

Tim Weaver, Esq.  
WSBA# 3364  
[weavertimatty@qwest.net](mailto:weavertimatty@qwest.net)  
LAW OFFICE OF TIM WEAVER  
402 E. Yakima Ave., Suite 710  
P. O. Box 487  
Yakima, WA 98907-0487  
Telephone: (509) 575-1500  
FAX: (509) 575-1227

*Attorney for Intervenor Plaintiff Confederated Tribes and  
Bands of the Yakama Nation*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON**

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UNITED STATES OF AMERICA, et al.,

Civil No. 68-513-KI

v.

YAKAMA NATION'S MEMORANDUM  
IN SUPPORT OF MOTION FOR ORDER  
GRANTING PARTIAL SUMMARY  
JUDGMENT

STATE OF OREGON, et. al.,

Defendants.

**ORAL ARGUMENT REQUESTED**

TABLE OF CONTENTS

	<u>PAGE</u>
MEMORANDUM HISTORICAL FACTS . . . . .	1
UNDISPUTED FACTS UPON WHICH THIS MOTION IS BASED . . . .	5
1. In 1855, the Wenatchee were treated as a “tribe” by the United States for the purposes of the treaty-making process. . . . .	5
2. At and before 1855, the Icicle Creek area was a usual and accustomed fishing place of the Wenatchee who signed the treaty. . . . .	5
3. In its challenge to Yakama’s TRO/preliminary injunction proceeding that led to this trial and before the Ninth Circuit, Colville Alleged, and the Ninth Circuit ruled, that Colville had only a claim for “new” rights under the 1894 process. . . . .	6
4. That all Wenatchee fishing rights held in 1855 vested with the Yakama Nation upon the signing of the Treaty, and are currently held and administered by the Yakama for the communal use of its members. . . . .	6
5. That the Yakama, as a result of the Wenatchee Basin and particularly Icicle Creek areas being “usual and accustomed” places of the Wenatchee, hold precisely those rights under the Treaty of 1855. . . . .	6
6. That the right to fish at usual and accustomed places is a communal right held by the Yakama Nation for use by all of its members. . . . .	6
7. If in fact the Wenatchee right was an “exclusive right” as they claim here, that exclusive right is vested in the Yakama Nation under the Treaty. . . . .	7
ARGUMENT . . . . .	7
1. Summary Judgment Standard. . . . .	7
2. Legal Standard for Establishing a Usual and Accustomed Fishing Place Under Stevens’ Treaties. . . . .	8

3. Colville’s Primary Historical Expert Admits That Wenatchee Was a Full Party to the Treaty of 1855. . . . . 9

4. Colville Expert Testimony and Deposition Answers Establish The Wenatchee Basin and Particularly Icicle Creek as Usual and Accustomed Fishing Place of the Wenatchee. . . . .10

LEGAL ARGUMENT . . . . .11

CONCLUSION . . . . . 14

TABLE OF AUTHORITIES

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 248 (1986)	7
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 323 (1986)	7
<i>Intel Corp. v. Hartford Accident &amp; Indem. Co.</i> , 952 F.2d 1551 (9 <sup>th</sup> Cir. 1991)	7
<i>Kennedy v. Allied Mut. Ins. Co.</i> , 952 F.2d 262 (9 <sup>th</sup> Cir. 1991).	7
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574, 586 (1986)	7
<i>United States v. Oregon</i> , 787 F. Supp. 1557 (D. Or. 1992)	11, 12, 14
<i>United States v. Oregon</i> , 29 F.3d 481, 487 (9 <sup>th</sup> Cir. 1994)	7, 12-14
<i>United States v. Oregon</i> , 470 F.3d 809, 816 (9 <sup>th</sup> Cir. 2006)	3, 6, 13
<i>United States v. Washington</i> , 384 F. Supp. 312 (W.D. Wash. 1974).	8
<i>United States v. Washington</i> , 641 F.2d 1368, 1371 (9 <sup>th</sup> Cir. 1981)	12
<i>United States v. Washington</i> , 730 F.2d 1314, 13-17 (9 <sup>th</sup> Cir. 1984).	11
<u>Statutes/Other:</u> Sen. Ex. Doc. No. 67, 53 <sup>rd</sup> Cong. 2d Session Yakama Treaty June 8, 1855 (12 Stat. 951)	<i>Impassim</i> <i>Impassim</i>

MEMORANDUM  
HISTORICAL FACTS

This case has a long and complex history before this Court and the Ninth Circuit, and at two points extending to the Supreme Court which denied certiorari in both instances.

