



LUMMI INDIAN BUSINESS COUNCIL

2616 KWINA ROAD · BELLINGHAM, WASHINGTON 98226 · (360)384-1489

DEPARTMENT _____ DIRECT NO. _____

June 6, 2011

The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

The Honorable Larry Echo Hawk
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Re: Litigation Request to Protect Lummi Nation Treaty Fishing and Water Rights

Dear Secretary Salazar and Assistant Secretary Echo Hawk:

The Lummi Nation requests that the United States commence litigation against the State of Washington for the purpose of obtaining a declaratory judgment that quantifies the Lummi Nation's treaty reserved water rights in the Nooksack River basin and on the Lummi Reservation, and enjoins the issuance of, or reliance upon, state water permits that would impair these rights. The State's administration of water rights has abrogated tribal treaty rights and threatens to extirpate the fishery resources upon which the Nation relies.

The Lummi Nation is a federally-recognized Indian Tribe and a party to the 1855 Treaty of Point Elliott, 12 Stat. 927, 11 Kapp. 669. *United States v. Washington*, 384 F. Supp. 312, 360-363, aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976), aff'd in substantial part, 443 U.S. 658 (1979). The Nation's reservation is located in northwestern Washington State, at the mouth of the Nooksack River where it flows into Bellingham Bay.

The Lummi people have fished in the Nooksack River and the waters of northern Puget Sound since time immemorial. Article V of the Treaty of Point Elliott provides that 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." The Lummi Nation has adjudicated treaty rights to fish in the marine areas of Puget Sound from the Canadian Border "south to the present environs of Seattle" and in the river systems, "**especially the Nooksack**, emptying into the bays from Boundary Bay south to Fidalgo Bay." 384 F. Supp at 360 (emphasis added). As the court ruled in 1974, "fishing is vitally important to the people of the tribe, both for subsistence and a livelihood," 384 F.Supp. at 362, and that statement remains true today.

The Lummi Nation retains a federal Indian reserved water right to instream flows sufficient to support their treaty fishing rights. *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984); *United States v. Winans*, 198 U.S. 371 (1905). Lummi also retains a federal reserved water right for consumptive uses necessary to fulfill other

purposes of its reservation. *Winters v. United States*, 207 U.S. 564 (1908). A portion of that right was adjudicated in *United States and Lummi Nation v. State of Washington Department of Ecology*, C01-0047Z (W.D. Wash.), but that litigation covered only one water source and only a portion of the Lummi Reservation.

At this time, state-permitted water diversions have reduced flows in the Nooksack River and threaten the fish species that make up the Nation's treaty fishery. In addition, state sanctioned water withdrawals within the Lummi Reservation threaten the Nation's reserved water rights on the Reservation. Federal legal action is necessary in order to protect and preserve the Nation's water rights and its treaty fishery.

I. The Lummi Nation Has Federal Reserved Water Rights For Instream Flows Necessary To Support Its Treaty Fishery.

The Lummi Nation has treaty-based rights. A treaty between the United States and an Indian tribe is not a grant of rights to the Indians but, rather, a grant from them. *United States v. Winans*, 198 U.S. 371, 381 (1905). The Lummi Nation has possessed certain rights, such as rights to fish and hunt, from time immemorial. *State v. Buchanan*, 978 P.2d 1070, 1078 (Wash. 1999). Rights not expressly ceded in a treaty, as well as those expressly reserved, remain with the tribe. *Id.*

The Treaty of Point Elliott reserves to the Lummi Nation the right of taking fish at usual and accustomed grounds and stations. Article V, 12 Stat. 927, II Kapp. 669. In the Treaty, the Nation reserved the right to fish in the Nooksack River, its tributaries, and at other locations in Puget Sound.

In accordance with the Treaty of Point Elliott and the "reservation of rights" doctrine, the Lummi Nation retains a federal reserved water right to support its treaty hunting, fishing, and gathering rights. *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir. 1981).

The Nation's water right includes the right to sufficient instream flow to support the tribal treaty fishery. *Id.*; *Joint Board of Control v. United States*, 832 F.2d 1127, 1131-32 (9th Cir. 1987); *United States v. Anderson*, 591 F. Supp. 1, 5-6 (E.D. Wash. 1982), *aff'd in part & rev'd in part on other grounds*, 736 F.2d 1358 (9th Cir. 1984). As stated by the Ninth Circuit in *Joint Board of Control*, "[t]o the extent that the Tribes here did exercise aboriginal fishing rights, the treaty language clearly preserved those rights, and the water needed for them." *Joint Board of Control*, 832 F.2d at 1131.

