

## Case Summation for Understanding Tribal Treaty Rights and Ceded Lands in the Pacific Northwest Region: Boldt + Winters Decisions

The following materials introduce fundamental concepts of federal Indian law and provide essential background information for Oregon land trusts working to restore Tribal access to their homelands. Perhaps more than any other legal field, an understanding of Indian law requires a knowledge of the history of federal Indian policy. This historical overview is confined to concepts most relevant to a land trust toolkit, and deals broadly with issues of tribal sovereignty and the federal trust doctrine. Three cases, the *Winan decision*,<sup>1</sup> the *Boldt decision*,<sup>2</sup> and *Winters*<sup>3</sup> are summarized since they illustrate the application of these essential principles to resources that are pertinent to land trust involvement in the Land Back movement in the Pacific Northwest Region.

**Commented [ND1]:** I read Winans and think it would be good to include it because it specifically deals with tribal access on privately owned lands.

### I. Eras of Indian Law and History Discussed in the Memo:

Federal Indian policy is divided into specific periods with distinct legal developments. This memo briefly touches on: the Colonial Period (up to 1789); the Early Republic (1789-1830); the Removal Era (1820-1860); the Reservation Era (1850-1887); the Allotment and Assimilation Era (1871-1934); and Self Determination (1968-present), while excluding other significant periods.<sup>4</sup> What follows is a discussion of these eras as they underpin an understanding of the cases in the memo.

**Commented [ND2]:** Suggest including the Allotment and Assimilation Era (1887-1934) because it was during this period that Tribes lost even more of their land base.

#### A. Colonial Period (up to 1789)

During the Colonial Period, the Law of Nations (International law) governed the interactions of the dominant European powers with Indigenous peoples. The Law of Nations included both the “doctrine of discovery” and the “law of conquest” which vested sovereign rights to the colonizing nations but preserved a measure of rights in the native populations.<sup>5</sup> Great Britain, and later the United States, primarily dealt with Indigenous peoples as separate sovereigns using treaties (supreme agreements between nations) by which Tribes would delineate their lands and include provisions about wildlife and other natural resources the Indians could continue to use. In exchange, the Indians ceded large tracks of land to the colonizing entity, first European powers, and then the federal government. Some, if not most of these treaties were made under duress. It is estimated that the federal government has or has allowed every single treaty with Indigenous people to be violated.<sup>6</sup>

<sup>1</sup> *United States v. Winans*, 198 U.S. 371 (1905).

<sup>2</sup> *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (Boldt, J.).

<sup>3</sup> *Winters v. United States*, 207 U.S. 564 (1908).

<sup>4</sup> For more information, see *Cohen's Handbook of Federal Indian Law*, ch.1 (Nell Jessup Newton, et al. eds. 2012).

<sup>5</sup> See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823) below.

<sup>6</sup>

[https://rise.articulate.com/share/\\_r5P8\\_cxd3VU2m3G01HJLcBuuhYBrLLX#/lessons/xpWLCt8rLMNJxzLKlb7Eul\\_nk4seemN2](https://rise.articulate.com/share/_r5P8_cxd3VU2m3G01HJLcBuuhYBrLLX#/lessons/xpWLCt8rLMNJxzLKlb7Eul_nk4seemN2)

With ratification of the Constitution, the federal government became the sole authority of Indian affairs. Congress is empowered to “regulate Commerce... with the Indian tribes,” Art. I, § 8, cl. 3; the President is empowered to make treaties, with the consent of the Senate, Art. II, § 2, cl. 2; and the Supremacy Clause guarantees that treaties, as well as the Constitution, and federal statutes, are the supreme law of the land. Art. VI.

#### *B. Early Republic Era (1789-1830) and Removal Era (1820-1860)*

During the Early Republic Era, the United States used its inherited treaty policy to gain vast tracts of land that it gave away or sold to fund war debts and to further settlement of the American West. Throughout this period, the federal government continued to enter into treaties to regulate relations with specific Tribes. Yet, as demand for territory grew, so did agitation for greater access to Indian lands. Eventually, demand for land dominated and removal, as the name implies, became the official government policy, where the federal government forced all treaty Tribes to an area west of the Mississippi in the hopes of relocating all Indigenous peoples to one separate territory.<sup>7</sup>

It was also during this era (1823-1832) that Chief Justice John Marshall laid the foundations of federal Indian law in three cases, *Johnson v. M’Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia* (the Marshall Trilogy). In *M’Intosh*, the Court ruled that Indian tribes had only a right of occupancy. The implication of this case was the consecration of the doctrines of discovery and conquest which shored up the United States’ title to Indian lands.