In the first phase of this case, begun in 1988, the Colville Confederated Tribes filed a motion to intervene as a party in this proceeding, claiming that it held reserved off-reservation fishing rights under the Yakama Treaty of 1855. It made this claim on the basis that it was the “successor in interest” to treaty rights of several of which it refers to as its “constituent bands”, including persons who claim blood relations to the treaty time group called the “Wenatchee” or “Wenatshapam”. They alleged there, as they do here, that the Wenatchee signed and were a party to the treaty of 1855. (See Colville Complaint in Intervention, Docket No. 1653, pertinent pages attached hereto as Exhibit 1). Yakama does not dispute that the Wenatchee were a party to the Treaty of 1855, and that they like the rest of the tribes or bands signing that treaty, brought their fishing, hunting and gathering rights into that treaty-making process.

In that earlier proceeding, Colville attempted to prove that the Wenatchee because many of them had gone to the Colville Reservation, had retained their off-reservation fishing rights, and prayed for an order allowing them to fish not only at Icicle Creek, but at all usual and accustomed fishing places of the

Yakama Nation. (Complaint in Intervention, Exhibit 2). Further, during the pendency of that litigation, Colville twice moved for an order approving special fishing at Icicle Creek, both of which were rejected by the Court. (Orders filed as Docket Nos. 1765 and 1826). As is discussed below, all decisions in that case were directly contrary to Colville's position.

The decision in the initial intervention trial ended in 1994 with a denial of certiorari by the Supreme Court pursuant to these rulings, Yakama continued to fish at Icicle Creek and Colville did not, until 2004 when it decided to set fishing regulations and hold a fishery at Icicle Creek. Yakama filed for a temporary restraining order/preliminary injunction which was denied by this Court in 2005. Colville again adopted regulations and prepared to commence fishing. Yakama again moved for a temporary restraining order/preliminary injunction which this Court granted. During the injunction process, Colville asserted that it was not exercising rights under the Yakama Treaty of 1855, but instead was asserting rights it claimed arose from the 1894 Agreement and statute regarding the sale of the reservation proposed in Article 10 of that treaty. That proposed reservation never came into being.

In defense, Yakama asserted that the Colville claim was barred by the doctrines of issue and claim preclusion due to the rulings of this Court and the Ninth Circuit in those earlier intervention proceedings. This Court agreed and entered a permanent injunction which Colville then appealed to the Ninth Circuit. On appeal the Circuit reversed the trial court, holding that the

intervention proceeding was based solely on rights held under the Yakama Treaty of 1855, and that the current Colville claim was based upon “new rights” arising solely under the 1894 agreement and statute. *United States v. Oregon*, 470 F.3d 809, 816:

The Wenatchi thus characterize their fishing rights under the 1894 Agreement as new rights, granted by the United States as part of its independent agreement to buy back the reservation that should have been, but never was, set aside in Article X of the 1855 Treaty.

...

Accordingly, the law of the case supports the view that any fishing rights the Wenatchi gained under the 1894 Agreement must have been new rights. The 1855 Treaty and the 1894 Agreement, therefore, present entirely different transactional nuclei.

(Emphasis added).

The Court remanded the case to the trial court for a trial on the merits. At a status conference following the remand, this Court determined that its injunction had been dissolved and the parties were in precisely the position they had been in prior to issues of the permanent injunction – that Colville was likely to fish at Icicle Creek and that it was up to Yakama to decide whether to contest that fishery. That is precisely what occurred in the spring of 2007. The Court denied Yakama’s TRO/preliminary injunction motion and Yakama waived the right to an early hearing on a permanent injunction. Instead the parties jointly asked this Court to set the matter for trial and establish a schedule.

