) (proposed listing)  64 Fed. Reg. 14508 (March 25, 1999) (final listing)  70 Fed. Reg. 37160 (June 28, 2005) (reaffirmed listing)
Pacific Coast Chum	Not listed	63 Fed. Reg. 11774 (March 10, 1998)
<b>Pink Salmon</b>		
Odd-Year Pink	Not listed	60 Fed. Reg. 51928 (Oct. 4, 1995)
Even-Year (Snohomish) Pink	Not listed	60 Fed. Reg. 51928 (Oct. 4, 1995)
<b>Sockeye Salmon</b>		
Baker River Sockeye	Not listed	63 Fed. Reg. 11750 (March 10, 1998)
Ozette Lake Sockeye	Threatened	63 Fed. Reg. 11750 (March 10, 1998) (proposed listing)  64 Fed. Reg. 14528 (March 25, 1999) (final listing)

		70 Fed. Reg. 37160 (June 28, 2005) (reaffirmed listing)
Lake Pleasant Sockeye	Not listed	63 Fed. Reg. 11750 (March 10, 1998)
Lake Quinault Sockeye	Not listed	63 Fed. Reg. 11750 (March 10, 1998)
<b>Steelhead</b>		
Puget Sound Steelhead	Threatened	71 Fed. Reg. 15666 (March 29, 2006) (proposed listing)  72 Fed. Reg. 26722 (May 11, 2007) (final listing)
Olympic Peninsula Steelhead	Not listed	61 Fed. Reg. 41541 (Aug. 9, 1996)
Southwest Washington Steelhead	Not listed	61 Fed. Reg. 41541 (Aug. 9, 1996)

11. In 2002, the Washington Department of Fish and Wildlife updated the 1992 Salmon and Steelhead Stock Inventory, now called the Salmonid Stock Inventory (SaSI). Tables showing the 2002 status of stocks that spawn within the *United States v. Washington* Case Area are attached as Exhibit F. (Stocks from Willapa Bay, which is outside the Case Area, are also shown on the tables.) Here is a summary:

Condition of Salmon and Steelhead Stocks in U.S. v. Washington Case Area, as Reported in 2002 WDFW Salmonid Stock Inventory (SaSI)					
Region	Healthy Stocks	Depressed Stocks	Critical Stocks	Stocks Whose Status is Unknown	Extinct Stocks
North Puget Sound	25	15	2	24	0
South Puget Sound	28	14	3	12	1
Hood Canal	17	14	2	8	6
Strait of Juan de Fuca	11	9	5	16	1
North Coast	31	3	1	34	0
Grays Harbor	16	8	0	4	0
<b>TOTALS</b>	128	63	13	98	8

12. The ESA reviews and the 2002 SaSI tables only hint at the wide variation in the condition of *U.S. v. Washington* Case Area salmon and steelhead stocks. For example, wild chum salmon that spawn in Kennedy Creek, which flows into Totten Inlet in Mason County, are so numerous that the Kennedy Creek fall chum run has become a tourist attraction. But wild summer chum from Hood Canal are listed as threatened under the ESA.

13. Because they are only a snapshot, the SaSI tables do not show the year-to-year variability in run sizes. A scouring winter flood in a particular watershed can depress a stock for years, for example. That may have happened to Quillayute Chinook salmon in December 2007. Conditions that

affect the amount of food available to salmon while they are maturing in the ocean can have a large impact on the abundance of many stocks. Short-term El Niño events, and the long-term Pacific Decadal Oscillation, are cyclic natural phenomena that affect ocean water temperatures and currents—and food availability for salmon. When food is scarce, salmon die, and state and tribal fishery co-managers must constrain fisheries on the returning adults. We saw several years of poor ocean conditions for Pacific Northwest salmon, and meager fisheries, during the mid-1990s. Those effects are illustrated in tribal harvest numbers shown in the tables and graphs attached to the Declaration of Keith Lutz in Support of Tribes’ Motion for Summary Judgment (Doc. No. 18654/299) (attached as Exhibit G). Climate change, and its potential effects on the salmon life cycle, pose additional challenges and unknowns. Some of these are briefly described in the attached testimony that I provided to a United States Senate committee in 2008 (Exhibit H).

14. The SaSI tables do not include salmon stocks that spawn in Canada, but some Canadian salmon stocks are important contributors to treaty Indian and non-treaty fisheries within the *United States v. Washington* Case Area. Historically, the Fraser River in British Columbia supported huge runs of sockeye and pink salmon, as well as chum, coho, and Chinook. Fraser River salmon migrate in variable numbers through Washington waters in the Strait of Juan de Fuca and northern Puget Sound on their way to the Fraser River mouth at Vancouver. They pass through the usual and accustomed fishing grounds of nine of the *United States v. Washington* Tribes. The

Pacific Salmon Treaty governs allocation of the catch between Canadian and American fishermen, and orders in *United States v. Washington* govern treaty Indian/non-Indian allocation in the United States. A special panel established under the Pacific Salmon Treaty manages fisheries on Fraser River fish. *United States v. Washington* Tribes and WDFW have representatives on that panel.

