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June 5, 2018

### MEMORANDUM

**TO: Council Members**

**FROM: Laura Robinson, Program Liaison Coordinator**

**SUBJECT: Presentation on Indian Treaty Rights and Intersection with the Northwest Power Act**

### BACKGROUND:

**Presenter:** Charles "Jody" Calica, Vice Chair, Warm Springs Tribal Council  
John Ogan, Legal Counsel, Warm Springs Tribe

**Summary:** Jody Calica has been the Tribal Council Representative of the Simnasho District of the Warm Springs Reservation since 2016. Previously, Jody was the Education Director for the Tribe, Municipal Manager, Natural Resources General Manager, and Chief Operations Officer, as well as the Secretary-Treasurer/Chief Executive Officer for three consecutive Tribal Council terms. John Ogan is a tribal attorney who works to protect treaty rights and advance the legal rights of tribes. Together, Jody and John will share with the Council Members a briefing on the treaty rights of the Warm Springs Tribe and how those treaty rights affect fish and wildlife and other natural resource decisions in the Basin. The Northwest Power Act connects the Council to the tribes and their legal rights in a number of provisions (see [staff document](#) of all references to the responsibilities to the Native American Tribes in the Northwest Power Act).

**Relevance:** The Confederated Tribes of Warm Springs Reservation are one of the federally-recognized Columbia River Basin Tribes. Under the Northwest Power Act the Council must provide for the participation of and

consultation with the federally-recognized tribes in the Basin as the Council develops the Fish and Wildlife Program and Power Plan.

**Background:** Three bands create the Confederated Tribes of the Warm Springs: the Wascoes, the Warm Springs, and the Paiutes. The reservation is located in north-central Oregon and is bordered by the Cascade Mountain Range on the west, including the summit of Mount Jefferson, and the Deschutes River to the east.

The Treaty of 1855, also known as the Treaty of the Middle Oregon Tribes, defined 640,000 acres of reservation land and affirmed the rights of the tribes to harvest fish, game, and other foods, such as roots and berries, on the “usual and accustomed” lands outside of the reservation boundary. Also in signing the Treaty of 1855, the Tribe ceded over 10 million acres of land. The June 25, 1855 treaty was the final in a collection of four treaties negotiated and signed in the spring of 1855 with tribes of the Columbia Plateau.

The tribal government was established in 1938 and is led by an 11-member Tribal Council which includes three hereditary chiefs. Today the Warm Springs Tribe has over 5,000 citizens, most of whom live on the reservation, with the majority under 25-years old.

The Natural Resources Department is the Tribe’s largest department and it implements projects in the Deschutes, Hood, John Day, Willamette, and Fifteenmile subbasins, focusing on anadromous and resident fish and wildlife species.

**More Info:**

- [June 6, 2016 presentation](#) to the Council
- [Website](#) for the Confederated Tribes of the Warm Springs
- [Treaty of 1855](#)