In its TRO/preliminary injunction, Yakama has only pled that Colville has no right to fish at Icicle Creek, either under the Yakama Treaty of 1855 or

any provision of the 1894 Agreement and statute. Colville has filed no responsive pleadings, so its actual position here is not totally clear. Obviously Colville asserts it gained “new rights” from the 1894 proceedings as designated by the circuit remand, and that Yakama lost its rights as a result of those same proceedings. Based upon statements by counsel in argument to this Court to the effect that “Yakama has never proven that Icicle Creek is a usual and accustomed fishing place”. Directions to its expert witnesses to prove that the Kittitas were “only visitors” at Icicle Creek (Dr. Ackerman Report Exhibit 1, page No. 39, (see attached Exhibit 3), and therefore not able to claim it as a usual and accustomed place, deposition testimony alleging Wenatchee holds a continuing “exclusive right: to Icicle Creek (Dep. of Mathew Dick, page 10 (see attached Exhibit 4); Deposition of Richard Hart, page 3 (see attached Exhibit 5), and expert testimony to that effect, (Hart opening report, page 3 (see attached Exhibit 6), and Yakama assumes Colville is challenging Yakama’s rights at Icicle Creek also on the basis that it is not a Yakama usual and accustomed place.<sup>1</sup> Colville’s answers to Yakama’s discovery also reflect that Colville may be asserting some sort of “aboriginal right” to exclusive use of the Icicle fishery which was not impacted by their signature on the Treaty of 1855. (See Colville answers to interrogatories Nos. 13, 14, 15, 16, 17, 19, 20, 21, 23, 24, attached as Exhibit 7).

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<sup>1</sup> While Colville’s argument on that issue is the subject of this motion, Yakama does not waive and will assert at trial defenses that any such Colville claim is barred by sovereign immunity and further constitutes an improper collateral attack on prior final rulings of this Court and the Ninth Circuit. Further, Yakama submits that Colville,

Yakama submits that any such claim is both beyond the scope of Colville’s prior argument to the Ninth Circuit, which was clearly and solely limited to “new rights” under the 1894 process, and accordingly is well beyond the scope of permissible issues that can be raised here. Further, Yakama submits that all fishing rights held by the Wenatchee in 1855, as this Court and the Ninth Circuit has ruled on three occasions, are vested in the Yakama Nation under the Treaty, and no longer exist at Colville. <sup>2</sup>

UNDISPUTED FACTS UPON  
WHICH THIS MOTION IS BASED.

Yakama has filed a separate Concise Statement of Facts as required by the local rules. This section simply sets forth the few undisputed facts that are germane and necessary to be considered for purposes of this motion.

1. In 1855, the Wenatchee were treated as a “tribe” by the United States for purposes of the treaty-making process, and the Wenatchee were a full party to that treaty. The rulings of this Court discussed below confirm this beyond question, and Colville’s primary expert Richard Hart confirms it in his expert report discussed, *infra*.

2. At and before 1855, the Icicle Creek area was a usual and accustomed fishing place of the Wenatchee who signed the treaty. Both Mathew Dick, Colville/Wenatchee cultural expert, and Richard Hart, their

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as a new party to the underlying United States v. Oregon case, has no standing to bring any claims in that proceeding.

<sup>2</sup> Further, if this issue reaches trial, Yakama will assert Colville is estopped from raising any such issue on the basis that it clearly implicates the 1855 treaty and was not raised in the trial on treaty rights.

primary historical expert, confirm this in their depositions, which are quoted *infra*.

3. In its challenge to Yakama's TRO/preliminary injunction proceeding that led to this trial, and before the Ninth Circuit, Colville alleged, and the Ninth Circuit ruled, that Colville had only a claim for "new" rights under the 1894 process:

. . . [W]e found that well before 1894 the Wenatchi had refused to move to the Yakama Nation Reservation and had separated themselves politically from the Yakama Nation, thereby depriving themselves of any 1855 Treaty rights.

*United States v. Oregon*, 470  
F.3d 809, 816 (9<sup>th</sup> Cir. 2006).

4. That all Wenatchee fishing rights held in 1855 vested with the Yakama Nation upon the signing of the Treaty, and are currently held and administered by the Yakama for the communal use of its members.

5. That the Yakama, as a result of the Wenatchee Basin and particularly Icicle Creek areas being "usual and accustomed" places of the Wenatchee, hold precisely those rights under the Treaty of 1855. *United States v. Oregon*, 29 F.3d 481, 487 (9<sup>th</sup> Cir. 1994).