15. Salmon from the Fraser River and some other British Columbia rivers have been struggling in recent years, just like their neighbors to the south. There have been three failures of the Fraser River sockeye run since 1998. The Fraser River sockeye fisheries failed in 1999, 2007, and 2008. As shown in the figures provided by the Tribes in the Declaration of Keith Lutz (Exhibit G, attached), the strength of the Fraser run can make a big difference in the overall tribal catch. In 1985, 20 percent of the Tribes' total catch was Canadian-origin sockeye, but in 1999, a year in which the Fraser River sockeye fisheries failed, only four percent of the Tribes' total catch was Canadian-origin sockeye.

16. Because many factors affect salmon abundance, catch levels in fisheries can fluctuate over time. Though 2008 was a poor year for Fraser River sockeye, we saw record returns of sockeye to the Columbia and Snake River Basins, the highest since 1950. Similarly, catch levels in Chinook fisheries in the North Pacific region have varied dramatically from each other in recent years. Chinook salmon from many rivers, including Washington rivers, mature in the marine waters off Southeast Alaska and British Columbia. Fisheries in those waters are set according

to the overall number of Chinook available. Between 2005 and 2008, the pre-season Chinook abundance-based catch levels decreased by about 50% off Southeast Alaska and Northern British Columbia, but remained fairly stable off the West Coast of Vancouver Island.

## **II. Efforts to Make Things Better for Salmon: Integrating or Connecting “The Four Hs”**

### **A. Introduction**

17. The late 1990s were times of turmoil in salmon fisheries management in the Pacific Northwest. For several years, the United States and Canada had been unable to agree on an update to the Pacific Salmon Treaty, which limits catches in fisheries on salmon stocks that migrate between the two countries. Heavy fishing in both countries was putting salmon stocks at risk. In the Columbia River, several salmon and steelhead stocks had been listed as threatened and endangered under the federal Endangered Species Act. In *United States v. Oregon*, the Columbia River counterpart to *United States v. Washington*, the States, Tribes, and the Federal Government had been taking each other to court over disagreements about how to manage fisheries in the face of ESA constraints. In Puget Sound, additional ESA listings were on the horizon. That was the situation I found when I arrived at WDFW in early 1999.

18. I believed then, and still believe today, that the best way to rebuild sustainable salmon populations is through an integrated, holistic system of stewardship that provides protection and support throughout the salmon’s entire life cycle. Fisheries

managers call this “gravel-to-gravel” management, because it extends from the gravel streambeds where salmon first emerge from their eggs as fry, out to the open ocean where the salmon feed and mature to adults, and back to the gravel of the natal streams, where the adult salmon return to spawn and create the next generation. A “gravel-to-gravel” management approach is possible only through collaboration between all the people whose lives are intertwined with the salmon.

19. To enhance that collaboration, one of my top priorities when I came to WDFW was to reestablish a co-manager relationship between WDFW and tribal governments. One of the first things I did when I arrived was to establish a new unit within the Department that is now called the Intergovernmental Resource Management (IRM) group. Its primary mission is to work cooperatively with the Indian Tribes that have federally-secured fishing and hunting rights in Washington, in government-to-government, co-management relationships. I also made organizational changes within WDFW to carry out my philosophy that science should drive decision-making, not the other way around.

20. As of 1999, it was already Washington State policy to take the lead in responding to ESA salmon listings. Human activity that affects salmon survival and recovery has been categorized into “4 H’s”—harvest, hatcheries, hydroelectric power, and habitat. As described in the attached testimony that I provided to a Washington State legislative committee in 2004 (Exhibit D), the Washington Legislature adopted several key pieces of legislation over several legislative sessions, beginning in 1998, to address all



four “H’s”, both in the short term and over the long term. Most of the legislation is currently codified in Chapters 77.85 and 77.95 of the Revised Code of Washington. During my ten years as WDFW Director, my staff and I worked with the fishery co-manager Tribes, including those in *United States v. Washington* and *United States v. Oregon*, state, federal, and Canadian officials, the Washington Legislature, the United States Congress, local governments, and non-governmental groups to implement the legislative policies and improve conditions for wild salmon in all four “H’s” throughout Washington State. This work is summarized in guest columns I wrote for the Seattle Post-Intelligencer in 2003 and 2008, both of which are attached (Exhibits J and K).

## **B. Harvest**

21. Fisheries management within the *United States v. Washington* Case Area has changed quite a bit since Judge Boldt issued his injunction in March 1974. Some of those changes occurred before I arrived at WDFW, and some occurred under my direction. WDFW and the Tribes have modified fisheries management to focus more on the needs of individual stocks. We reduced fishing pressure on many wild stocks, allowing a greater percentage to return to the spawning grounds. NOAA Fisheries described some of those changes in a December 2008 Biological Opinion, noting that, while overfishing contributed to declines of Puget Sound Chinook and Hood Canal Summer Chum in the 1980s and early 1990s, state and tribal fishery co-managers have made reforms designed to allow those salmon

populations to rebuild. (See Exhibit D, pages 5-46, 5-60, 5-61, 9-18, 9-19, 9-28; Bates Nos. F0009884, F0009898-99, F0010102-03, F0010112.)