# *COLUMBIA RIVER TREATY RIGHTS AND THE NWPA FISH AND WILDLIFE PROGRAM*

Presentation for the NPCC

June 12, 2018

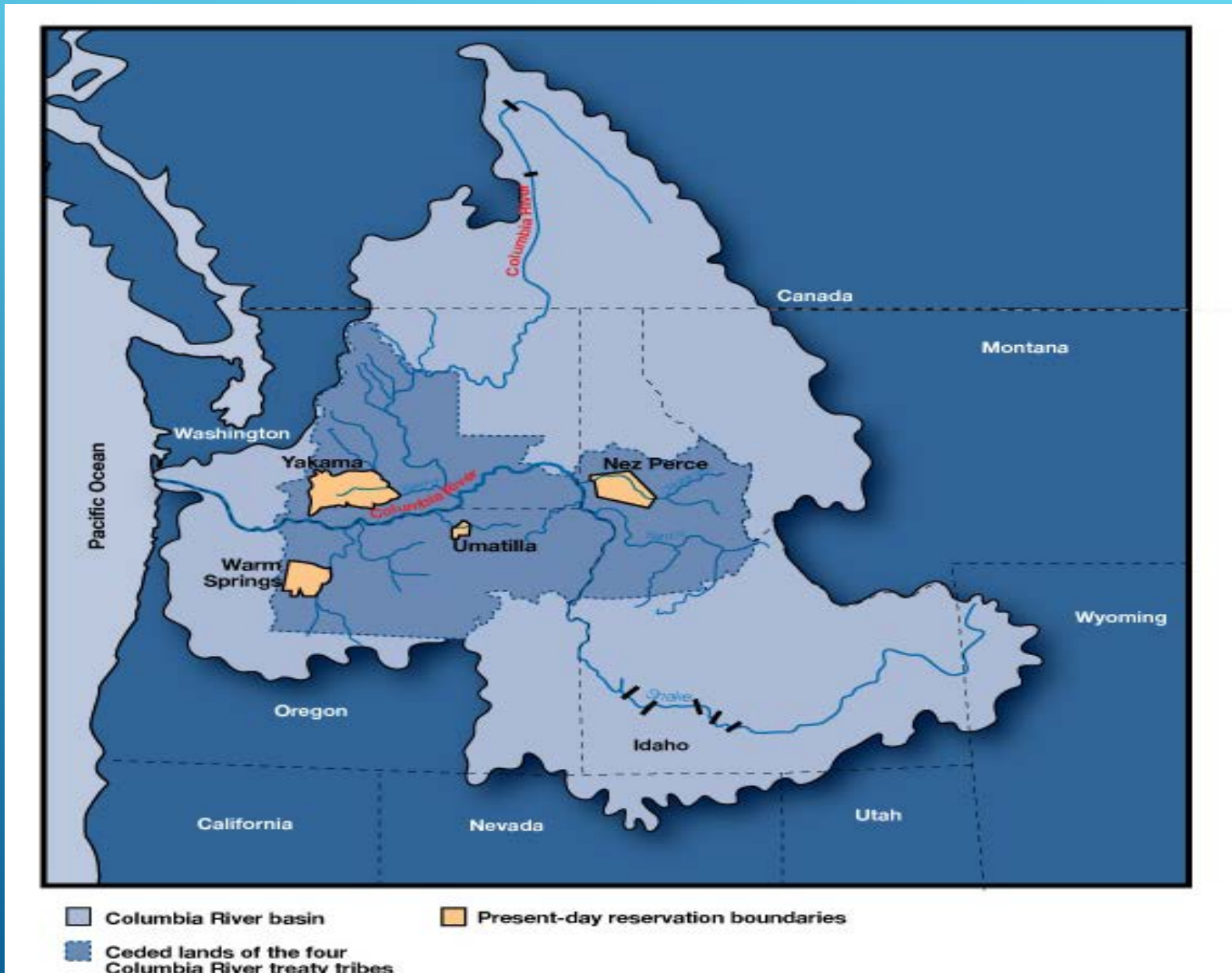
The Confederated Tribes of the Warm  
Springs

Law Office of John W. Ogan



- ▶ **Background – Columbia River Basin and its Stevens-Palmer Treaty Tribes**
- ▶ **Key Treaty Fishing Case Rulings**
- ▶ **NWPA Treatment of Treaty Rights**

# COLUMBIA RIVER TREATY TRIBES' LANDS



- ▶ In 1855, the United States entered into several treaties with Indian tribes and bands living along the Columbia River and its tributaries in what are now the states of Oregon, Washington and Idaho.
- ▶ The 1855 treaties were cession agreements in which the Tribes reserved homelands, sovereignty, and other rights, including fishing rights.

## 1855 STEVENS AND PALMER TREATIES







## THE TREATY FISHING CLAUSE

- ▶ The treaties expressly provide: "That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with the citizens of the United States [or Territory] . . . ."
- ▶ Applies to all fish "destined to pass their U&As" – *U.S. v. Oregon* (1969).
- ▶ Hatchery fish are Treaty fish – *U.S. v. Washington* (1985).



## NATURE AND SCOPE OF THE FISHING RIGHT

- ▶ They are property rights protected by the Fifth Amendment of the Constitution. *Menominee Tribe v. U.S. (1963)*.
- ▶ Include, right to have fish available for harvest; access; protection from federal actions; right to have federal court protect the fishery.





**TREATY RIGHT TO HABITAT PROTECTION  
AFFIRMED BY SCOTUS ON JUNE 11, 2018**



**THE CASE DEALT WITH STATE OWNED  
BLOCKING CULVERTS BUT THE LEGAL  
PRINCIPLE IS BROADER – HOW BROAD?**

# CONFLICTS LEADING TO *US V. OREGON*

- ▶ 1918 - Congress allows the states of Oregon and Washington to enter into an interstate compact for the purpose of jointly regulating commercial fisheries in the mainstem Columbia River.
- ▶ In 1957, the states, through the Columbia River Compact, restrict commercial fishing between Bonneville Dam and Miller Island upstream from The Dalles Dam. All commercial salmon fishing (treaty Indian & non-Indian) is prohibited above Miller Island.