6. That the right to fish at usual and accustomed places is a communal right held by the Yakama Nation for use by all of its members. *United States v. Oregon*, 29 F.3d, 481, 484 (9<sup>th</sup> Cir. 1994).

7. If in fact the Wenatchee right was an “exclusive right as they claim here, that exclusive right is vested in the Yakama Nation under the Treaty. *United States v. Oregon*, 29 F.3rd 481, 487.

ARGUMENT.

1. Summary Judgment Standard.

Summary judgment is appropriate because there is no genuine issue of material fact and the Yakama Nation is entitled to judgment as a matter of law. See, Fed. R. Civ. P. 56(c). Yakama bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once it has done so, Colville must show there is sufficient evidence for a reasonable fact-finder to find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Yakama need not negate the Colville’s defenses but may simply point to portions of the pleadings, admissions, answers to interrogatories, depositions, and expert reports which together establish that any factual disputes are either not genuine or the disputed facts are not material. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 265 (9<sup>th</sup> Cir. 1991). Thereafter, Colville must present significant and probative evidence to support its defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9<sup>th</sup> Cir. 1991).

Here there is no genuine issue regarding the fact that the Wenatchee signed the Treaty of 1855, or the fact that at that time the Wenatchee Basin,

and particularly the Icicle Creek area, was a usual and accustomed fishing place of the Wenatchee. There is no genuine dispute that upon the signing of the Treaty, the fishing rights of the 14 Tribes and Bands signing it, including Wenatchee, vested in the Yakama Nation and remains the right of the Yakama Nation.

2. Legal Standard for Establishing a Usual and Accustomed Fishing Place Under Stevens' Treaties.

In his landmark decision in 1974, Judge George Boldt established the legal standard for establishing usual and accustomed places:

Therefore, the court finds and holds that every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a usual and accustomed ground or station at which the treaty tribe reserved, and its members presently have, the right to take fish.

*United States v. Washington*, 384 F. Supp. 312, 332 (W.D. Wash. 1974).

As the Colville allege here, and Yakama does not dispute, the Wenatchee, at and before the Yakama Treaty, lived and fished throughout the Wenatchee Basin, with one of their more important fishing villages being at Leavenworth, at the juncture of the Wenatchee and Icicle Creek. <sup>3</sup> Clearly Wenatchee “customarily” fished throughout the Wenatchee Basin.

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<sup>3</sup> Yakama reserves the right to assert at trial, if this motion is unsuccessful, that this village was in fact a joint village of Kittitas and Wenatchee, who exercised joint use of the fishing places, making it a usual and accustomed place of both groups.

3. Colville's Primary Historical Expert Admits That Wenatchee Was a Full Party to the Treaty of 1855.

Richard Hart, at pages 34-35 of his report states:

Fourteen Indian leaders and eleven non-Indians, signed the 1855 Yakima Treaty, including the Wenatchi Chief Te-Cole-Kun and the Entiat Chief La-hoom. Tecolekun, whose name translates as "Red Hair", was a Wenatchi Chief who lived in the Wenatchi village the mouth of the Wenatchee River, on the west side of the Columbia and the north bank of the Wenatchee.

Hart Report, Pages 34-34, Exhibit 8 attached. And, as a result of this signing, Hart unequivocally states that "the Wenatchee were full parties to the Treaty of 1855". (Hart at 37, excerpt at Exhibit 9 attached. Yakama does not contest that the Wenatchee signed the Treaty and was a full party to it, bringing all their rights to the Confederated Tribes and Bands of the Yakama Nation.

4. Colville Expert Testimony and Deposition Answers Establish the Wenatchee Basin and Particularly Icicle Creek as Usual and Accustomed Fishing Place of the Wenatchee.

Richard Hart again sets the factual stage for the area as a usual and accustomed fishing place of the Wenatchee:

More than any other place, the Wenatshapam Fishery was the hub around which the Wenatchi tribe's cycle of activities rotated. The center of the Wenatshapam Fishery was the confluence of the Icicle River with the Wenatchee River. (See Map 22, number 2). At the fishery each year, all tribal members were able to obtain much of the fish supply necessary for their survival throughout the remainder of the year.

Hart Report at Page 6, Exhibit 10 attached.