22. To help wild Chinook reach the spawning grounds, WDFW and the Puget Sound Treaty Indian Tribes jointly developed a Resource Management Plan (RMP) for Puget Sound Chinook under the federal Endangered Species Act. The RMP provides the framework under which WDFW and the Tribes manage salmon fisheries that affect Chinook in the greater Puget Sound area. WDFW and the Tribes completed the RMP in 2004 and submitted it to NOAA Fisheries for approval. NOAA Fisheries determined that the RMP is consistent with the federal ESA, concluding that state and tribal harvest would not jeopardize the existence of ESA-listed fish or impede their recovery. Third parties filed a lawsuit challenging that determination, but Judge Lasnik rejected the challenge in *Salmon Spawning & Recovery Alliance v. Lohn*, No C06-1462RSL (W.D. Wash. March 20, 2008). The current RMP will expire in 2010, and WDFW and the Puget Sound Treaty Indian Tribes are already working on a new one.

23. Harvest reform by WDFW and the Treaty Indian Tribes is not enough, however. As shown in Figure 7 of *United States v. Washington* Joint Exhibit 2a, juvenile Chinook salmon from Washington rivers migrate to Canadian and Southeast Alaskan marine waters before reversing their migration and returning to Washington as adults to spawn. People fish for them in those waters. In recent years, between one-third and two-thirds of all Chinook salmon that were harvested in the three major mixed-stock fisheries off the coasts of Southeast

Alaska and British Columbia originated in Washington waters, as depicted in Exhibit L. It is estimated that about one-third of those fish were wild salmon, many listed as threatened or endangered under the federal Endangered Species Act. New data showed that a Chinook agreement negotiated by the United States and Canada in 1999 was not performing as expected. Canadian catches of some U.S.-origin Chinook, primarily from the Lower Columbia River and Puget Sound, exceeded those anticipated by the 1999 negotiators. A lawsuit related to that situation came before this Court, *Salmon Spawning & Recovery Alliance v. Gutierrez*, No. C05-1877RSM (W.D. Wash.).

24. The 1999 U.S./Canada agreement was due to expire at the end of 2008, and at the beginning of 2007 the two countries began negotiating a replacement agreement through the United States/Canada Pacific Salmon Commission. I was appointed to be the Washington and Oregon Commissioner, and I served as the Pacific Salmon Commission Chair in 2007-08. Other people involved in the negotiations with Canada included Ron Allen of the Jamestown S’Klallam Tribe, and representatives from Alaska, Oregon, the Columbia River Treaty Tribes, and federal agencies. In addition, Terry Williams of the Tulalip Tribes and Lorraine Loomis of the Swinomish Tribe were observers at most of the negotiating sessions.

25. In May 2008, after nearly 18 months of negotiations, the Pacific Salmon Commission reached an agreement. The Chinook portion of the agreement is attached, along with a letter of transmittal to the United States and Canadian governments (Exhibit

M). The terms of the agreement require the West Coast Vancouver Island fishery in British Columbia and the Southeast Alaska fishery to reduce their catch of Chinook salmon by 30 percent and 15 percent, respectively, in each year during the 2009-2018 period. The agreement is grounded in science and is designed to be responsive to changes in salmon stock status over time. NOAA Fisheries determined on December 22, 2008 that, if implemented, the agreed-to fishing regimes, in combination with existing Chinook management regimes in Washington, are not likely to jeopardize the continued existence or impede recovery of any threatened or endangered species (Exhibit D). Canada and the United States exchanged diplomatic notes on the following day, and the new agreement entered into force on January 9, 2009. The new agreement and related documents are posted on the Pacific Salmon Commission web site, <http://www.psc.org/Index.htm>. The agreement is expected to increase the number of wild and hatchery-origin Chinook salmon returning to Washington, giving state and tribal fishery managers in the *United States v. Washington* Case Area more latitude when planning fisheries on hatchery Chinook while protecting wild Chinook. We should begin to see those effects in 2009 fisheries, before the trial in this Subproceeding commences. Most importantly, the new agreement will help fishery managers to meet the recovery exploitation rates for most wild Puget Sound Chinook stocks.

26. NOAA Fisheries has also predicted that, for most Puget Sound Chinook stocks, the new agreement with Canada is likely, in varying degrees, to boost the number of wild Chinook that reach the

spawning grounds. (See Exhibit D, pages 7-67, 7-78, 7-88; Bates Nos. F0010017, F0010028, F0010038.) That will allow the fish to explore unused habitat, expand existing spawning areas, and pioneer new spawning grounds.

27. It will take money to implement the new Pacific Salmon Treaty agreement. The agreement specifies that the United States shall make available up to \$37.5 million to invest in scientific support and to ease the pain of fishery reductions in Canada. The United States negotiators, including the Tribes, are also asking Congress for an additional \$30 million over ten years to pay for hatchery and habitat projects designed to improve the status of Dungeness, Nooksack, Skagit, Stillaguamish, and Snohomish Chinook stocks from the *United States v. Washington* Case Area. An additional \$30 million is being requested to ease the economic impact of reducing fisheries in Southeast Alaska. In September 2008, January 2009, and March 2009 I traveled to Washington, D.C., to seek such funding, along with tribal representatives from Puget Sound and the Columbia River and representatives from the States of Alaska and Oregon.

28. The tables and other information in NOAA Fisheries' December 2008 Biological Opinion on the new Pacific Salmon Treaty agreement suggest that our harvest reforms and other measures are bearing fruit. Information provided by the Tribes and WDFW shows that salmon abundance and escapement of Puget Sound Chinook and Hood Canal Summer Chum stocks is generally trending upward, although NOAA Fisheries cautions that increased escapements of wild adults may be affected by the

presence of hatchery origin Chinook. (Exhibit D, Table 5.1.4.1-4 and Figure 5.2.1.1-2, pages 5-51 and 5-62, Bates Nos. F0009889 and F009900.)

