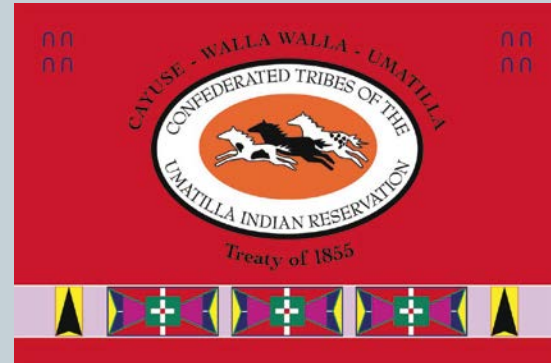


# Hatchery vs. Wild? It's not that simple - legal frameworks, hatchery reform and forgotten promises.



**PRESENTED BY:  
BRENT H. HALL**



# Topics Covered

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- I. Treaty Obligations – The Harvest Guarantee**
- II. Other Legal Obligations and Initiatives**
- III. The Endangered Species Act and the Hatchery Listing Policy**
- IV. Delisting with Hatchery Fish Present Meets the Legal Obligations**

- The 1855 treaties were “cession” agreements.
- The Tribes reserved homelands, sovereignty, and other rights, including fishing rights.



## 1855 Stevens and Palmer Treaties

# Tribally Reserved Rights

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- A treaty is not a grant of rights to Indians but a grant of rights from them, and those rights not specifically granted are reserved to the Indians. *United States v. Winans*, (SCT 1905).
- Treaty minutes: fishing clause absolutely essential.

# The Treaty Fishing Clause

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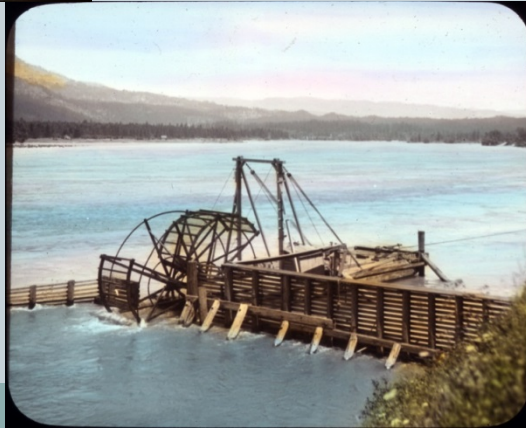
- The treaties expressly provide: "That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with the citizens of the United States . . . ."
- Applies to all fish "destined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

# The Treaty Fishing Right: Early Fishing Conflicts

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➤ With settlement and commerce, fishing conflicts soon arose over Indian access to their traditional fishing areas.



➤ By the late 1800's the United States started filing lawsuits against non-Indians who were preventing tribal fishermen from fishing at their traditional places.

# The Scope of the Reserved Right to Take Fish

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Several of these cases reach the U.S. Supreme Court, which affirms the Tribes' reserved treaty rights to fish at all traditional areas.



➤ *U.S. v. Winans*: 198 US 371 (1905):

“The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the existence of which there was not a shadow of impediment, and **which were not much less necessary to the existence of the Indians that the atmosphere they breathed.**” (Emphasis added.)

# Scope of the Treaty Fishing Right: *United States v. Oregon*, CV 68-413

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- Judge Belloni upholds the Tribes right to fish at all traditional fishing areas free from unreasonable or unnecessary regulation.
- State had argued that the treaty fishing right only gave Indians the same rights as given to all other U.S. citizens:

**Judge Belloni: “Such a reading would not seem unreasonable if all history, anthropology, biology, prior case law and the intention of the parties to the treaty were to be ignored.”**

302 F.Supp. 899, 905 (D.Or. 1969)



# Summary of the Scope of the Reserved Right to Take Fish

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- Treaties take precedence over conflicting state laws by reason of the Supremacy Clause of US Constitution. Art. VI, Sect. 2; *Worcester v. Georgia*, (1832).
- Treaty right to fish is a protected property right, protected by the Fifth Amendment. *Menominee v. U.S.* (1968); *Muckleshoot v. Hall*, (1988).
- Right to access. *Winans* (1905).

