

**BRIEF STATEMENT AS TO THE GROUNDS FOR USE  
OF LUMMI INDIAN NATION TRIBAL MEMBER  
IDENTIFICATION CARDS FOR TRANSPORTING  
PERSONS & PROPERTY ACROSS THE  
INTERNATIONAL US/CANADA BORDER- AS SO MUCH  
IS GOVERNED OVER AND CONTROLLED BY THE  
DEPARTMENT OF HOMELAND SECURITY**

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## **BACKGROUND FACTS:**

The Lummi Indian Nation is Coast Salish. The Coast Salish are indigenous to the Pacific Northwest region of the United States and the Southwest region of British Columbia, Canada. The “Xwlemi” (Lummi) People have historically maintained intercommunity ties with the nations/ tribes/ bands of British Columbia (Vancouver Island and mainland BC). The relationships between the intertribal communities have been based on in-common economies, inter-tribal politics, inheritance rights, intercommunity marriages, sharing of traditional spirituality and cultural practices, dependence upon common natural resources, and constant systems of communication amongst “relatives of the nations.” These historical, political, legal, societal, familial, spiritual ties between the native communities have never been extinguished by the tribes/nations, the United States, or Canada by any national or international law.

The rights of self-determination and self-government of the Lummi Nation are recognized by the United States as a binding, legal relationship maintained as a government-to-government matter. Indian Nations have jurisdiction over their membership and work cooperatively with the United States to recognize and process membership identification and registration. The Lummi work on registration of membership based on the need to deliver federally funded services and management of treaty rights (e.g., hunting, fishing, gathering). Screening of qualified membership is even more arduous than getting state identification due to the blood quantum requirements that must be supported by historical documents (e.g., federal census rolls, land records, probate records, etc.). The U.S. Supreme has ruled that determination of tribal membership is right of the nation to determine, control, and manage. In consequence, the Indian Nations have developed their own “enrollment offices” that specifically screen, analyze, and document each enrollment application carefully.

There are several different “treaty negotiation groups of tribes” that were signatory to ratified treaties with the United States negotiated by Isaac Stevens. While the Lummi, Nooksack, and Colville Tribes are immediate border tribes, there are several others that depend upon border crossings to maintain historical relationships. The Quinault, Quileute, Makah, Jamestown Sklallum, Port Gamble Sklallum, Lower Elwha Sklallum, Suquamish, Skokomish, Squaxin Island, Nisqually, Muckleshoot, Puyallup, Tulalip, Stillaguamish, Snoqualmie, Upper Skagit, Swinomish, and Sauk Suiattle are all tribes that practice traditional crossings of the US/Canada Border for cultural purposes and socio-economic exchanges. All these tribes share common practices of control & management of enrollment applications as required by the Bureau of Indian Affairs, Department of Interior, and the Federal District Court for purposes of management of treaty hunting & fishing rights, as well as land inheritance rights (See: Cobell).

All of these tribes are concerned about securing the rights to manage the identification of their membership for purposes of crossing back and forth the US/Canada Border. Most all of these tribes are now classified as “Self-governing” based on federal law.

### **CONSTITUTIONAL FOUNDATIONS FOR GOVERNMENT-TO-GOVERNMENT RELATIONSHIPS:**

It is a matter of fact that the Department of Homeland Security, as an entity/agency of the federal/national government, can deal with the Indian Tribes directly and in line with national plenary powers associated with the legal/political idea of management of “Indian Affairs.” The government-to-government relationship between the Indian Tribes and the United States, per the US Constitution, was proclaimed by the Congress in 1987 (SCR #76) and 1988 (HCR#331).

The fact that management of “Indian Affairs” was not a power of the colonies but remained a power of the King has translated, post-1787, into “Indian Affairs is a plenary power of the Nation” and not the individual states. This then means that the relationships with the Indians are legally maintained at the federal/national level. We know, and the record shows, that there are constitutional foundations to the relationships that exist between the United States and the tribes. This relationship is with the “Nation” and not just the Bureau of Indian Affairs. By “Nation” we reference all federal departments, agencies, institutions, bureaus, commissions and other entities created by the national government for specific performances, services, benefits, duties, or responsibilities.

In the Constitutional Convention, *tribal Indians* were identified as those people that were not included as part of the “*We the People*” (Popular sovereignty) that were delegating the constitutional power to the national government or reserving certain inherent, inalienable rights to themselves. Tribal Indians were not going to be represented or governed by the People’s government. The ‘tribal Indians’ were defined as ‘*excluding Indians not taxed*’ (Article I, Section 2, Clause 3)- to clearly proclaim that they could not be represented (by this constituted foreign government) nor could they be taxed to support a government that did not represent them. This was true in 1787 and then the issue came up after the Civil War. The 14<sup>th</sup> Amendment was drafted and ratified in final form to assure that the tribal Indians could not become national citizens (14<sup>th</sup> Amd, Section 1- *Subject to the jurisdiction thereof*) and could not become state citizens (14<sup>th</sup> Amd, Section 2- *Excluding Indians not taxed*). And, the 1924 Indian Citizen Act did not amend the 14<sup>th</sup> Amendment or the original 1787 Constitution language. And, the 16<sup>th</sup> Amendment did not amend the 14<sup>th</sup> Amendment or amend the original language to assure ‘tribal Indians’ were included under the 16<sup>th</sup> amendment as a part of the People.