29. A new report from the Washington Governor's Salmon Recovery Office is also encouraging. The *2008 State of Salmon in Watersheds* report considered the abundance of wild Chinook in the Puget Sound Salmon Recovery Region by comparing pre-ESA listing years with post-ESA listing years. Overall, the abundance and escapements of wild Chinook across the region and within the major population groups showed increases, though some groups are not doing as well as others. (See Exhibit E, pages 35 and 37; Bates Nos. F0013139 and F001341.) As NOAA Fisheries has put it, however, "Survival and recovery of the Puget Sound Chinook Salmon ESU will depend, over the long term, on improvements in habitat conditions, and reductions in the effects of hatcheries, in addition to the harvest reforms that have been and are being implemented." (Exhibit D, page 5-52; Bates No. F0009890.)

### **C. Hatcheries**

30. Hatcheries produce the vast majority of the salmon harvested in the Pacific Northwest, generating significant economic, recreational and cultural benefits for the State of Washington, including the Treaty Tribes. For example, 60 to 70 percent of the Chinook caught in Puget Sound-area fisheries currently are of hatchery origin. But hatchery fish can also pose risks to wild fish, ranging from genetic mixing to competition for food. That has sparked an ongoing series of reforms, designed to

prevent hatchery fish—and the facilities that produce them—from interfering with wild salmon, while providing increased catches in tribal and non-tribal fisheries.

31. In Fiscal Year 2000, Congress appropriated funds to establish the Puget Sound and Coastal Washington Hatchery Reform Project. Its goals are to use science to reform hatcheries so that they will conserve wild salmon and steelhead populations while supporting sustainable tribal and non-tribal fisheries. An independent group of scientists, the Hatchery Scientific Review Group (HSRG), was established to provide guidance to policymakers and hatchery managers based on the best available science. Some of the scientists are current or retired employees of WDFW, some are affiliated with *United States v. Washington* Indian Tribes, and some work for federal agencies.

32. Between 2001 and 2003, the HSRG reviewed more than 200 state, tribal, and federal hatchery programs at over 100 hatcheries in the Puget Sound and Washington Coastal regions. In 2004, the HSRG published a report containing over 1,000 recommendations for change at individual hatcheries, along with 18 recommendations to be applied across the entire system. State, tribal, and federal hatchery managers have taken steps to implement the recommendations, and have developed databases to track the status of each one. Since 2004, WDFW and the Tribes have addressed more than 800 of the HSRG's recommendations.

33. In response to the HSRG recommendations, WDFW and the *United States v. Washington*

Tribes have discontinued several hatchery programs and have retooled others so that they will support, not degrade, naturally-spawning salmon and steelhead populations. An example is a plan that WDFW and the Tulalip Tribes jointly developed to restructure hatchery runs returning to the Tulalip Tribes' hatchery on Tulalip Bay. WDFW and the Tribes have also made infrastructure changes in their hatchery programs. For example, WDFW and the Stillaguamish Tribe have collaborated in making improvements at facilities on the Stillaguamish River.

34. All of this takes money, and many of the hundreds of HSRG recommendations that remain to be implemented are the ones that are the most costly and time-consuming. Cost estimates for capital (large construction) funds range between \$100 and \$150 million to accomplish the HSRG-recommended reforms at state hatcheries in the Puget Sound region alone. Another \$5 to \$10 million in state operating funds are also required. As of December 2008, planned renovations at WDFW's Voights Creek Hatchery in the Puyallup watershed were expected to cost about \$16 million to meet HSRG recommendations and bring the hatchery up to current water quality standards. Because recent winter flooding has caused additional damage, creating additional costs, WDFW has proposed to close the Voights Creek facility altogether, with resulting loss to fisheries. Funding for reforms at all state, tribal, and federal hatcheries has been slow to materialize, and is lagging behind funding for other salmon recovery efforts.



#### **D. Hydroelectric Power**

35. With respect to their effect on Washington salmon, hydroelectric power dams get the most public attention in the Columbia River Basin, but they have a role for salmon in the *United States v. Washington* Case Area, as well.

36. The Baker River, a tributary to the Skagit River, has two hydroelectric dams that are currently operated by Puget Sound Energy under a license from the Federal Energy Regulatory Commission. As the expiration date of the original 1956 license neared, Puget Sound Energy negotiated with WDFW, the Upper Skagit, Swinomish, and Sauk-Suiattle Tribes, the Northwest Indian Fisheries Commission, and others over the terms of a new one. The parties reached agreement, and in October 2008 the Federal Energy Regulatory Commission approved the new license with the terms they had negotiated. The new license includes provisions for improved salmon propagation facilities, better management of water flows for fish, means for getting fish past the dams, in-river fish habitat enhancement with gravel and woody debris, and strategies for controlling shoreline erosion. These measures are expected to increase salmon production, primarily sockeye, from the Baker River.