The Nation's water right includes "the right to prevent other appropriators from depleting the streams water below a protected level in any area where the non-consumptive right applies." *Adair*, 723 F.2d at 1411; *Joint Board of Control*, 832 F.2d at 1131-32; *see also Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033 (9th Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985).

The priority date for water for the reserved fishing right is time immemorial, not the date of the Treaty. *Joint Board of Control*, 832 F.2d at 1131 (holding that “the priority date of time immemorial obviously predates all competing rights asserted by . . . the irrigators in this case.”) The Treaty did not create the fishing right; rather, it recognized and preserved an existing right. *Winans*, 198 U.S. at 381; *Adair*, 723 F.2d at 1414; *Buchanan*, 978 P.2d at 1078. As stated by the Ninth Circuit Court of Appeals in *Adair*:

[W]ithin the 1864 Treaty is a recognition of the Tribe’s aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation.

Such water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather, the treaty confirmed the continued existence of these rights. [Internal citations omitted]

Adair, 723 F.2d at 1414.

Because the priority date for the Nation’s fishing water rights is time immemorial, that right takes precedence over all competing and later non-Indian uses. *Joint Board of Control*, 832 F.2d at 1131. Even if the priority date were the 1855 Treaty date, that priority date would still have clear seniority over all competing non-Indian uses in the Nooksack River basin. The Nation’s senior right is entitled to the full measure of its right before other junior holders can claim any water.

In *Joint Board of Control v. United States*, the Ninth Circuit Court of Appeals specifically rejected the argument that the Tribe was not entitled to the full quantity of its fishing water right:

At oral argument, the Joint Board contended that the law would not permit the tribal fisheries to be protected in full if the result was to deprive a much larger number of farmers of the water needed for irrigation. This contention ignores one of the fundamental principles of the appropriative system of water rights. [Internal citations omitted]. ‘Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users.’ [Internal citations omitted] To the extent that the Tribes enjoy treaty-protected aboriginal fishing rights, they can ‘prevent other appropriators from depleting the streams waters below a protected level.’

Joint Board of Control, 832 F.2d at 1132.

Great effort has gone into establishing and protecting tribal treaty rights to fisheries. See *United States v. Washington*, 384 F. Supp. 312, *aff’d* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Puget Sound Gillnetters Ass’n v. United States District Court*, 573 F.2d 1117 (9th Cir. 1978), *aff’d*, *Washington v. Washington Commercial Passenger Fishing Vessel*

Assoc., 443 U.S. 658 (1979). Without sufficient water, that effort, and the resulting decisions affirming the tribal treaty right to fish would be effectively nullified.

The United States has a trust responsibility to protect tribal trust resources. This trust responsibility is held by all federal agencies. *Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). The trust responsibility requires the United States to protect tribal fishing and water rights, which are held in trust for the benefit of the tribes. See *Mitchell v. United States*, 463 U.S. 206, 224-226 (1982) (discussing, in general, United States responsibility as trustee to tribal resources); *Joint Board of Control*, 832 F.2d at 1132 (discussing United States duty, as trustee, to protect tribal water rights necessary for treaty fishing). Federal legal action brought the United States, as trustee for the Lummi Nation and its trust resources is necessary at this time in order to ensure protection and preservation of the Nation's treaty rights.

II. The Lummi Nation Has Federal Reserved Water Rights In An Amount Necessary to Fulfill the "Homeland" Purposes of its Reservation, Including, But Not Limited To, Instream Flows for Treaty Fisheries.

In addition to the "non-consumptive" reserved water rights necessary to support the treaty fishery, the Nation also has an additional quantity of "consumptive" reserved water rights necessary to fulfill the tribal "homeland" purposes of its reservation. *Winters v. United States*, 207 U.S. 564 (1908) (holding that, in setting aside land for the Fort Belknap Indian Reservation, Congress impliedly reserved water to effectuate the purpose of the reservation); see also *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (holding that when the United States withdraws land from the public domain and reserves it for a federal purpose, it implicitly reserves water to the extent needed to accomplish the purpose of the reservation). In sum, the *Winters* doctrine provides that when the United States reserves land for a purpose requiring water, it impliedly reserves sufficient water, then unappropriated, to fulfill the purposes for which the land is reserved. The priority date of the *Winters* right is the date that Congress or the Executive acted to reserve the lands.