Next, in *Cherokee Nation v. Georgia*, the Court held that the Indian tribes were not foreign states but “domestic dependent nations” whose relationship to the US “resembles that of a ward to his guardian.” 30 U.S. (5 Pet.) 1, 17 (1831). A year later, in *Worcester*, the Court clarified this relationship by noting that Indian tribes were “distinct political communities, having territorial boundaries, within which their authority is exclusive.” Marshall further concluded that the laws of the states “can have no force” within tribal territories. 31 U.S. (6 Pet.) 515, 557 (1832). Today, this relationship is referred to as a trustee-beneficiary relationship meaning that the government has a legal obligation to provide certain services to tribes and to act as a fiduciary and conservator of the remaining Indian land and resources.

Together, these cases define the nature of tribal sovereignty as being akin to quasi-independent nations—a Tribe is not treated as a foreign nation due to the law of conquest, nor is it treated as a traditional state in the union, but rather as something in between. Tribal sovereignty is limited by being within the boundaries of the United States, but that tribal sovereignty is “inherent sovereignty,” which means that it predates the United States and thus is not delegated by the federal government and thereby theoretically inviolate unless qualified by treaties or express Congressional legislation.<sup>8</sup>

#### *C. Reservation Era (1850-1887)*

---

<sup>7</sup> The most familiar example of this policy is known as the Trail of Tears enacted under Pres. Jackson.

<sup>8</sup> Sovereignty means an Indian tribes’ inherent right to self-government/determination.

As it became apparent that the goal of a single separate territory containing all Indigenous peoples was unrealistic, the Removal Era gave way to the Reservation Era. The federal government began relocating tribes onto reservations, or small pockets of tribal territory where they would be inculcated in American social values and means of production. Justice Black commented on the nature of the reservations in *Arizona v. California*, “It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation.” 373 U.S. 546, 598-99 (1963). It was during this era that the tribes located in the Pacific Northwest now known as Washington negotiated treaties with the governor of the territory, Isaac Stevens, in what became known as the “Stevens Treaties”.<sup>9</sup> These are the treaties at issue in the *Winans* and *Boldt* decisions. Tribes in Oregon also signed similarly worded treaties with Joel Palmer, the Superintendent of Indian Affairs for the Oregon Territory.

Further, as a matter of policy, Congress ceased treaty making in 1871 and the United States turned to easier methods of making Indian law—namely acts of Congress. During this era, Congress passed statutes extinguishing aboriginal rights to lands where those rights were not extinguished by a treaty, generally through payment of a sum of money that undervalued the land.<sup>10</sup>

#### D. Allotment and Assimilation Era (1871-1934)

Land trusts engaged in any type of repatriation work will undoubtedly encounter the effects of the Allotment and Assimilation Era. This is because the policies in this Era are responsible for a substantial diminishment of Indian land and the fractionation of Indian ownership. These aims were primarily accomplished through the General Allotment Act, also known as the Dawes Act of 1887, which mandated the forced conversion of communally held tribal land into small parcels for individual Indian ownership and allotted the rest of the Indian land (so-called “surplus” land) to non-native interests in the hope that Indian families would assimilate into American society.

Specifically, the Act authorized the President to allot tribal lands (reservation lands) to individual tribal members in 80-160 acre parcels to be held in trust for a set period. Upon conclusion of the period, the allottee would receive the patent in fee simple absolute in the hopes that the family would then use the land in a beneficial way in accordance with American norms. Moreover, the Dawes Act also authorized the President to dispose of the “surplus” lands left over after all of the allotments had been made.<sup>11</sup>

This “experiment in social engineering<sup>12</sup>” was a disaster for Indian tribes because many allottees resisted or rejected assimilation into the American individualized agrarian lifestyle for a variety of reasons. Further, once the allottees received the patents in fee, their land could then be encumbered, sold, taxed, and be subject to intestacy laws of the state.<sup>13</sup> If an allottee was

---

<sup>9</sup> Charles Bernholz & Robert Weiner, *The Palmer and Stevens “Usual and Accustomed Places” Treaties in the Opinions of the Courts*, 25 Gov’t Info. Q., 778, 779-83 (2008).

<sup>10</sup> Michael C. Blumm, et al., *Native American Natural Resources Law: Cases and Materials* 74 (4th ed. 2018).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 75.

unable to meet the financial burdens imposed by the allotment and land ownership, they could—and often did—lose their land to sales, fraud, and sheriff’s auctions. As a result, by 1934, two-thirds of the land allotted, or approximately 27 million acres, had passed into non-Indian hands.<sup>14</sup> Additionally, due to disposal of surplus lands, Tribes lost approximately 60 million acres of trust lands.<sup>15</sup> The net result of these land programs created an enduring configuration in areas subject to them: the checkerboard pattern of Indian land ownership.