And:

The Wenatshapam Fishery was one of the most important fisheries in the entire region and the site of the most important Wenatchi village. In July and August the Wenatchis were mostly occupied harvesting fish at the Wenatshapam fishery.

Hart Report at Page 10, Exhibit 11.

In their depositions, both Hart and Mathew Dick, Colville Wenatchee cultural experts, agree that the Icicle Creek area was a Wenatchee usual; and accustomed fishing place:

Q: Your mother was bilingual, Salish and Sahaptin?

A: Uh-huh.

Q: Do you agree that the area around Icicle Creek and the junction with the Wenatchees was a usual and a custom fishing place of the Wenatchees?

A: Sure.

Q: And that was the case at the time of the Treaty?

A: Uh-huh. Yes.

Deposition of Mathew Dick, page 10, lines 1-9, Exhibit 4.

Q: I think your report indicates that as a result of that the Wenatchee were complete parties to the Treaty of 1855?

A: Yes. They were [parties to the Treaty.

Q: In that regard, I'm assuming that you agree that the Icicle Area was a usual and custom fishing place of the Wenatchee Tribe?

A: Yes.

Q: As that term is used in the Treaty?

A: Yes.

Deposition of Richard Hart, p. 22, Exhibit 5.

Yakama does not dispute Colville's characterization of the area as a usual and accustomed fishing place at the time of the treaty.

Based upon the foregoing, it is clearly beyond argument that there is no genuine issue of material fact regarding the status of the Wenatchee Basin and

in particular Icicle Creek as a usual and accustomed fishing place of the Wenatchee in 1855.

Based upon the foregoing, it is clearly beyond argument that there is no genuine issue of material fact regarding the status of the Wenatchee Basin and in particular Icicle Creek as a usual and accustomed fishing place of the Wenatchee. <sup>4</sup>

### LEGAL ARGUMENT

Based upon the facts admitted by Colville and not disputed by Yakama, that Wenatchee was a full party to the Treaty and had usual and accustomed fishing rights in the Wenatchee Basin and at Icicle Creek, the issue here for resolution is whether Yakama legally holds those Wenatchee rights pursuant to the Yakama Treaty.

The three courts which have dealt with this issue have consistently ruled that Wenatchee fishery rights held by them in 1855 are now vested in the Yakama pursuant to the Treaty.

First Judge Marsh found in *United States v. Oregon*, 787 F. Supp. 1557 (D. Or. 1992), that Colville had not met its burden of proof regarding any Yakama Treaty rights existing at Colville for the Wenatchee, and determined that those rights were held and administered by Yakama.

The Colville Confederacy bears the burden of establishing treaty tribe status. *United States v. Washington*, 730 F.2d 1314, 1316-17 (9<sup>th</sup> Cir. 1984). The “sole purpose” of requiring proof of tribal status is to ensure that the group asserting treaty rights is the

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<sup>4</sup> Out of an abundance of caution, Yakama wants to make clear that it does not agree that this place was an area of exclusive use of the Wenatchee, and reserves that argument if this issue must be tried.

group named in the treaty. *United States v. Washington*, 641 F.2d 1368, 1371 (9<sup>th</sup> Cir. 1981). . . .

*Id.* at 1567.

I find that the tribal entities which are reflected in the Yakima and Nez Perce treaties of 1855 are the present day Confederated Tribes and Bands of the Yakima Indian Nation and the Nez Perce Tribe of Idaho. While it is well. . . .

*Id.* at 1567.

I conclude that the Nez Perce Tribe and Confederated Tribes and Bands of the Yakima Nation are the only duly recognized “tribal” organizations that may administer or regulate the exercise of fishing rights by treaty tribe members. . . .

*Id.* at 1567.

Thus, although many current members of the Colville Confederacy are descendants of groups identified as belonging to part of the Yakima Nation within the 1855 treaty, Colville has failed to establish that those descendants are entitled to exercise rights reserved to the Wenatchi, Entiat, Chelan and Columbia who signed the Treaty as part of the “Yakima Nation.”

*Id.* at 1567. (Emphasis added).

And finally:

I find the administrators of those rights, as reflected in the 1855 treaties, are The Confederated Tribes and Bands of the Yakima Indian Nation and The Nez Perce Tribe of Idaho.