# Summary of the Scope of the Reserved Right to Take Fish

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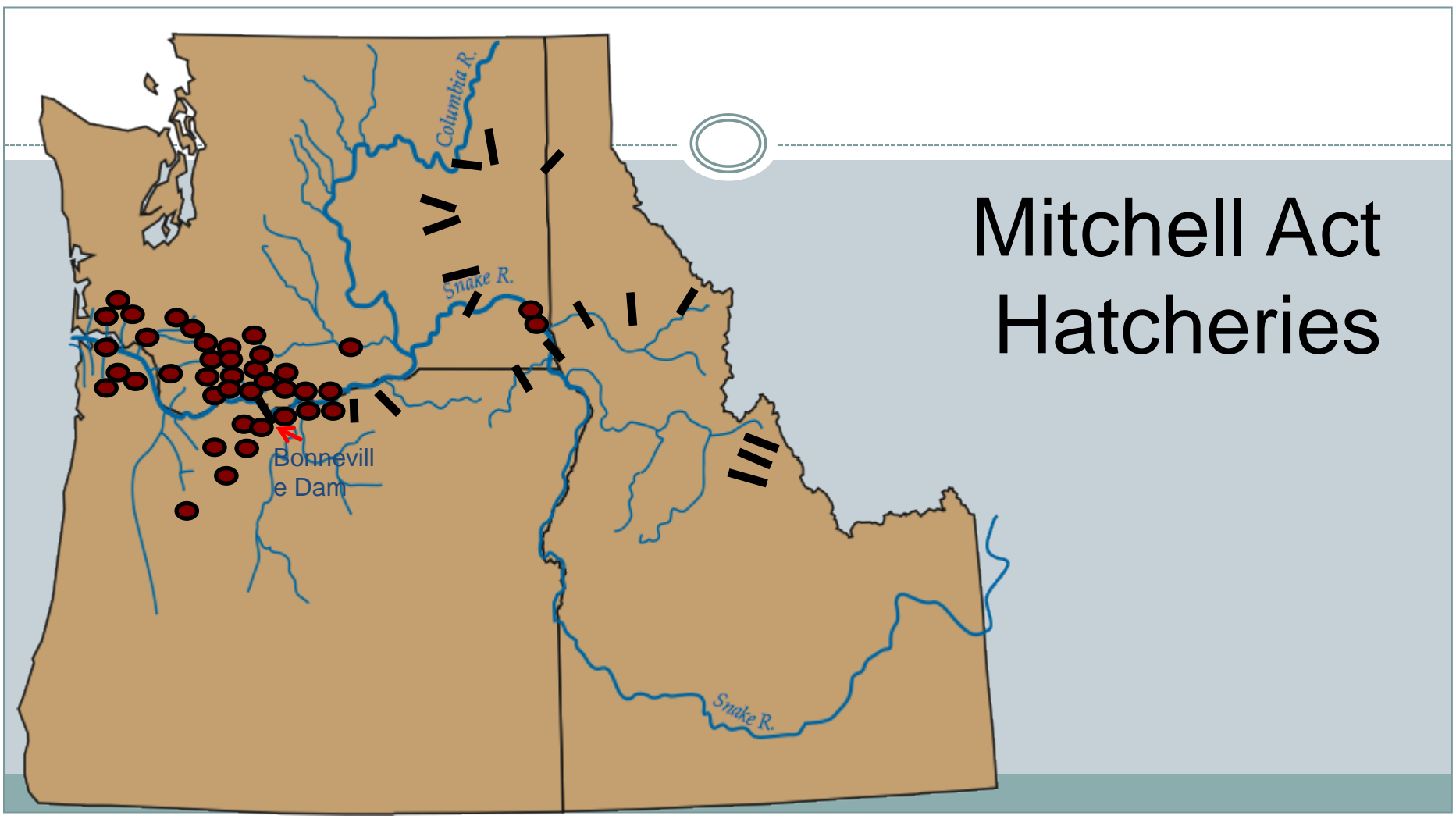
- Includes right to have fish available to harvest. *Passenger Fishing Vessel Ass'n v. Washington* (1979).
- Protection from federal actions. *KRD v. SVID* (1985).
- Right to have federal court protect the fishery against state or other actors. *U.S. v. Oregon* (1969); *NW Sea Farms v. US ACOE* (1996).