#### *E. Self Determination (1968-present)*

The modern era is referred to as the Self Determination Era because the federal government, in coming nearly full circle, implemented a policy of encouraging tribal sovereignty. Starting with President Nixon, and continuing with subsequent presidents, the Executive Branch reinitiated the federal policy of reaffirming the “government to government” relationship between tribes and the United States and began to acknowledge historical wrongs.<sup>16</sup>

### **II. Reserved Treaty Rights: The *Winans* and *Winter* Doctrines**

The three cases covered in this memo discuss reservations, treaties, and natural resources vital to tribes in Oregon and Washington—land, water, and fish. The cases summarize tribal reserved rights to resources and together represent the core cases on the reserved rights doctrine which is a critical aspect of treaty interpretation and tribal sovereignty. These cases establish and reaffirm that rights can be reserved by or for tribes in treaties, agreements, or other instruments that ceded aboriginal lands and/or created reservations.

#### *A. The Winans Decision (198 U.S. 371 (1905))*

In 1855 the Yakama Nation<sup>17</sup> signed a treaty (subsequently ratified by the United States in 1859) in which the United States promised members of the Yakama Nation “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory...together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land...” (Article III).

Over the course of the Appropriations Era, the Yakama Nation lost its land that bordered the Columbia River and other usual and accustomed fishing locations. Despite this dispossession, members of the Yakama Nation continued to access their traditional sites to fish and relied on Article III of the 1859 Treaty as the basis for their right of access to these now private lands. The landowners attempted to exclude the members of the Yakama Nation and established fishing wheels that effectively monopolized the fishery at that location. These forms of exclusion lead to the lawsuit. At issue was whether Article III’s right to access fishing grounds granted access to lands ceded or lost by the Yakama Nation and applied to private parties.

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g. President Obama’s “Apology to Native Peoples of the United States.”

<sup>17</sup> The Tribe renamed itself “Yakama” in the mid-1990s. See, <https://www.yakama.com/about/>. This memo follows the Nation’s preferred spelling.

The Supreme Court affirmed the continuing treaty right of the Yakama Nation to fish its "usual and accustomed places, in common with citizens of the Territory" even though the land had been acquired by private parties.<sup>18</sup> In expressive language, the Court interpreted the rights reserved in the treaty in a negative sense: to not be a grant of rights *to* Indians, but a grant of rights *from* them.<sup>19</sup> In this way, the Court expansively affirmed the continuing treaty right of the Yakama Nation to fish because the right to access the places in controversy "was a part of larger rights possessed by the Indians... and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."<sup>20</sup> That is to say, the access rights were held by Tribes as part of their inherent sovereignty and the treaty represented legal recognition of this fact.<sup>21</sup> Since the Treaty dealt with the cessation of large tracts of land, this interpretation meant that the contingency of future non-Indian ownership was provided for—bounded as it were—by "the usual and accustomed places" language. Therefore, according to the Court, the treaty imposed a servitude upon "every piece of land as though described therein."<sup>22</sup> The servitude is in nature both an easement (right to cross private property to reach fishing grounds) and a piscary profit *a prendre*, or the right to go onto another's land and remove the fish resource.<sup>23</sup>

*B. The Winter's Decision (207 U.S. 564 (1908))*

The United States, as trustee for several Indian tribes at the Fort Belknap Reservation in Montana, constructed an irrigation system flowing from the Milk River, a non-navigable stream, for the Tribes and sought to enjoin (stop) upstream users of the river from diverting water for their own projects. In this case, the defendants appropriated water after the federal government reserved the land for the reservation but before the irrigation project began pumping.

During the Reservation Era, the government's Indian policy was to put Tribes onto reservations which in turn would (theoretically) act as incubators for assimilation into American culture. Here, to accomplish this, the Tribes were prohibited from accessing many of their traditional foods and instead taught and encouraged to farm. To accomplish the farming, the reservation required large quantities of water to irrigate the crops. Meanwhile, nearby white settlers were also establishing farms with irrigation. The competition between the white settlers and the reservation for the limited quantity of water spurred the litigation.

The Supreme Court held that, even though there was no mention of water in the reservation proclamation, when the federal government established the reservation as a trustee for the Tribes, it not only set aside lands but *impliedly* reserved, as of the date of reservation, a quantity of appurtenant water sufficient to fulfill the purposes of the reservation from the unappropriated water in the Milk.<sup>24</sup>

---

<sup>18</sup> *U.S. v. Winans*, 198 U.S. 371, 381 (1905).

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right*, 30 *Envtl. L.* 279, 281 (2000).

<sup>22</sup> *Id.*

<sup>23</sup> Blumm, *supra* note 10, at 630.