If the Congress wanted to have relationships with the Indian tribes then it could do so by enacting *trade & commerce* laws governing the U.S. citizens and member states’ economic relationships with the Indian nations (Article I, Section 8, Clause 3). If the national government wanted peace and friendship and to secure legal title to the surplus Indian lands then it could use the treaty-making powers of the President & Senate (Article II, Section 2, Clause 2). If anyone had a legitimate problem with the acts of commerce or treaties-made then the Supreme Court had jurisdiction to hear the cases (Article III, Section 2, Clause 1).

Prior debts and engagements that were entered into with the tribes were still binding (in 1787, per Article VI, Clause 1) under the new (1787) constitution. And, treaties-made or which shall be made became a part of the ‘supreme Law of the Land’ (Article VI, Clause 2).

And, all state and national legislators and public officers were required to take an oath or affirmation to support the 1787 Constitution as ratified and amended (Article VI, Clause 3).

Eventually, new states were created and admitted into the Union (based on the 1787 N.W. Ordinance and Article IV, Section 3), and were required to 'disclaim jurisdiction' over Indian Affairs (via state constitution required per national policy governing the Article IV, Section 4 qualification process), since Indian Affairs was a matter of national plenary power. The individual states absolutely could not enter any treaties with the Indian Nations (Article I, Section 10, Clause 1)- not even with the consent of congress. However, the individual states may be able to, based on the Cherokee case finding that the Cherokee tribe established itself as a state, enter 'compacts' with the tribes (Article I, Section 10, Clause 3), with the Consent of Congress.

### **FOREIGN CLAIMS TO ANCIENT NATIVE LANDS OF THE PACIFIC NW:**

There was no "US/Canada Border" at the time of contact or at the time that treaties with the United States were negotiated, at least not any border that was recognized or understood by the Indian Nations as legitimately existing and dividing their traditional territories between "foreign" countries. At this time, the location of trading posts was a matter of foreign visitors operating within Indian Country, not Indians conducting trade in "foreign country."

The Trading Posts of British Columbia, in the Fraser Valley and on Vancouver's Island, became centers for the Indians of Puget Sound to bring their trade goods and make exchanges. The fur trade was the big reason for the trade centers. Over time, the trade jurisdictional area became what is now Washington State. On this side of the mountain range, the language used by the Indians and traders was commonly called Coastal Chinook Jargon. It was composed of words that came from the Spanish, French, English, Russian, and Indian languages (of which several tribal languages and different dialects were borrowed from). The jargon was limited to about three hundred words. The "trade" exchanges and conversations between the races were conducted by the use of this jargon. Not very many Indians or non-Indians could use the jargon, and were forced to rely upon the few that did speak it. Later on, this jargon would be used as the foundation for the negotiation of several treaties between the United States and the Coast Salish Indian Nations. In the beginning, however, the "Americans" were competing with the British, Spanish, and Russians over the trade with the Indians, in the native territories of the northwest.

The United States and Britain had a joint occupancy convention of 1818 that lasted until finalization of the Oregon Treaty of 1846. This treaty was result of the United States taking a more aggressive stance and demanding a border more fixed rather than somewhere between the 42<sup>nd</sup> and 54<sup>th</sup> parallels. During that time, many Coast Salish Nations around the Straits of Georgia and Straits of Juan de Fuca, and South Puget Sound, became accustomed to trading with the non-Indians at the forts in British Columbia. The luxury of the commercial trade activity at Vancouver Island would, later, be restricted by treaty agreement between the United States and the Indian Nations, simply as a means to limit the influences of Great Britain and its trade goods in the northwest. This, also, had the background idea that the US would meet and exceed the trade benefits surrendered by treaty and accepted by the Nations.

The United States claimed the Pacific Northwest under the doctrine of Discovery. In the leading case of M'Intosh, the United States asserted that it had inherited the "discovery claim." The concept of "first Christian nation" to discover an unoccupied land

was entitled to it and their claim was superior to all claims of other subsequent Christian nations making the same discovery. Discovery, in accordance to the Christian nations, gave them superior title to the lands, even when it was occupied by natives. This, of course, was a legal fiction generated to their own benefit. There were no Indians or Indian Nations involved in M'Intosh. See: Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (U.S. Sup.Ct.1823)).