"The underlying purpose of all Indian reservations is the establishment of a permanent home for Indian people." Cohen's Handbook of Federal Indian Law, 2005 ed., Section 19.03[5][c], citing *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981); *Winters v. United States*, 143 F.3d 740, 742 (9th Cir. 1906); *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68, 74 (Ariz. 2001). The reserved lands on the Lummi Reservation, including trust allotments, carry with them sufficient water to sustain domestic uses, food production, municipal and economic development activities of the Nation. *Id.*

Preservation of the Nation's treaty fishery is also part of the "homeland" purpose of the Reservation. *Adair*, 723 F.2d at 1409-1410 (noting that "one of the 'very purposes' of establishing the Klamath Reservation was to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle"); *Walton*, 647 F.2d at 47-48 (finding that providing a "homeland

for the Indians” as well as “preservation of the Tribe’s access to fishing grounds” were dual purposes behind establishment of the Colville Reservation). Here, the Lummi Nation has reserved rights to water in amounts necessary to provide a permanent “homeland,” including instream flows in sufficient quantities to maintain and preserve its treaty fishery.

The Lummi Reservation was created by the Treaty of Point Elliott in 1855, and its boundaries were later formalized by Executive Order in 1873. See *United States v. Milner*, 583 F.3d 1174, 1183-1186 (9th Cir. 2009). The Reservation consists of approximately 12,500 acres of uplands and 7000 acres of tidelands.

III. Federal Legal Action Is Necessary to Protect and Preserve Nooksack Water Rights and the Nooksack Treaty Fishery.

The Nooksack River originates in the Cascade Mountains east of the Lummi Reservation. It is comprised of three “forks” (the North, South, and Middle) which conjoin near Deming. Historically, the Nooksack River produced multiple runs of salmon annually, including both spring and fall Chinook (King), Coho (Silver), Chum (Dog), and, in odd numbered years, Pink (Humpback) salmon. In addition to salmon, Steelhead trout, Dolly Varden, char, and sea-run cutthroat trout spawn in the river and migrate to marine waters. All of these species are anadromous fish, i.e., fish which are hatched and spend a portion of their lives in fresh water but then migrate to the sea to mature, returning to their fresh water natal streams to spawn. Since time immemorial, the Lummi Nation and its members have harvested these species for commercial, subsistence, and ceremonial purposes. The Tribe’s treaty right guarantees the right of taking these fish.

Adequate instream flows are critical to the maintenance of the treaty fishery. As part of the treaty fishing rights litigation, the United States, State of Washington, and treaty tribes identified five necessary elements of anadromous fish habitat: (1) access to and from the sea; (2) an adequate supply of good-quality water; (3) a sufficient amount of suitable gravel for spawning and egg incubation; (4) an ample food supply; and (5) sufficient shelter. See *United States Fish and Wildlife Service, et al., 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* (1973). Each of these elements requires adequate instream flows.

The National Marine Fisheries Service has emphasized the following basic requirements for salmon habitat: “Juvenile salmon may remain in fresh water streams over a year. They must find adequate food, shelter, and water quality conditions to survive and avoid predators. They must be able to migrate upstream and downstream within their stream and into the estuary to find these conditions and to escape high water or unfavorable stream conditions.” *Proposed Recommendations for Amendment 14 to the Pacific Coast Salmon Plan for Essential Fish Habitat*, National Marine Fisheries Service, March 26, 1988 Draft, p. 137. Sufficient instream flows are necessary to maintain suitable habitat.

All life stages (eggs, larvae/alevins, juvenile and adult) of Chinook, Coho, Pink, Chum, Sockeye salmon, and Steelhead trout are found within the Three Forks of the Nooksack River. All life stages of these species require sufficient instream flows to support their habitat requirements. Migrating adult Chinook salmon require adequate flows as they travel the River to their spawning grounds. Low stream flows result in barriers that impede migration. Prior to and during spawning, adult Chinook salmon require deep pools with an abundance of large logs or other hiding structures in close proximity to spawning areas. Incubating eggs and alevins (the life stage between hatching and juvenile fish stage) require a continual supply of water through the redd (salmon spawning nest) to protect them from high temperatures, provide oxygen, and process waste. Emerging Chinook fry and juveniles require shallow stream margins and pools for rearing and benefit from logs and other cover to avoid predation and to find food.