*Id.* at 1572. (Emphasis added).

The Ninth Circuit, in its Opinion upholding Judge Marsh, *United States v. Oregon*, 29 F.3d 481 (9<sup>th</sup> Cir. 1994), reached the same conclusion:

The Yakima Nation has thus continually exercised the off-reservation fishing rights and continued the fishing culture of the original signatories to the 1855 treaty. The constituent tribes with which we are concerned have not.

*Id.* at 486.

We therefore agree with the result reached by the district court that the descendants of the Wenatchi, Entiat, Columbia, Chelan, and Palus tribes now living on the Colville Reservation are not entitled to exercise treaty fishing rights. . . .

We reach this result because we conclude that the constituent tribes when they entered the Colville Confederacy did not retain any treaty fishing rights accorded signatories to the 1855 treaty.

*Id.* at 486.

And finally:

Rather, we conclude that by deliberately separating from the Yakima Nation, these tribes failed to maintain political cohesion with the tribal entity in which the treaty fishing rights are vested.

*Id.* at 486. (Emphasis added).

Lastly, the Ninth Circuit in its Opinion in *United States v. Oregon*, 470 F.3d 809 (9<sup>th</sup> Cir. 2006) held:

In affirming Judge Marsh’s denial of Colville’s motion to intervene, we found that well before 1894 the Wenatchi had refused to move to the Yakama Nation Reservation and had separated themselves politically from the Yakama Nation, thereby depriving themselves of any 1855 Treaty rights. *See, United States v. Oregon*, 29 F.3d at 485-86 (concluding that, based on the evidence, the Wenatchi “deliberately sought to separate themselves” from the Yakima Nation and, therefore, held no rights under the 1855 Treaty).

*Id.* at 816.

The facts here are clear and undisputed. In 1855, Wenatchee had rights to fish the Wenatchee Basin and Icicle Creek as a usual and accustomed fishing place as that term was used in the Yakama Treaty. Wenatchee was a “full

party” to that treaty, bringing all of its rights under the aegis of the Yakima Nation.

In conjunction with the undisputed facts, the law is also clear. Any rights held by the Wenatchee at the time of the treaty vested with the Yakama Nation upon the Wenatchee signature, and continue to be the rights of the Yakama Nation. *Supra* 787 F. Supp. 1557, 1567, 1572. Those rights include claiming the Wenatchee Basin and in particular Icicle Creek as a usual and accustomed place of the Yakama Nation. Further, at 1567, the Court specifically found that the Wenatchee are not entitled to exercise any rights under the 1855 treaty.

In upholding Judge Marsh the Ninth Circuit put it most succinctly, stating that when many Wenatchee deliberately separated from the Yakama Nation, those parties failed to maintain political cohesion “with the tribal entity in which the treaty fishing rights are vested”, referring specifically to Yakama. *Supra*, 29 F.3d 481, 486. This decision was cited favorably by the holding in *supra* 470 F.3d 809, 816.

#### CONCLUSION

There is no dispute as to any material fact. The law as applied to those facts leads to only one possible conclusion – all fishing rights held by Wenatchee in 1855 including their usual and accustomed fishing places are now vested in the Yakama Nation and the Wenatchee at Colville have retained

none of those rights. Accordingly a declaration as requested in the motion filed herewith is appropriate and should be entered by this Court.

Respectfully submitted this 7th day of March, 2008.

/s/ Tim Weaver

Tim Weaver

WSBA 3364

(509) 575-1500

[weavertimatty@qwest.net](mailto:weavertimatty@qwest.net)

Law Office of Tim Weaver

Attorney for Yakama Nation

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2008, a copy of the foregoing document has been served through the Court's ECF system upon all persons of record included to receive such notice therein. The following will be served via United States Mail, postage prepaid on the above date:

Nolan M. Shishido  
DOI Reg. Solicitor Office  
500 NE Multnomah, Suite 607  
Portland, OR 97232

David D. Shaw  
David D. Shaw, P.C.  
707 SW Washington, Suite 1400  
Portland, OR 97205-2504

/s/ Tim Weaver

TIM WEAVER

WSBA#3364

*Attorney for Intervenor Plaintiff*

*Confederated Tribes and Bands of the  
Yakama Nation*