Case Comment: Sauk-Suiattle Indian Tribe On Its Own Behalf And In Its Capacity As Sahkuméhu Ex Rel Tsuladxw V. City of Seattle

Christopher Cason

University of Washington School of Law
ccason.mobile@gmail.com

Abstract. Recent events have brought indigenous peoples' rights to the forefront of human rights discourse, from the aboriginals in Australia to the Adat communities in Indonesia. The U.S. maintains a difficult but unique relationship between the native people and the government. The continuing tension between the native Indian tribes and the non-native government and population, illustrates the unique sovereign and treaty relationship ensconced in the law. While there is voluminous literature discussing this relationship, a novel argument has been recently promulgated by the Sauk-Suiattle Indian Tribe in an attempt to force the mitigation of the deleterious effects of hydroelectric dams on Salmon populations. This comment analyzes the case and its numerous pre-trial rulings both to understand the voracity of the novel legal theory and more importantly to better understand treaty relationships between the native populations and the government. The analysis reveals that the case was correctly decided, lacking precedent and subject matter jurisdiction of tribal courts. Despite the ruling against it, the Plaintiff Tribe was able to make headway in salmon protection efforts.

Keywords. Indian Treaties, Native Fishing Rights, Standing, Religious Freedom, Tribal Court Jurisdiction

1. Introduction

1.1. Background

A case seeking protection of native salmon spawning is a microcosm of the indigenous people of North America's relationship with the U.S. The lawsuit was born from an unwritten law of the Sauk-Suiattle Indian Tribe stating that salmon (Tsuladx^{w} in the Sauk-Suiattle language) are living beings and possess inalienable "rights of nature." The Tribe sued for injunctive and declaratory relief protecting these rights.[1] The case was never adjudicated on the merits but rather was facing dismissal for lack of *in personam* jurisdiction over the Defendant when the Defendant settled out of court.[1] The settlement involved modifying the proposed hydroelectric dams to allow safe passage for salmon to

A. A. Nassihudin et al. (eds.), *Proceedings of the 3rd International Conference on Law, Governance, and Social Justice (ICoLGaS 2023)*, Advances in Social Science, Education and Humanities Research 805,
https://doi.org/10.2991/978-2-38476-164-7_14

spawn upriver.[2] This case illustrates both the efficacy and the fragility of the human rights guaranteed to Native Americans under the sovereign treaty regime.

The history of colonization has brought shameful and long-lasting devastation to indigenous populations. This is especially true in nations where the colonizers became the majority population and controlled the government.[3] Deserving more than a footnote here, the most glaring example of colonial impact was the forced relocation of millions of natives from the SE United States to Western territories commonly known as the "trail of tears." This 20-year episode has left a stain on the fabric of Native-U.S. Relations.

This history underlies the relationship between Native Americans and the U.S. For purposes of this paper, the terms "Native," "Native American," and "Indian" are used to refer to the indigenous people of the geographical area that is today the United States. The terms "Native Tribe," "Native American Tribe," or "Indian Tribe" denote those groups of indigenous people who share common cultures, language, religion, laws, geographical origins, and/or other common characteristics who deal with the U.S. government as a group, and manage the affairs of "tribal lands." These terms are used interchangeably herein as they are likewise used interchangeably in legislation, case law, and academic writing. Government, which is both unique and fraught.[4] Ostensibly, Native American or Indian Tribes maintain sovereignty, in a similar relationship with the United States to that with foreign nations. This system of semi-autonomy resulted in a series of treaties between Indian nations and federal legislation pitting the U.S. government against Indian tribes for what have now become scarce natural resources including water and fish stocks.[5] This unique relationship and the treaties born therefrom during mid-19th century form the basis for this case and the broader discussion about protection of indigenous peoples' rights.

1.2. Facts of the Case

The man-made structures giving rise to the cause of action are a series of hydroelectric dams erected on the Skagit River, in the state of Washington.[6] The anadromous[7] salmon populations have been decimated by the generation of hydroelectric power.[8] Hydroelectric dams, generally thought of as "green" energy, can impact salmon by inundating spawning areas, changing historic river flow patterns, raising water temperatures, and most importantly blocking passage of salmon between spawning and rearing habitat and the Pacific Ocean. [8] The unfortunate impacts on the environment, especially for salmon stocks, of "green" energy have ironically pitted environmentalists and environmental lawyers against each other.