37. When I arrived at WDFW, a small dam on Goldsborough Creek, in Mason County, blocked fish passage to 14 miles of excellent habitat. Goldsborough Dam had been built in 1921 to supply power to the City of Shelton, but it was no longer being used for any purpose. It was identified as a good candidate for removal because of the anticipated fish

benefits relative to the cost of removal. In 2001, after years of planning, Goldsborough Dam was removed in a \$4.8 million project that involved WDFW, the Squaxin Island Tribe, the United States Army Corps of Engineers, Simpson Timber Company, and others. In 2007, the Squaxin Island Tribe reported that 41,200 out of 42,172 juvenile coho migrating out of the creek came from the area upstream of the old dam site.

38. Negotiations and studies about making some small dams in Western Washington more fish-friendly are underway in connection with proceedings before the Federal Energy Regulatory Commission. Examples include the Jackson Project on the Sultan River in the Snohomish River Basin and the Morse Creek Project near Port Angeles. Tribes are involved in both matters. Two large fish-blocking dams in the *United States v. Washington* case area are slated for removal, the Elwha and Glines Canyon Dams on the Elwha River in Olympic National Park. Removal is expected to cost hundreds of millions of dollars.

## **E. Habitat**

39. As part of the package of salmon recovery legislation that it enacted in the late 1990s, the Washington Legislature established a process under which regional salmon recovery organizations could form and develop regional salmon recovery plans. Seven regional salmon recovery organizations have been formed, three of them within the *United States v. Washington* Case Area. Six regional recovery plans have been submitted to and approved by NOAA Fisheries. Two of them were developed for parts of the *United States v. Washington* Case Area: The Puget

Sound Salmon Recovery Plan, and the Hood Canal Chum Recovery Plan. The Governor's Salmon Recovery Office has prepared a summary of these plans (attached as Exhibit N), and their status as of the end of 2008 (attached as Exhibit E). The *United States v. Washington* Tribes and WDFW were involved in the development of both plans, co-authoring the Skagit Chinook section of the Puget Sound plan. NOAA Fisheries adopted both plans, with additions, in 2007. The Tribes and WDFW are also involved in the development of a recovery plan for Lake Ozette sockeye, and in the discussions about the development of a recovery plan for Puget Sound steelhead.

40. Most locally-developed recovery plans include provisions for all four "Hs," but habitat may be their greatest strength because that is where local communities and property owners can do the most. The Puget Sound Salmon Recovery Plan, which is expected to take 50 years to implement, takes an ecosystem approach within 14 local watersheds. Actions to be implemented include estuarine restoration, nearshore habitat restoration, floodplain restoration, streamside riparian habitat restoration, measures to create better water flow conditions for fish and clean up pollution—and fish passage barrier correction.

41. In 1999, the Washington Legislature established the Washington State Salmon Recovery Funding Board (SRF Board), one of the boards supported by the Recreation and Conservation Office where I currently work. While I was WDFW Director, a member of my staff served as a non-voting member on the SRF Board under my direction. The voting

members of the SRF Board include a representative from one of the *United States v. Washington* Tribes. The Salmon Recovery Funding Board makes grants for salmon habitat projects and other salmon recovery activities. The SRF Board has set up procedures and criteria for making annual funding awards in order to allocate funds fairly across the state in a manner that will provide the most benefit to salmon. Applicants compete for the awards. Since 2000, the SRF Board has funded 430 projects in the Puget Sound Region, totaling more than \$131 million. Grant recipients have provided nearly \$84 million in matching funds, for a total investment of more than \$215 million. During the same period, the SRF Board has funded 80 projects in the Hood Canal Region totaling more than \$24 million. Grant recipients have provided nearly \$19 million, for a total investment of \$42.3 million. In both regions, habitat restoration, including culvert replacements, represents about 50% of the expenditures. Some of the money comes from state funding sources, and some of it comes from the Pacific Coastal Salmon Recovery Fund (PCSRF) established by Congress. Some \$233 million of federal PCSRF monies have been distributed in Washington State in accordance with a Memorandum of Understanding between the SRF Board and NOAA Fisheries, which requires a minimum of 25% in non-federal matching funds.

42. Indian Tribes are eligible for and have received SRF Board grants. Some of the projects for which the Tribes have sought funding have involved culvert inventory or repair, but others have not. Illustrating our shared strategy of gravel-to-gravel stewardship that takes into account all aspects of a

salmon's life, the Tribes have sought and been granted funding for projects to restore estuaries and side channels, and to enhance stream habitat by adding large woody debris and riparian vegetation. WDFW and the Washington State Department of Transportation have been involved with the Jamestown S'Klallam Tribe and others in a multi-year, multi-million dollar effort to restore Jimmycomelately Creek and the Lower Sequim Bay Estuary, with partial funding from the SRF Board. That project is expected to help in the recovery of Hood Canal Summer Chum salmon. See Exhibit N (Bates No. F0004340).

43. Local non-profit groups called Regional Fisheries Enhancement Groups (RFEGs) are also eligible for SRF Board grants. The Washington Legislature authorized the creation of Regional Fisheries Enhancement Groups in 1989. Additional legislation during the 1990s made RFEGs eligible for state and federal funding for salmon habitat enhancement and restoration projects. RFEGs have also obtained private funding. Fourteen RFEGs have been formed, including nine in the *United States v. Washington* Case Area. WDFW provides administrative and technical support. Staff from several *United States v. Washington* Tribes serve on RFEG boards, and RFEGs and Tribes have worked together on many projects, including fish passage barrier removal projects. The Regional Fisheries Enhancement Group Program Annual Report for 2006-07 (excerpts attached as Exhibit O) states that, over a period of twelve years, RFEGs had fixed 600 fish passage barriers and opened up 650 miles of fish habitat. Most of those projects were on private lands.