<sup>24</sup> *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

To sum, the *Winter's Doctrine*, as it is now called, superimposes a federal water right, implied by virtue of reservation, or in other words, the setting aside of federal land (for use by Indians), on a state system that bases water rights on prior appropriation and beneficial use. This right has been expanded to all federal reservations, not just those set aside for Indian use.<sup>25</sup>

Accordingly, this case is the lodestar for most Tribal reserved rights to water because those rights are generally implied from the creation of a reservation and encompass sufficient water to carry out the purposes for which the land was set aside.

### III. Non-Possessory Off-Reservation Reserved Treaty Rights: Fishing + (Hunting/Gathering?)

*The Boldt Decision (United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974))*

As shown above, per the *Winter's Doctrine*, the act of creating a reservation impliedly reserves rights to any unappropriated water sufficient for the purposes of the reservation at the time the reservation is created. On the other end of the spectrum, however, is the question about the scope of use rights expressly reserved for places (and uses) off-reservation following the *Winans* decision. The *Boldt* decision, and its progeny, emphatically defend the rights of Indians to access First Foods on and off the reservation through the express reservation of rights contained in ratified treaties.

In the mid-1850s, Tribes negotiated treaties with the United States that ceded most of their aboriginal lands but that reserved their right to fish both on the reservations and also at traditional off-reservation sites "in common with all citizens of the territory." During the twentieth century, as environmental damage and overfishing steadily reduced the runs, state enforcement officers began arresting Indians for fishing outside of state laws. In the lead up to the litigation brought by the United States against Washington State, State officers mounted major raids on the Puyallup, Nisqually, and Green Rivers and on Makah fishers in Neah Bay. From there the state enforcement effort expanded to all twenty-three tribes in northwest Washington, where thousands of Indians exercised treaty fishing rights. The Tribes maintained that the Point Elliott Treaty guaranteed them the right to half of all the salmon and the right to fish under their own laws while the state argued that it had the power to regulate and limit their catch for purposes of conservation.

Specifically at issue in the case was the scope of Article 5 of the Point Elliott Treaty (and nearly identical Medicine Creek Treaty) which secured a "right of taking fish":

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

---

<sup>25</sup> See, *Arizona v. California*, 373 U.S. 546 (1963).

As a general proposition, Indians are subject to state law for off-reservation activities,<sup>26</sup> but an unanswered question at the time was whether the state had the right to regulate Indians exercising their recognized treaty-reserved off-reservation rights.<sup>27</sup>

After protests on the Puyallup River, in September 1970 the U.S. Attorney for the Western District of Washington filed a suit against the state of Washington on behalf of the United States and as trustee for seven Tribes. Other tribes intervened, the State Department of Fisheries and the State Game Commission, and the Washington Reef Net Owners Association were included as defendants.

Judge Boldt invalidated Washington's regulatory scheme as discriminatory because the state failed to present evidence that any member of a Tribe had exercised their rights in a way detrimental to the perpetuation of any species of anadromous fish.<sup>28</sup> Judge Boldt then interpreted the treaty language recognizing the tribes' "right to fish in common with" white settlers to mean "sharing equally the opportunity to take fish" or fifty percent of the harvest that swam past their traditional fishing grounds and ordered co-management of the fishery between the state and tribes.<sup>29</sup>

In doing so, Judge Boldt stressed the fundamentals of federal Indian law—the supremacy of federal treaty law and the quasi-sovereign status of Indians, "Because the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state."<sup>30</sup> Consequently, this case, and the litigation that followed, solidified Tribal rights to First Foods reserved in treaties crafting protections to sustain the Tribes moving forward.<sup>31</sup>

---

<sup>26</sup> *Mescalero Apache Tribes v. Jones*, 411 U.S. 145 (1973).

<sup>27</sup> See *U.S. v. Winans*, 198 U.S. 371 (1905) above.

<sup>28</sup> *United States v. Washington*, 384 F. Supp. 312, 344 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

<sup>29</sup> *Id.* This decision was ultimately upheld by the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1978).

<sup>30</sup> *Washington*, 384 F. Supp. at 4-7.

<sup>31</sup> The Oregon case coming to the same conclusion and which informed Judge Boldt's reasoning is *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969) (J. Belloni). There, J. Belloni determined that Oregon's longstanding state regulations prohibiting net fishing above the Dalles Dam was designed to conserve fish for non-Indian harvests and not to conserve the species. *Sohappy* 302 F. Supp. at 905. He ruled that Indians, via their treaties, were allotted a "fair share" of the annual harvests and created procedural and substantive standards, including tribal participation in developing harvest regulations, meant to make tribes "coequal" in status. *Sohappy* 302 F. Supp. at 911. The *Boldt* decision, and the subsequent appeals, more or less solidified J. Belloni's original holding.