Truth be told, the U.S. Supreme Court's 2017-18 Term has been an unsually quiet one for environmental and natural resources law. Until now.

This week the Supreme Court heard oral arguments in a last-minute addition to the Court's current docket. *Washington v. United States*, No. 17-269, a case the justices only accepted for review in January, looms as the most consequential environmental Supreme Court decision of 2018. It's also a fascinating mix of Western American history, Native American law and policy, fisheries protection and environmental justice.

The *Washington* case has its historical and legal roots in a 164-year old treaty in which the federal government granted Native American tribes in Western Washington permanent fishing rights. The 1854-55 "Stevens Treaties" (named for the Governor of the then-Washington Territory and Superintendent of Indian Affairs who negotiated the pacts with the tribes on behalf of the federal government) guaranteed the tribes "the right of taking fish, at all usual and accustomed grounds and stations…in common with all citizens of the Territory" in exchange for the tribes' relinquishment of their claims to 64 million acres of land in Washington in favor of relocation to tribal reservations.

The Washington tribes' principal concern–both in the mid-nineteenth century and today–has been preserving their access to regional salmon fisheries that have played such a vital role as a tribal food source, means of commercial exchange and for cultural and religious purposes. As was the case with most nineteenth century government-tribal treaties, the Stevens Treaties turned out to be a bad deal for the Washington tribes. The fishing rights they'd negotiated were quickly trampled, both by white settlers who relocated in the region

and often blocked Native American fishers' access to the waters of northwest Washington, and by white commercial fishermen who by the end of the 19th century were catching enormous quantities of salmon in the region, leaving precious little fish for tribal members using their more traditional fishing methods and gear.

After Washington was admitted to the Union in 1889, state officials overtly and repeatedly acted to frustrate the tribes' exercise of their on- and off-reservation fishing rights granted under the Stevens Treaties. This state of affairs prompted numerous political and legal conflicts in the late 19th and early 20th centuries, including two cases ultimately decided by the Supreme Court–both interpreting the Stevens Treaties in the tribes' favor.

Fast forward to the late 20th century: the United States, both on its own behalf and as trustee for the Pacific Northwest tribes, sued Washington State in 1970 to address the state-federal/tribal political conflicts and enforce the Stevens Treaties' fishing clause. By that time, however, the single greatest threat to tribal fishing rights had become modern technology–specifically, the extensive system of road culverts that the state and its political subdivisions had built to channel rivers and streams underneath the state's road and highway system. It's essentially undisputed that Washington's road culvert system substantially impedes the migration of salmon both upstream and downstream. That, in turn, has led to the substantial diminution of salmon populations in western Washington, to the detriment of Native American and white fishers alike. (It's also undisputed that technology currently exists by which state and local road builders can avoid this adverse environmental impact by designing road culverts that allow unobstructed fish passage.)

In an earlier phase of this longstanding litigation, a federal district court held–and the Supreme Court ultimately confirmed–that under the Stevens Treaties the tribes have the right to up to 50% of the harvestable fish in the affected region in western Washington.

The latest chapter in this protracted legal saga began in 2001, when the tribes and federal government asked the district court "to enforce a duty upon the State of Washington to refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced." Washington State's legal response to this claim was straightforward: "there is no treaty-based right or duty of fish habitat protection" as asserted by the federal government and tribes.

The district court ruled in favor of the tribes and U.S., concluding that the fishing clause of the Stevens Treaties imposes a duty on Washington State to refrain from building or operating culverts under state roads that hinder fish passage and thereby substantially diminish the number of fish that would otherwise be available for tribal harvest. The district judge thereafter held a trial to determine an appropriate remedy, eventually issuing a detailed injunction requiring state officials to inventory all state-owned barrier culverts; take immediate steps to retrofit some of the most damaging culverts; and mandating that the remainder be retrofitted at the end of their useful lives.

The Ninth Circuit Court of Appeals affirmed in a lengthy, unanimous opinion authored by Judge William Fletcher. The Court of Appeals concluded that by building and maintaining a system of barrier culverts, "Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties." Rejecting the state's argument that the government's treaty obligations do not extend to fisheries habitat protection, Judge Fletcher concluded:

> The Indians did no understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous argument."

In its successful petition for certiorari, Washington State argues that its obligations under the Treaties do not extend to providing fish-friendly culverts and road projects; that the

federal government is equitably estopped from arguing to the contrary by virtue of having approved some of the offending culverts; and that the injunctive relief granted by the lower courts offends federalism principles and imposes an undue financial burden on the state.

The respective legal arguments advanced in the *Washington* case have a decidedly through-the-looking-glass quality to them: on the one hand, Washington–normally a progressive and environmentally-conscious state–is taking a quite conservative legal and political position usually embraced by the reddest of red states. Conversely, the Trump Administration and Justice Department have maintained the same aggressive advocacy in favor of the tribes' fishing rights and fisheries protection that previous administrations have advanced in the *Washington* litigation. (The latter comes as a pleasant and most welcome surprise.)

One other interesting jurisprudential footnote to the case: Justice Anthony Kennedy announced he would recuse himself from the Court's deliberations in the *Washington* case after he belatedly discovered that in 1985 he'd participated in an earlier phase of the same litigation while serving as a judge on the Ninth Circuit Court of Appeals. (Kennedy's recusal would be more consequential if *Washington* were a "normal" Supreme Court case in which his vote would likely be decisive; however, the justices' votes in Native American law cases generally don't track their normal progressive/conservative voting patterns.)

Early press reports indicate that the Supreme Court's April 18th arguments did not go particularly well for Washington State. That's both unsurprising and a very good thing. The federal government and the tribes have the better of the legal argument

in *Washington.* The lower federal courts were quite right to reject Washington State's argument that its construction of environmentally-damaging infrastructure, responsible for devastating fisheries on which the tribal nations depend, is somehow consistent with its longstanding obligations under the Stevens Treaties. As Ninth Circuit Judge Fletcher aptly noted, that's a cynical and disingenuous argument indeed, and one that the Supreme Court should reject.

Ultimately, *Washington v. United States* is a case about environmental justice, and the obligation of government to live up to both the letter and spirit of its fiduciary duty to Native American tribes under longstanding treaties. For centuries, government has failed to do so. Hopefully, the Supreme Court's decision in *Washington*–due by the end of June–will follow a different and more just legal path.