1.3. Procedural History

In 2021, the Tribe filed two separate lawsuits against the city of Seattle, one case in Sauk-Suiattle Tribal Court, and two cases in state superior court. Both cases sought relief for violation of the 1955 Point Elliot Treaty, the 4th and 14th amendments to the U.S. Constitution, and the American Indian Religious Freedom Act (AIRFA).[1], [9] The claim

filed in the Tribal Court contained an additional claim for declaratory relief.[1] The Tribal Court dismissed the case on jurisdictional grounds and the Tribe appealed.[1]

Before the appeal was heard, the parties settled the cases. The city of Seattle agreed to modify the dams in order to allow passage around the dams both upstream and downstream but did not agree to the declaratory relief sought in the Tribal Court case. [2] Although this case never reached a trial on the merits, the legal issues raise offer insight into the legal aspects of Native-U.S. relations and the human rights implications of this relationship.

2. Problems

The research addresses three issues: (1) Whether, under the law of treaties, the actions of the City of Seattle violated the numerous treaties between Native American Tribes and the U.S. by continuing to operate a hydroelectric dam that inhibited the upstream and downstream migration of salmon; (2) Whether, under the U.S. Constitution and the American Indian Religious Freedom Act, the actions of the City of Seattle violated the rights of Native American Tribes by continuing to operate a hydroelectric dam that inhibited the upstream and downstream migration of salmon; and (3) Whether the Court should declare that Tsuladx^{w} possesses inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation, and that the Native American Tribes have standing to protect these inherent rights.

3. Method

This research is normative juridical research that uses a legislative, case, and historical approaches. This descriptive research aims to understand the phenomenon and provide a comprehensive explanation and solution of a phenomenon. In addition, this research is not intended to verify theory or falsify a theory but uses theory as a basis to explain phenomena. Data collection in this study was obtained from secondary sources in the form of books, journals, articles in books, magazines, newspapers, government documents or published papers, the Internet, archives and reports, previous survey results, and other references related to the research topic. The author uses qualitative analysis techniques. This technique emphasizes the author's interpretation of the sources of data obtained. Unique to this case was analysis of the evolution of Native American treaties entered into with the U.S. as sovereign nations during the late 1800s and the jurisprudence arising therefrom.

4. Discussion

2.1. Issues Presented

To determine whether the courts ruled correctly in this case, multiple dispositive issues were posed by the Plaintiff: (1) whether, under the law of treaties, the city of Seattle violated treaty obligations with the Plaintiff tribe by erecting hydroelectric dams without tribal consultation; (2) whether, under tribal law, the Tribal Court has *in personam* and subject matter jurisdiction over non-tribal land and entities; and (3) whether, under tribal law, non-human species share inalienable rights.

2.2. Legal analysis of Native-U.S. Treaty law

Unique among the former British colonies, the formative U.S. government recognized the native North Americans as sovereign countries and as such negotiated with the Indian nations as foreign countries. This relationship is enshrined in 14th Amendment to the U.S. Constitution (Art. I, Sec. 2, Cl. 3 and Art. I, Sec. 8). In the early days of Native-U.S. treaty relations, the U.S. backed by jurisprudence from the Supreme Court undercut the efficacy of the treaties entered into between the federal government and several tribes.[10] The 19th century saw best wishes and opportunism through legislation and jurisprudence. The first Marshall court addressed the rights of Native Americans by holding that private citizens could not purchase land from Native Americans,[11] that the Cherokee nation was sovereign but dependent like a "ward to its guardian,"[12] and the federal government was the sole authority to deal with native tribes.[13] The legislature further attempted to limit the sovereignty of tribal nations (Indian Appropriations Act of 1851 ~ P.L. 31-14, 9 Stat. 574 (1851)), and most nefariously robbed natives of their land under the pretext of benevolent assimilation (General Allotment Act ~ P.L. 49-105, 24 Stat. 388 (1887)). The 19th century gave way to somewhat improved treatment of Indians in the 20th century.

More recently, the Supreme Court has affirmed numerous aspects of tribal governance authority, including the power to tax members and nonmembers,[14] the power to prosecute Indian lawbreakers,[15] tribal sovereign immunity,[16] the power to adjudicate civil claims,[17] and the power to exclude persons from Indian lands.[18] The Court further held that Indian treaty rights remain extant unless Congress expressly abrogates them, and even then only if the government pays just compensation.[19] Of the rights preserved, tribal fishing rights have proven most important and controversial.