# CONFLICTS LEADING TO *US V. OREGON*

- ▶ The states attempt to enforce these regulations on tribal fishermen, confrontations ensue and tensions run high.
- ▶ There are frequent state criminal court proceedings against individual tribal members.
- ▶ Tribal attorneys and U.S. Department of Interior attorneys assist in defending Indian fishermen in state courts.

# U.S. V. OREGON

- ▶ In September, 1968, the United States files suit in federal district court in Oregon against the State of Oregon to enforce Indian off-reservation fishing rights in the Columbia River Basin (*United States v. Oregon*).
- ▶ The Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Nez Perce Tribe, and the Confederated Tribes of the Warm Springs Reservation of Oregon intervene in *U.S. v. Oregon* as plaintiffs.

# IN 1969, JUDGE BELLONI RENDERS HIS DECISION IN *SOHAPPY V. SMITH/U.S. V. OREGON* HOLDING THAT:

- ▶ The tribes have a right to a fair share of the available harvest and the state is limited in its power to regulate the exercise of the Indians' federal treaty rights.
- ▶ The state may regulate treaty fisheries only when reasonable and necessary for conservation, the state's conservation regulations must not discriminate against the Indians and must be the least restrictive means.



# JUDGE BELLONI ALSO FINDS:



- ▶ That it is patently unfair to manage the Columbia Basin salmon such that few fish survive to reach the tribes' usual and accustomed fishing places.
- ▶ That the tribes have an absolute right to that fishery and thus are entitled to a fair share of the fish produced by the Columbia River system.
- ▶ That in regulating tribal fisheries for conservation purposes, the protection of treaty fishing rights must be an objective co-equal with regulation for other users of the fishery resource.

# 1974 WA INTERVENTION AND 50%

- ▶ The State of Washington intervenes in *U.S. v. Oregon* to litigate the Tribes' attempt to apply the Boldt decision to the 1974 spring run.
- ▶ Judge Belloni modifies his original decision and applies Judge Boldt's 50% rule.
- ▶ The Ninth Circuit Court of Appeals upholds this ruling (in a 1976 decision).

# A KEY PROVISION OF THE 1974 DECISION READS:



"The Indian treaty fishermen are entitled to have the opportunity to take up to 50% of the spring chinook run destined to reach the tribes' usual and accustomed grounds and stations. By `destined to reach . . . ' I am referring to that portion of the spring run which would, in the normal course of events, instinctively migrate to these places except for prior interception by non-treaty harvesters or other artificial factors."

- ▶ Treaty fishing rights are federal property rights
- ▶ Right to harvest up to 50% (counting prior interceptions against non-treaty share)
- ▶ Tribes have right to co-manage with states and self-regulate their fisheries
- ▶ Treaty right includes right to harvestable populations; may enjoin state actions that imperil those

**SUMMARIZING KEY  
TREATY RIGHT  
CONCEPTS IMPORTANT  
IN NWPA**



## RELATING IT TO THE NWPA FISH AND WILDLIFE PROGRAM



- ▶ Program measures must be consistent with legal rights of Tribes
- ▶ Program measures to complement existing and future activities of federal and state wildlife agencies and Tribes
- ▶ Program measures based on best available scientific knowledge
- ▶ Council to consult with agencies and Tribes during amendment process
- ▶ Inconsistent recommendations addressed with due weight to those of agencies and Tribes
- ▶ Decision not to include agency/Tribal recommendations requires written findings – limited bases for rejection

## **NWPA FISH AND WILDLIFE PROGRAM AMENDMENT PROCESS**



- ▶ 2018-2027 *US v. OR Management Agreement* – provides for harvest and hatchery production
- ▶ Tributary habitat protection and restoration programs – watershed scale and ongoing
- ▶ Lamprey protection and restoration
- ▶ Wildlife and non-ESA species are valued and invested in
- ▶ Seek more efficient implementation to maximize investment in biological benefits
- ▶ Collaborate on hydro operations that optimize a balance among resource benefit, responsiveness to Court, minimizes negative economic consequences on BPA and Region with targeted flexibility
- ▶ Focus on CRSO and CRT as key places to share future of the Columbia

## EXISTING AND FUTURE ACTIVITIES OF WARM SPRINGS AND OTHER TRIBES



**QUESTIONS OR COMMENTS?**





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# THE END