State permitted water diversions have significantly depleted flows in the Nooksack River and directly threaten the treaty fishery. Simply put, fish need water. Low flows resulting from diversions result in reduced wetted habitat, increased temperatures, and impaired channel configuration. As flows go down, productive, protective side channels may become shallow, isolated ponds where fish are trapped. As stream temperatures rise, oxygen content is reduced and potential for disease increases. Low flows and reduced habitat area also result in reduced food supply. Competition for food increases as the same number of fish is concentrated into a smaller area. Finally, dewatering of streams can leave salmon eggs dry, exposed, and lifeless.

Due in part to increased diversions of water for development and other uses, the Puget Sound Chinook salmon and the Puget Sound steelhead are currently listed under the Endangered Species Act. The Biological Opinion prepared by the National Marine Fisheries Service on September 22, 2008 regarding Implementation of the National Flood Insurance Program in the State of Washington (the "FEMA Floodplain BiOp") identifies blockages by dams, water diversions, and shifts/changes in flow regimes as a cause in the decline of the Puget Sound Chinook salmon. FEMA Floodplain BiOp, p. 27. Similarly, habitat loss (which results from loss of stream flow) is cited as the "principal factor for decline of [Puget Sound] steelhead." *Id.* p. 30. *See also* p. 42 (noting that "salmon declines are particularly prevalent in Washington . . . due to greater human impacts on freshwater and estuarine habitats"). The FEMA Floodplain BiOp identifies the need for critical habitat consisting of spawning, rearing, and migration areas with adequate water quantity and quality. *Id.* at p. 45.

The FEMA Floodplain BiOp discussed anthropogenic impacts to the Nooksack River specifically, noting that "habitat degradation from human actions is considered the leading cause for the decline of North and South Fork [Nooksack] Chinook salmon." *Id.* at p. 64. Increased water temperatures in the South Fork were cited as a major cause of concern. *Id.* at p. 64-65. The South Fork Chinook salmon population was designated as a "high risk" population due, in part, to the "low productivity of the freshwater habitat." *Id.* at p. 112. This low productivity is due in part to extensive channel modification and diversions.

Substantial work has already been performed by stakeholders to determine the instream flows necessary to maintain the treaty fishery. More than \$1 million was invested in a public process to analyze needed water flows in the Nooksack tributaries. Several reports and recommendations resulted from a 1999 workshop which developed the methodology to quantify the relationship between instream flow and fish habitat quantity and quality for various fish species and life stages throughout Water Resource Inventory Area 1. The first item listed in the link below is an overview of how the work was conducted.

<http://wria1project.whatcomcounty.org/Resource-Library/Studies-And-Reports/Habitat-and-Instream-Flow/71.aspx>

As a result of this process, the existing analysis performed by Utah State University (USU) provides the best available science on the level of flows required for maintenance of the treaty fishery and its habitat. The USU flows significantly exceed the minimum instream flows that have been required under Washington law in the Nooksack River and its tributaries since 1985. See Washington Admin. Code 173-501. The state regulation establishing minimum flows fails to achieve its flow objectives because of non enforcement of permitting requirements or because of claims to hold diversion rights that predate 1985.

In summary, all life stages of salmon and Steelhead found in the Three Forks of the Nooksack River are negatively affected by state-permitted diversions that have reduced stream flows. The diversions are impairing maintenance of the tribal fishery. The diversions are junior in priority to the time immemorial water rights of the Tribe. Although negotiations regarding water rights and instream flows have been ongoing between the Lummi Nation, the Nooksack Tribe, the State of Washington, and other stakeholders since 2005, no resolution has been reached. Federal legal action brought by the United States on behalf of the Tribe is necessary to protect the trust resources of the Tribe and to preserve the treaty right of taking fish. If the treaty right to take fish is to be respected and to achieve the intentions of the parties, declaratory and injunctive relief must be obtained against the State and its water users.