44. Degraded estuarine conditions have been identified as a major factor limiting salmon recovery in Puget Sound. (See Exhibit E page 33, Bates No. F0013137, and Exhibit N, Bates No. F0004332.) To address it, large-scale estuary-restoration projects are now underway in the Nisqually River Delta, the Skagit River Delta, and in the Skokomish River Delta in Hood Canal. A brochure that the United States Fish and Wildlife Service published about the restoration of the Nisqually River Delta is attached (Exhibit P). Because people recognized the importance of these projects, they put aside other salmon recovery projects to make sure these got started. The Nisqually, Swinomish, Upper Skagit, Sauk-Suiattle, and Skokomish Tribes have played a major role in the effort.

45. A related problem in Puget Sound is degraded nearshore conditions. (See Exhibit E page 33, Bates No. F0013137, and Exhibit N, Bates No. F0004332.) An estimated 80% of the Puget Sound nearshore is no longer functional for salmon. Under my direction, WDFW joined with the United States Army Corps of Engineers in 2001 as the necessary non-federal sponsor, and then added others to convene the Puget Sound Nearshore Partnership. Its mission is to build and implement an ecosystem-based restoration strategy for the badly-damaged nearshore environment of Puget Sound. We were joined by other state and federal agencies, local governments, the Northwest Indian Fisheries Commission, tribal governments, businesses, and others. The Partnership has sponsored a multi-million-dollar study of the function of the nearshore environment. The results are being used to identify

restoration and protection actions across 2,500 miles of the Puget Sound nearshore. The Corps of Engineers is expected to use the information to advance large-scale projects beyond the existing capacity of regional programs and authorities.

46. Beginning in 2006, the Washington State Legislature has appropriated funds for Estuary and Salmon Restoration in Puget Sound to assist the work of the Puget Sound Nearshore Partnership. More than \$20 million has been granted to dozens of projects that will provide 3,500 acres of restored habitat spanning all ten Puget Sound counties. Recipients have included the Lummi, Swinomish, Tulalip, and Nisqually Tribes.

47. Salmon habitat restoration is a priority regionally as well as in Washington State. During the 1990s, it became clear to Canadians and Americans that their shared Pacific Northwest salmon runs could not be restored to optimum production through fishing restrictions alone. Recognizing the need to address non-fishing factors, Canada and the United States added a "Habitat and Restoration" provision to the Pacific Salmon Treaty in 1999 (attached as Exhibit Q). It emphasizes the importance of protecting and restoring salmon habitat and water quality as well as restricting fisheries, and thus directs the Pacific Salmon Commission to examine non-fishing factors that affect salmon production. In 2006, the Commission agreed to establish a Habitat and Restoration Technical Committee to do that work (Exhibit R). The Commission is currently developing a charter for that committee.

48. In 2007, the Pacific Salmon Commission directed an Ad Hoc Habitat Scoping Committee to prepare a report on the salmon habitat activities carried out by Canada and the United States since 1999. I co-chaired that committee, which also included members from the Columbia River Intertribal Fish Commission. We produced a report, which is attached as Exhibit S. It describes the variety of habitat restoration efforts in both countries, featuring some case studies. One of those is the Skagit River Estuary Restoration at Deepwater Slough, a joint project of the Swinomish and Sauk-Suiattle Tribes, WDFW, and the United States Army Corps of Engineers. It is designed to increase habitat for juvenile Chinook salmon, and, according to tribal monitoring data, it appears to be successful. Another case study is the removal of Goldsborough Dam described above in Paragraph 37.

49. The 1999 revisions to the Pacific Salmon Treaty also set up two endowment funds to be used for habitat restoration and other projects in the United States and Canada. Monies from the Southern Boundary Restoration and Enhancement Fund, or "Southern Fund," have been distributed to Tribes, Regional Fisheries Enhancement Groups, WDFW, and other organizations. Between 2004 and 2008, the Southern Fund distributed nearly \$5.5 million in grants for projects in Washington and Oregon, including nearly \$1 million to *United States v. Washington* Tribes and tribal organizations for projects such as the Nisqually Estuary Restoration, and for salmon stock assessments in northern Puget Sound. No distributions will be made in 2009, however. The Southern Fund is not immune from the



current global economic downturn, and the value of its corpus has fallen below the original invested amount.

50. In 2007, the Washington Legislature created the Puget Sound Partnership, whose mission is to restore the Puget Sound ecosystem to health by 2020, and to implement the Puget Sound Salmon Recovery Plan. In December 2008, the Puget Sound Partnership released an Action Agenda that the Puget Sound Tribes helped to develop. The focus of the Action Agenda is broad. It proposes actions to protect and preserve the natural functions that we still have in the Puget Sound region, restore what we can, and reduce sources of water pollution. The Action Agenda identifies dozens of state, tribal, local, federal, and Canadian entities with a role in implementing the actions, and it includes a funding strategy. These efforts have the goal of a healthier Puget Sound that can produce and sustain more juvenile salmon and other creatures.