2.3. Tribal Fishing Rights

Modern day tribal fishing rights are based on the original reservation treaties of the mid-19th century.[20] In 1855, Governor Isaac I. Stevens of Washington Territory negotiated treaties with the Flathead or Selish Indians and other tribes as part of a campaign to end Indian sovereignty along strategic commercial railway lines. At the time, the tribes were essentially giving up their sovereignty for reservation land to preserve their territory

against their rival tribe, the Blackfoot.[21] The Point Elliot Treaty of 1855 specifically preserved tribal fishing rights, specifying in Article 5 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 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, [t]hat they shall not take shell-fish [sic.] from any beds staked or cultivated by citizens.* [22]

The tribes have also litigated disputes among themselves about the boundaries of their respective usual and accustomed fishing places.[23] Known as the "Boldt Decision," this decision laid the foundation for preservation of native fishing rights. [24] In subsequent rounds of *United States v. Washington*, the courts allocated half the shellfish and any other marine species with commercial value to the Indians.[25] The progeny of the Boldt Decision directly supports the Tribe's first claims for relief in this case.

Additionally, the role of Native Americans as caretakers of the natural environment is supported by the jurisprudence arising from the AIRFA. The AIRFA was enacted as a counterbalance to the colonial missionary activities to allow Native American religious beliefs and practices to flourish in perpetuity. [26] The courts have regularly read this act as protecting the stewardship role of native populations in protecting their ancestral lands and the natural environment therein.[27] The line of cases mostly deals with burial grounds and not animal protection, and extending this jurisprudence to salmon protection may be a stretch.

The acts of omissions of the City of Seattle violated the 1855 treaty and the 4th and 14th amendments. Enforcement of Indian riparian and fishing rights have been well-protected by the courts.[5] Language of Indian treaties securing a "right of taking fish … in common with all citizens of the Territory" was not intended merely to guarantee Indians of the Pacific Northwest access to usual and accustomed fishing sites and an "equal opportunity" for individual Indians, along with non-Indians, to fish, but instead secures to the Indian tribe the right to harvest a share of each run of anadromous fish that pass through tribal fishing areas. [8] While this case did not reach an adjudication on the merits of the case, the 9th Circuit in its dicta addressed the efficacy of these rights[1] and the only question remaining was the extent to which the Defendant-city's actions infringed on these rights. As a matter of law, the Tribe should prevail on its first claims.

2.4. Rights of Non-human species

Courts have repeatedly failed to rule in favor of protecting animal species on par with humans. There have recently been a series of cases where putative plaintiffs have battled to enforce "rights of nature" in response to threats facing wild animals, plants and aquatic ecosystems like rivers and lakes.[28] For instance, in a case pitting the plight of goats on an island-military installation the 9th Circuit Court of appeals sided with the U.S. Navy in allowing "aerial eradication" of goat populations.[29] In so holding, the 9th Circuit,

relying on *Sierra Club v. Morton,* indicated that the Animal Lovers Volunteer Association lacked standing to bring a claim on behalf of the goat population to compel a comprehensive environment impact statement. Many scholars have called for a reassessment of the standing issue in animal rights cases,[30] and some have found support in the courts.[31] The Court, however, while not shutting down a standing argument completely, set the standard where standing can only be found when the alleged harm to the natural environment proximately causes harm to human-plaintiffs. This standard, established in *Humane Soc'y of the United States v. Babbitt*,[32] sets a high bar for establishing standing on behalf of non-humans.

The *Sui Generis* argument of the Tribe is unsupported by exiting jurisprudence. In the present case, the Plaintiff argues in Paragraph 8.1 of its claim for declaratory relief that "[salmon] possess inherent rights to exist, flourish, regenerate and evolve, as well as inherent rights to restoration, recovery and preservation."[1] The Tribe in its complaint articulate these rights as:

> *the right to pure water and freshwater habitat; the right to a healthy climate system and natural environment free from human caused global warming impacts and emissions and declare defendant's conduct threaten and imperils plaintiffs' rights and significantly impacts their health, welfare, safety and economic security within their aboriginal territory and that such impact is felt on the Sauk-Suiattle Reservation.*[1]

Under *Humane Soc'y* and *Sierra Club,* the door is left sightly open to establish standing through proof that humans are harmed by the actions of a public entity. In the absence of such proof, it appears that had the case gone to trial, it would have been an uphill battle to establish the *prima facie* element of standing.