No state adjudication of water rights in the Nooksack basin has ever been completed and no such adjudication is currently being proposed. The Nation's reserved rights can and should be determined without the necessity of determining the status or validity of any state-based water rights in the basin. Therefore, the scope of litigation necessary to confirm and defend the Nation's water rights will be much narrower than would be required if a state general adjudication were undertaken.

If you have any questions, comments or request additional information, please contact Merle Jefferson, the Director of the Lummi Natural Resources Department. He can be reached at 360-384-2225 and merlej@lummi-nsn.gov. In addition to serving as the director of the natural resources department, Merle is a member of the Lummi Indian Business Council. If you have any technical questions please contact Jeremy Freimund, the Water Resources Manager for the Lummi Natural Resources Department. He can be reached at 360-384-2212 and jeremyf@lummi-nsn.gov.

The continued efforts to protect the tribal treaty rights and the water necessary to support the treaty rights are a priority for the Lummi Nation. It is my sincere hope that the United States will now be in a position to take a meaningful role in this process. Enclosed with this letter is a resolution from the Lummi Indian Business Council that supports this litigation request to your department.

Sincerely,



Clifford Cultee, Chairman
Lummi Indian Business Council

Enclosure



LUMMI INDIAN BUSINESS COUNCIL

2616 KWINA ROAD • BELLINGHAM, WASHINGTON 98226 • (360) 384-1489

RESOLUTION # 2011-078

TITLE: Approval of Litigation Request to the U.S. Department of the Interior for the Lummi Nation Water Rights from the Nooksack River

WHEREAS, the Lummi Indian Business Council is the duly constituted governing body of the Lummi Indian Reservation by the authority of the Constitution and By-laws of the Lummi Tribe of the Lummi Reservation, Washington; and

WHEREAS, the Lummi Indian Business Council has the inherent duty and responsibility to protect the Treaty rights of the Lummi Nation and its members; and

WHEREAS, the Lummi Indian Business Council has established the Lummi Nation's Treaty reserved water rights as one of its most important priorities for affirmative protection and advocacy; and

WHEREAS, the Treaty of Point Elliot and subsequent case law established the Lummi Nation's Treaty reserved rights to water of sufficient quantity to support a permanent, economically viable homeland for the Lummi People; and

WHEREAS, the Lummi people have fished in the Nooksack River and the waters of northern Puget Sound since time immemorial. Article V of the Treaty of Point Elliott provides that 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

WHEREAS, the Lummi Nation retained a federal Indian reserved water to instream flows sufficient to support a sustainable, harvestable surplus of fish to exercise their treaty fishing rights when the reservation to take fish was made in the Treaty of Point Elliott; and

WHEREAS, at this time, state-permitted water diversions in the Nooksack River Basin threaten the fish species that make up the Nation's treaty fishery and the water resources needed to ensure a permanent, economically viable homeland for the Lummi People; and

WHEREAS, at this time, the amount of water necessary to support the Lummi Indian Reservation as a permanent and economically viable homeland has not been established; and

WHEREAS, the United States has a trust responsibility to protect tribal trust resources and therefore the United States is required to protect tribal fishing and water rights; and

WHEREAS, federal legal action brought by the United States, as trustee for the Lummi Nation and its trust resources is necessary at this time in order to ensure protections and preservation of the Nation's treaty rights, on and off the Lummi Indian Reservation; and

NOW THEREFORE BE IT RESOLVED, the Lummi Nation requests that the United States commence litigation against the State of Washington for the purpose of obtaining a declaratory judgment that quantifies the Lummi Nation's treaty reserved water rights in the Nooksack River Basin and on the Lummi Indian Reservation, and enjoins the issuance of, or reliance upon state water permits that would impair these rights; and

BE IT FINALLY RESOLVED, that the Chairman (or Vice Chairman in his absence) is hereby authorized and directed to execute this resolution and any documents connected therewith, and the Secretary (or the Recording Secretary in his absence) is authorized and directed to execute the following certification.

LUMMI NATION



Clifford Cultee, Chairman
Lummi Indian Business Council

CERTIFICATION

As Secretary of the Lummi Indian Business Council, I hereby certify that the above Resolution #2011-078 was adopted at a Regular Meeting of the Council held on the 17th day of May, 2011, at which time a quorum of 7 was present by a vote of 6 for, 0 against, and 0 abstention(s).



James Wilson, Secretary
Lummi Indian Business Council