### **III. Coupling Habitat Restoration with Hatchery and Harvest Reform: A Successful Model for Healthy Salmon and Sustainable Fisheries**

51. In my opinion, wild salmon can thrive on a sustainable basis only if we support them through their entire lifecycle, in a “gravel-to-gravel,” science-based approach to recovery. The public’s financial resources are limited, and I have already observed “salmon funding fatigue” among Congressional staffers. In my opinion, it would be a mistake to focus narrowly on only one factor affecting salmon, such as state-owned fish-blocking culverts. If juvenile salmon cannot find functional shelter in the estuary as they

adapt to salt water, they die—as was determined for the Skagit River. If they cannot find cool, unpolluted freshwater for migration and spawning, they die—as was determined for the Fraser River. If adult salmon are caught in excessive rates, the stock will not recover—as was determined for the Nooksack spring Chinook. If hatchery-origin salmon spawn at excessive rates with wild fish, the stocks suffer genetic harm. Fixing state-owned culverts alone will do little to solve these other, very real, bottlenecks to recovery.

52. Nor will fixing state-owned culverts alone sustain salmon fisheries, tribal or non-tribal. I believe that an ESA-compliant federal, state, and tribal hatchery system will be the backbone of any strategy for maintaining or increasing Chinook catches in the Puget Sound region. We cannot achieve that without funding for hatchery reform. The alternative is to cut hatchery production, with resulting cuts in fisheries. Fishermen can take nearly 100% of hatchery-origin Chinook, but future harvest rates even on healthy stocks of wild Chinook may not exceed 20-40% for many recovered stocks. We can never return to the excessive 60-80% wild harvest rates that helped put Puget Sound Chinook on the threatened species list, no matter how many culverts are fixed.

53. Within the habitat arena, culverts are not even on the list of major factors limiting Hood Canal Summer Chum salmon recovery (see Exhibit N, Bates No. F0004338). Even so, statewide, we have made more and faster progress in fixing fish passage barriers than we have in addressing other major habitat factors that affect salmon, thanks in part to the hard work of local watershed groups (Exhibit E,

pages 24, 29; Bates Nos. F0013128, F0013133). We have already fixed the easiest and cheapest fish passage barriers, and those that remain will be more difficult and expensive. In my opinion, our goal should be to address all factors on parallel tracks to the extent we can, including fish passage barriers. If we funnel inordinate amounts of money into fixing state-owned culverts while ignoring how they fit into the whole picture of the salmon life cycle, we will surely create choke points in other places, possibly prolonging salmon recovery.

54. Our experience in the Columbia River shows that spending money on only one or a few factors affecting salmon leads to failure. Billions of dollars have been spent on fish and wildlife restoration in the Columbia River Basin. Despite these expenditures, the abundance of wild salmon and steelhead populations has not recovered to the target goals set by the Northwest Power and Conservation Council. The Hatchery Scientific Review Group (HSRG), which recently completed its review of Columbia River Basin hatchery programs, has urged a holistic salmon recovery approach. In its analysis of Lower Columbia River Coho, the HSRG concluded that the benefits of habitat improvements would more than double if combined with hatchery reforms. Unless hatchery and harvest reforms are implemented, the potential benefits of current or improved habitat cannot be fully realized. (Exhibit T page 5; Exhibit U page 13.)

55. The new Chinook agreement between the United States and Canada (Exhibit M) recognizes the need for a broad, integrated approach to salmon recovery in both countries. It states that “successful

Chinook conservation, restoration, and harvest management depends on a sustained and [internationally] coordinated program of resource protection, restoration, enhancement and utilization.” In agreeing to set up a joint Habitat and Restoration Technical Committee (Exhibit R), the United States and Canada have promised to work together in planning how to integrate all factors necessary to help salmon survive and thrive in the *United States v. Washington* Case Area and regionally.

56. As shown in the attached “H-integration” diagram (Exhibit V), everything is connected when it comes to salmon. In the past, poor land use degraded habitat, and the wild salmon declined. Hatcheries were built to replace both. People who caught the more abundant hatchery fish took too many wild fish, and the wild salmon declined some more. Uncaught hatchery fish crowded the spawning grounds, and the outcompeted wild salmon declined still more. The gravel-to-gravel cycle was broken. My vision for the future is to reconnect the pieces. In restored freshwater and estuarine habitats, wild salmon will increase, and hatcheries will function as nurseries for wild salmon. Fisheries will target hatchery-origin fish while sparing wild fish. Wild salmon will thrive on the spawning grounds. The wild salmon will be healthy, and fisheries, catching both hatchery-origin and wild salmon, will be sustainable. Only if we reconnect all of the pieces in the gravel-to-gravel cycle can that happen.

57. We are reconnecting those pieces in the *United States v. Washington* Case Area. The integrated, collaborative, bottom-up salmon recovery approach we now have in place is the first time such

an approach has been tried, thanks in large part to the close working relationship between WDFW and the Tribes. While this Subproceeding has been pending, WDFW, the Tribes, other state agencies, local governments, citizen groups, and individuals have expended countless hours developing ecosystem-focused, science-based strategies to increase the number of salmon available in fisheries in the *United States v. Washington* Case Area. A lot of money has already been well spent as we are beginning to see signs of success. As NOAA Fisheries has cautioned, however, “the most pervasive risks to improved status of listed salmon require long and difficult efforts to correct, and many actions geared toward reducing the likelihood of extinction still require relatively long periods of time for their positive effects to become noticeable.” (Exhibit D, page 5-45; Bates No. F0009883.) The integrated strategies we have developed and thus far funded to address the complete life-history of wild salmon will take decades to fund and fully implement throughout the *United States v. Washington* Case Area. In my opinion, they should continue to be given the chance to build healthy fish populations and sustainable fisheries.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this *31st* day of March, 2009, at Olympia, Washington.