2.5. Jurisdiction of Tribal Courts

The only legal issue squarely adjudicated by the Tribal Court was whether the court possessed *in personam* and/or subject matter jurisdiction over the Defendant, city of Seattle. Modern tribal court arose from the 1883 decision in *Ex parte Crow Dog*.[33] The case concerned a Lakota tribal member, Crow Dog, who killed a fellow tribal member, Spotted Tail, on land which is the modern-day Rosebud Sioux reservation in South Dakota. [33] In their traditional way, the Tribe required Crow Dog to provide restitution to Spotted Tail's family in the form of goods and provisions.[33] Spotted Tail's family was satisfied with the resolution, but the federal government objected to what we now refer to as "restorative justice" and invoked its plenary power to strip tribal courts of autonomy and place serious crime under the jurisdiction of federal courts.[34] This followed from the doctrine of forced assimilation, the U.S. policy at the time.[35] Fortunately, more was done to restore the tribal governance system and support the tribal court system.

The resurgence of the Indian sovereignty movement has been illustrated by increasing reliance on tribal courts to adjudicate disputes and preserve "Indian Justice."[36] Under Tribal Law and Order Act of 2010, tribal courts have expanded

jurisdiction to address matters on reservation land and among tribal members. However, tribal court jurisdiction has never been extended to non-tribal members.[37] The Supreme Court broadly held that Indian tribes cannot exercise powers "expressly terminated by Congress" or "inconsistent with their status" as "domestic dependent nations."

In the present case the city of Seattle moved to dismiss the claims of the Sauk-Suiattle Tribe on purely jurisdictional grounds,[1] and the order was granted by the trial court.[1] Given the long line of legislative and judicial precedent, it was highly unlikely that the tribal court of appeals would have reversed the sound ruling of the tribal trial court.

5. Conclusion

Although the Sauk-Suiattle Tribe essentially lost its court battle, the effort should not be viewed as a failure. The Tribe's lawsuit accomplished two things. First, the settlement with the city of Seattle whereby the city agreed to modify its Skagit River dam to allow safe passage of salmon upstream and downstream, was a major accomplishment and likely the primary objective of Tribe in the first place. Second, the case keeps the plight of the Native Americans in the forefront of human rights and environmental policy considerations of the U.S.

The Courts were faced with three issued: (1) a claim for injunctive relief for violation of the Tribe's constitutional, treaty, and religious freedom rights; (2) a claim seeking a declaratory judgment that the Tribe had standing to protect the salmon population's right to exist; and (3) the dispute over the scope of the Tribal Court's jurisdiction. Although the Tribes claims were not ultimately tried on their merits, for purposes of this case comment, the courts followed existing precedent in rendering their pre-trial decisions. The claims for violation of fishing rights certain had merit in a long line of precedent upholding the Tribe's fishing rights under the treaty of Point Elliot. Less likely is a court's willingness to adopt the Tribe's standing argument for protection of the salmon's inherent "right to exist." On procedural ground the courts correctly ruled that this dispute falls under the exclusive jurisdiction of the federal courts.

Finally, while the Sauk-Suiattle and other tribes have found success in the court system, it seems as though there should be a more flexible efficient forum for addressing environmental concerns, native Americans' religious and cultural concerns, and the relationship with non-tribal entities.

References

[1] *SAU-CIV-01/22-001 (Sauk-Suiattle Tribal Court 2022)*. 2022.
[2] K. Surma, "Lawsuit Asserting the 'Rights of Salmon' Ends in a Settlement That

Benefits The Fish," 2023. [Online]. Available: https://insideclimatenews.org/news/06052023/lawsuit-asserting-the-rights-of-salmon-ends-in-a-settlement-that-benefits-the-fish/

[3] United Nations Human Rights, "Acting High Commissioner: Addressing the Legacies of Colonialism Can Contribute to Overcoming Inequalities Within and Among States and Sustainable Development Challenges of the Twenty-First Century," 2022. [Online]. Available: https://www.ohchr.org/en/press-releases/2022/09/acting-high-commissioner-addressing-legacies-colonialism-can-contribute#:~:text=The negative impact of colonialism,murdered indigenous women and girls

[4] D. H. Getches, C. F. Wilkinson, R. A. W. (Jr.), M. L. M. Fletcher, and K. A. Carpenter, *Cases and Materials on Federal Indian Law*. West Academic Publishing.