# Congress Acts to Mitigate for Fish Lost to Hydrosystem

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- **Mitchell Act Mitigation, 1938**
  - Implemented through states with state priorities
  - Mitigation for fish “destined to pass” tribes’ U&As illusory
    - Downriver vs. upriver hatcheries
- **Lower Snake River Compensation Act, 1976**
  - Mitigation for impacts from lower Snake River dams





# Mitchell Act Hatcheries

# Other Legal Proceedings That Affect Artificial Production

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- **Northwest Power Act, 1981**
  - Hatcheries funded by BPA in the FWP.
- ***U.S. v. Oregon* Management Agreements**
  - Contain harvest and hatchery production commitments.
- **Litigation**
  - Tribes brought several suits during the 1990s to enforce certain US v. OR production commitments.
- **Endangered Species Act**
  - Listings come to the Columbia River Basin in 1993

# Tensions Within the Endangered Species Act, and with Tribal Treaty Rights

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## ➤ **Internal:**

- “Recovery in the wild” vs. explicit authority to use artificial propagation.
- Similarly, the Hatchery Listing Policy does not require hatchery fish to be absent for a population to be self-sustaining, and provides flexibility on influence.

## ➤ **External: Treaty fishing right not abrogated or subservient to ESA**

- See, e.g., July 21, 1998 letter from Commerce Assistant Secretary Garcia to Ted Strong, CRITFC.
- Secretarial Order 3206.

# *The ESA and How the Hatchery Listing Policy Became the Hatchery Listing Policy*

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1991: NOAA issues ESU Policy. 56 FR 58,612.

1993: NOAA issues its first Hatchery Listing Policy. 58 FR 17,573.

2001: *Alsea Valley Alliance v. Evans*, (D. Or. 2001)

➤ Arbitrary and capricious to distinguish between natural and hatchery fish in a listing determination.

2005: NOAA issues revised Hatchery Listing Policy. 70 FR 37204.

# 2005 Hatchery Listing Policy, 70 FR 37204

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Response to *Alsea*. HLP characterizes problem with past status review:

“[W]e based our extinction risk assessments on whether the natural-origin fish in an ESU are, by themselves, self-sustaining in their natural ecosystems over the long term....**did not explicitly consider the contribution of hatchery fish to the current overall viability of the ESU, or whether the presence of hatchery fish within the ESU might have the potential for reducing the risk of extinction of the ESU or the likelihood that the ESU would become endangered in the foreseeable future**” \*37205 (emphasis added).



# 2005 Hatchery Listing Policy, 70 FR 37204

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“Specifically, this policy: establishes criteria for including hatchery stocks in ESUs; provides direction for considering hatchery fish in extinction risk assessments of ESUs; requires that hatchery fish determined to be part of an ESU will be included in any listing of the ESU; affirms NMFS’ commitment to conserving natural salmon and steelhead populations and the ecosystems upon which they depend; and affirms NMFS’ commitment to fulfilling trust and treaty obligations with regard to the harvest of some Pacific salmon and steelhead populations, consistent with the conservation and recovery of listed salmon and steelhead ESUs.”

# 2005 Hatchery Listing Policy, 70 FR 37204

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Paragraph (3) provides:

**“Status determinations [of an ESU] will be based on the status of the entire ESU. In assessing the status of an ESU, NMFS will apply this policy in support of the conservation of naturally-spawning salmon and the ecosystems upon which they depend, consistent with 2(b) of the ESA. Hatchery fish will be included in the assessing an ESU’s status in the context of their contributions to conserving natural self-sustaining populations.”** (Emphasis added.)

# 2005 Hatchery Listing Policy, 70 FR 37204

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Paragraph (4) provides:

**“The effects of hatchery fish on the status of an ESU will depend on which of the four key attributes are currently limiting the ESU, and how the hatchery fish within the ESU affect each of the attributes.** The presence of hatchery fish within the ESU can positively affect the overall status of the ESU, and thereby affect a listing determination, by contributing to increasing abundance and productivity of the natural populations in the ESU, by improving spatial distribution, by serving as a source population for repopulating unoccupied habitat, and by conserving genetic resources of depressed natural populations in the ESU.

# 2005 Hatchery Listing Policy, 70 FR 37204

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Paragraph (4) (cont'd) :

Conversely, a hatchery program managed without adequate consideration of its conservation effects can affect a listing determination by reducing adaptive genetic diversity of the ESU, and by reducing the reproductive fitness and productivity of the ESU. **In evaluating the effect of hatchery fish on the status of an ESU, the presence of a long-term hatchery monitoring and evaluation program is an important consideration.”**

# 2005 Hatchery Listing Policy, 70 FR 37204

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## Significant NMFS positions in the Comments:

- “We think it is inappropriate to make universal conclusions about all hatchery stocks, but think their relatedness to natural populations and the relative risks and benefits they pose need to be evaluated on a case-by-case basis.”\* 37208
- “The final policy provides a framework for explicitly considering hatchery –origin fish in listing determinations. The final policy requires that the relationship, risks, benefits, and uncertainties of specific hatchery stocks to the local natural populations be documented.” Id.
- “[W]e will evaluate the individual hatchery programs and describe the relationship of the hatchery stocks...to the local natural populations on the basis of: stock origin and the degree of known or inferred genetic divergence between the hatchery stock and the local population(s); and the similarity of hatchery stocks to natural populations in ecological and life-history traits.” \*37209

# 2005 Hatchery Listing Policy, 70 FR 37204

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The use of artificial propagation in recovery plans is recognized:

“[NMFS is] working on draft recovery plans that ...will establish biological and threats criteria that if satisfied would result in a proposal to remove the ESU from ESA protections, and will be informed by ESU-specific factors including artificial propagation.” \*37207

# What is Recovery?

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- A species reaches recovery when there is “improvement in the status of listed species to the point at which listing is no longer appropriate...” 16 U.S.C. 1533(a)(1)
- “Recovery is the process by which listed species and their ecosystems are restored and their future is safeguarded to the point that protections under the ESA are no longer needed.” 2010 NOAA Recovery Guidance.
- Recovery does not mean that all threats to a species have been eliminated. Rather, recovery means that all threats to the species have been “controlled.” See *Center for Biological Diversity v. Kempthorne* (D. Ariz. 2009).

# Delisting with Hatchery Fish Present

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- Positive benefits of hatcheries must be included in all status reviews.
- Can have a self-sustaining viable population with hatchery influence present.
- Can not have a self-sustaining population that depends on hatchery support.





# Delisting with Hatchery Fish Present

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- Human assisted genetic exchange is permissible in a delisting scenario.
- Grizzly bear case, *Greater Yellowstone Coalition, Inc. v. Servheen*, (D. Mont. 2009)
- Grey Wolf case, *Defenders of Wildlife v. Jewell*, (D.D.C. 2014)
- NOAA gets a high degree of deference on these issues.

# Applied to Columbia and Snake Rivers Salmonids

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At a minimum, Recovery Plans should:

- Plan on using artificial production in the ESU in the future to reduce “the likelihood that the ESU would become endangered in the foreseeable future.”
- As a backstop for delisting, artificial propagation is a permissible consideration under the 5 factor analysis.
- Recovery strategy is the link between the biological needs and situational background of the species.

# ESA and Treaty Fishing Rights Reconciled in Theory and Policy

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- In the mid-1990's the Administration assures tribes that there is no conflict between the statutory goals of the ESA and the federal trust responsibility to Indian tribes.” July 21, 1998 letter from NOAA Ass't Sec'y Garcia.
- NOAA and DOI issue Joint Secretarial Order 3206 on ESA and Tribal Rights to assure that “tribes do not bear a disproportionate burden for the conservation of listed species.”

# Harmonizing ESA Recovery and the Treaty Promises

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- Common sense and flexible ESA implementation.
- Recovery means threats “controlled” and not necessarily eliminated.
  - Can encompass many different scenarios, including backstops such as in the Grizzly Bear and Wolf cases
- No need to declare the science on artificial production is “settled.” *Trout Unlimited v. Lohn* (2009)

# Harmonizing ESA Recovery and Treaty Promises

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- We don't have low fish productivity because of hatcheries, we have hatcheries because of low productivity.
- Cannot make artificial production decisions in a sterile environment.
- These are ultimately policy decisions that must account for the overarching obligations of federal government to fulfill the Treaty promises to the Tribes.

# Thank You!

<http://www.umatilla.nsn.us/>



# What has happened to Columbia Basin salmon & steelhead?

- **Major loss in habitat quantity**
- **Major loss in habitat quality**
- **Two spawners often don't replace themselves (deficit returns)**
- **23 populations have become extinct**
- **176 populations are ESA-listed as threatened or endangered**
- **61% of accessible areas contains ESA-listed populations**
- **Past runs of 15M are now about 1.5M (about 80% hatchery)**



# Purpose of Hatcheries



**To compensate for impacts of reduced or lost fish production and productivity due to human actions (dam construction, habitat degradation, etc.)**

- **Recovery tool to help rebuild natural production**
- **Mitigation tool to help achieve harvestable populations**
- **Hatcheries don't fix factors that reduced productivity**
- **We don't have low fish productivity because of hatcheries, we have hatcheries because of low productivity**

# Trajectory of Fish Recovery Programs