*s/Jeffrey P. Koenings*  
JEFFREY P. KOENINGS, PH.D.

**EXHIBITS TO THE DECLARATION OF  
JEFFREY P. KOENINGS, Ph.D**

**Exhibit A**

Resumé of Jeffrey P. Koenings, Ph.D.

**Exhibit B**

Cover page, Section 1.1, and Figures 7 and 8 from *United States v. Washington Joint Exhibit 2a, Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Areas of Western Washington* (May 14, 1973)

**Exhibit C**

Excerpt from the *Washington Statewide Strategy to Recover Salmon: Extinction is Not An Option—Summary* (State of Washington Governor's Salmon Recovery Office, September 1999) (Cover pages and pages II.11 – II.21; Bates Nos. H00002844 - H00002846 and H00002863 – H00002873)

**Exhibit D**

*Endangered Species Act Section 7(a)(2) Consultation Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation: Consultation on the Approval of Revised Regimes under the Pacific Salmon Treaty and the Deferral of Management to Alaska of Certain Fisheries Included in those Regimes* (National Marine Fisheries Service, December 22, 2008) (Bates Nos. F0009795 – F0010216)

**Exhibit E**

Excerpt from 2008 State of Salmon in Watersheds: Salmon Recovery Act 10th Anniversary (State of Washington Governor's Salmon Recovery Office,

2009) (Bates Nos. F0013103 – F0013157 and F0013197 – F0013202)

**Exhibit F**

Salmonid Stock Inventory 2002 Summary Tables for stocks originating from the *United States v. Washington* Case Area and Willapa Bay (Washington Department of Fish and Wildlife 2002)

**Exhibit G**

Declaration of Keith Lutz in Support of Tribes' Motion for Summary Judgment (*United States v. Washington* Doc. No. 18564; Subproceeding 01-1 Doc. No. 299)

**Exhibit H**

Testimony of Jeffrey P. Koenings, Ph.D., Director, Washington Department of Fish and Wildlife, to the United States Senate Commerce, Science and Transportation Committee Field Hearing, Seattle, Washington, May 27, 2008 (Bates Nos. F0013264 – F0013270)

**Exhibit I**

Testimony to the Washington State House of Representatives Capital Budget Committee, January 22, 2004, by Bill Ruckelshaus, Chair, Salmon Recovery Funding Board, Jeff Koenings, Director, Washington State Department of Fish and Wildlife, and Bob Nichols, Senior Advisor, Office of the Governor (Bates Nos. F0013256 – F0013263)

**Exhibit J**

Jeffrey Koenings, *Fish Recovery Needs State Nurture Not Just Mother Nature*, Seattle Post-Intelligencer, April 27, 2003 (Bates Nos. F0013253 – 0013255)

**Exhibit K**

Jeffrey P. Koenings, Ph.D., *Salmon Recovery Comes of Age*, Seattle Post-Intelligencer, December 12, 2008 (Bates Nos. F0008269 – F0008271)

**Exhibit L**

Pie charts showing *Average Annual Chinook Catch Size & Composition, 2002-2006; Number of Chinook, by Pacific Salmon Treaty Management Area*

**Exhibit M**

Pacific Salmon Commission final agreement regarding Annex IV, Chapter 3 Chinook, to the Pacific Salmon Treaty, with letter of transmittal to the governments of the United States and Canada (May 21, 2008)

**Exhibit N**

Excerpts from *Statewide Strategy to Recover Salmon: Responding to Federal Endangered Species Act Listings “The Washington Way”* (State of Washington Governor’s Salmon Recovery Office, 2006) (Cover page and pages 12-21; Bates Nos. F0004318, F0004331 – F0004340)

**Exhibit O**

Excerpts from the Regional Fisheries Enhancement Group Program *Annual Report for July 1, 2006 – June 30, 2007* (Washington Department of Fish and Wildlife 2007) (Bates Nos. F0013907 – F0013908, F0013910 – F0013911, F0013914)

**Exhibit P**

United States Fish and Wildlife Service, *Summary of the Comprehensive Conservation Plan for Nisqually National Wildlife Refuge*, May 2005 (Bates No. USFWS\_SUPP022500 CD)



**Exhibit Q**

Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon, Attachment E, “Habitat and Restoration”

**Exhibit R**

Pacific Salmon Commission, “Proposal for a Habitat and Restoration Technical Committee” (adopted February 2006)

**Exhibit S**

Pacific Salmon Commission Ad Hoc Habitat Scoping Committee, *An Overview of Salmon Habitat and Restoration Related Activities in Canada and the United States 1999 – 2006, Pacific Salmon Commission Technical Report No. 24* (2008) (Bates Nos. F0008491 – F0008517)

**Exhibit T**

Memo from Hatchery Scientific Review Group to Columbia River Hatchery Reform Steering Committee (January 14, 2008)

**Exhibit U**

Hatchery Scientific Review Group, *Columbia River Hatchery Reform System-Wide Report*, Part 3.2-Coho ESUs (February 2009)

**Exhibit V**

Two-page chart H-Integration, Past and Future

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