[5] M. C. Blumm and J. G. Steadman, "Indian treaty fishing rights and habitat protection: The martinez decision supplies a resounding judicial reaffirmation," *Nat. Resour. J.*, 2010.

[6] L. Black, "Not going with the flow: salmon 'sue' US city over harm to population," 2022. [Online]. Available: https://www.theguardian.com/us-news/2022/mar/09/salmon-sue-us-seattle-harm-population

[7] F. L. Bodi and E. Erdheim, "Swimming upstream: FERC's failure to protect anadromous fish," *Ecol. Law Q.*, 1986.

[8] D. E. Booth, "Hydroelectric dams and the decline of chinook salmon in the Columbia River basin," *Mar. Resour. Econ.*, 1989, doi: 10.1086/mre.6.3.42871970.

[9] *Sauk-Suiattle Indian Tribe v. City of Seattle; Seattle City Light, a subdivision of the city of Seattle, WL-5200173 (W.D. Wash. 2021*. 2021.

[10] D. H. Getches, "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," *Calif. Law Rev.*, 1996, doi: 10.2307/3481094.

[11] *Johnson v. McIntosh, 21 U.S. (7 Wheat.) 543 (1823)*. 1823.

[12] *Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)*. 1831.

[13] *Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)*. 1832.

[14] *Washington v. Colville Confederated Tribes, 447 U.S. 134 (1980)*. 1980.

[15] *United States v. Wheeler, 435 U.S. 313 (1978)*. 1978.

[16] *Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)*. 1978.

[17] *National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985)*. 1985.

[18] *Merrion v. Jicarilla Apache Tribe, 445 U.S. 130 (1982)*. 1982.

[19] *Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 (1979)*. 1979.

[20] K. Richards, "The Stevens Treaties of 1854-1855," *Oregon Hist. Q.*, 2005, doi: 10.1353/ohq.2005.0012.

[21] O. Y. Lewis, "Treaty Fishing Rights: A Habitat Right as Part of the Trinity of

Rights Implied by the Fishing Clause of the Stevens Treaties," *Am. Indian Law Rev.*, 2002, doi: 10.2307/20070691.
[22] HistoryLink.org, "Treaty of Point Elliott, 1855," 2000. https://www.historylink.org/file/2629
[23] *United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), aff'd, 520 F.2d 676, 689 (9th Cir. 1975)*. 1975.
[24] P. Dougherty, "Boldt Decision: United States v. State of Washington," 2020. https://www.historylink.org/file/21084
[25] *United States v. Washington, 153 F.3d 725 (4th Cir. 1998)*. 1998.
[26] S. O'Brien, "A Legal Analysis of the American Indian Religious Freedom Act," in *Handbook of American Indian Religious Freedom*, C. Vecsey, Ed., New York: Thompson Publishing, 1991.
[27] *Fools Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982)*. 1982.
[28] M. Hogan, "Standing for nonhuman animals: Developing a guardianship model from the dissents in Sierra Club v. Morton," *California Law Review*. 2007.
[29] *Animal Lovers Volunteer Ass'n v. Weinberger, 765 F.2d 937, 938 (9th Cir. 1985)*. 1985.
[30] L. Magnotti, "Pawing Open the Courthouse Door: Why Animals' Interests Should Matter When Courts Grant Standing," *St. John's Law Rev. Assoc.*, vol. 80, no. 1, 2006.
[31] P. Manus, "The Blackbird Whistling - The Silence Just After: Evaluating the Environmental Legacy of Justice Blackmun," *Iowa Law Review*. 2000.
[32] *Humane Soc. of U.S. v. Babbitt. 46 F.3d 93 (D.C. Cir. 1995)*. 1995.
[33] *Ex Parte Crow Dog, 109 U.S. 556 (1883)*. 1883.
[34] M. A. Core, "Tribal Sovereignty: Federal Court Review of Tribal Court Decisions: Judicial Intrusion into Tribal Sovereignty," *Am. Indian Law Rev.*, 1987, doi: 10.2307/20068275.
[35] L. A. Carlson, "Federal policy and Indian land: economic interests and the sale of Indian allotments, 1900-1934.," *Agric. Hist.*, 1983.
[36] E. E. Joh, "Custom, Tribal Court Practice, and Popular Justice," *Am. Indian Law Rev.*, 2000, doi: 10.2307/20070653.
[37] *Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)*. 1978.