Another vehicle for asserting territorial claims was by settlement & extinguishment of claims of foreign nations by treaty. In the Oregon Territory more and more "Americans" had moved into the territory. Thus, in national interests and that of the settlers, the U.S. began to assert a superior claim to the territory. Rather than entering a state of war with Great Britain and other foreign interests, the United States chose to enter treaty negotiations to diplomatically secure the orderly withdrawal of competing foreign claims. In order of negotiated settlement, the following countries withdrew: Spain under the Treaty of February 22, 1819, 8 Stat. 252; Russia under the Convention of April 17, 1824, 8 Stat. 302; and then Great Britain by Treaty of June 15, 1846, 9 Stat. 869. These countries had established trade relationships with the Indian Nations, and in recognition of their obligations to the Indians, required the United States to promise to treat the Indians honorably as a part of the withdrawal treaty commitments. As mentioned above, the Oregon Treaty of June 15, 1846 had settled the disputed boundary line between British Columbia & Vancouver Island and the United States. After the foreign treaties were settled, the United States then initiated treaty-making with the Indian Nations, as empowered by the constitution, authorized by act of congress, and guided by the N.W. Ordinance of 1787.

The Oregon Territory was established by official Act of Congress on August 14, 1848, 9 Stat. 323. The enactment provided that "*nothing shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians \* \* \**" Section 14 of the act applied the Northwest Ordinance of 1787, 1 Stat. 51, which provided that: "*good faith shall always be observed toward the Indians; their lands and property shall never taken from them without their consent.*" And, of course, it was a territorial/property right that was exercised by the Indians, as pertains to crossing back & forth over the newly established US/Canada Border. The Indians had historical rights on each side of the border that remained un-extinguished to the present, although modified by applicable international politics.

The United States authorized negotiations of treaties with Indian Nations first in the Oregon Territory (Act of June 5, 1850, 9 Stat. 437). Within three years the Congress would divide this territory and create Washington Territory (Act of March 2, 1853, 10 Stat. 172). Section 2 of this act allowed for the appointment of a Territorial Governor to serve concurrently as the Superintendent of Indian Affairs. In the Appropriation Act of 1854 (Act of July 31, 1854, 10 Stat. 315, 330) authorization was granted for the use of appropriations to negotiate treaties in the several territories, including Washington Territory, to be completed prior to July 1, 1855.

In Worcester v. Georgia (31 U.S. (6 Pet.) 515, U.S. Sup. Ct. 1832), the Court held that "*the Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as the Indians. The very term*

*"nation," so generally applied to them, means "a people distinct from others." The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied to all in the same sense."*

These Indian Nations were important to their trade partners (Great Britain, Russia, and Spain, United States) and the protection of the native rights, diplomatically were a part of the treated agreements that the United States entered. These treaties are foundational to the government-to-government relationship the United States has with the Indian nations. The treaties are a recognition of the inherent sovereignty of the signatory Indian nations. The treaty commitments made by the US is a part of the "laws amongst nations" and the constitutional "Supreme Law of the Land, and is of central importance to the "sacred trust of civilization duties" the US owe to the tribes in perpetuity as consideration for the exchange for the substantial treaty territorial concessions.

### **ESTABLISHED TREATY RELATIONSHIPS WITH THE UNITED STATES:**

The problem confronting the United States was that it had laid claim to vast territories (the Oregon Territory) and extinguished vast & multiple foreign claims to lands that were still owned by the Indian nations. The Congress authorized its citizens to move into the territory without entering any treaty relationships with the Indians- which was foundational to any legitimate authorization for settlement and territorial expansion. Settlers were arriving and staking claims to lands that were authorized by Congress but of which Congress had not right to authorize until the legal title was secured from the Indian nations via negotiated and ratified treaty.

The Lummi Indian Nation, as well as the other Indian nations that were treaty signatories, entered treaty relationships with the United States at the Point Elliot Treaty negotiations (1855), arranged by Washington Territorial Governor Isaac Stevens. This Treaty With The Duwamish, Suquamish, ETC. (12 Stat. 927) was ratified by the U.S. Senate in 1859. The treaty was based on the Treaty With the Omaha, as negotiated in 1854 by Commissioner of Indian Affairs George Manypenny (1853-1857). It was one of the numerous treaties drafted to initiate the "colonialization of the Indian." It resulted in placing the Indian People on isolated, reservations of lands, as their permanent homes. This "colonialization" of the American Indian was a part of the federal Indian Policy being implemented through the Department of Interior, Bureau of Indian Affairs- which assumed jurisdiction over Indian Affairs, as of 1848, taking jurisdiction from the Department of War.

Commissioner Manypenny appointed Oregon Territorial Governor Joel Palmer and Washington Territorial Governor Isaac Stevens as Indian agents (Superintendents) and directed they immediately initiate negotiations with the Indian tribes in the respective territories. In about eighteen (18) months the two Governors would negotiate sixteen (16) treaties and cover the whole of Washington and Oregon Territories. The Governors would use either in-land or coastal Chinook Jargon to negotiate with the tribes. The jargons were a mixture of French, Spanish, Russian, English, and Indian words. Both were limited to about 300 words and understood by very few persons of the fur trade era. Governor

Stevens used B.F. Shaw as the interpreter for his negotiations. Some Indians spoke Chinook Jargon and were used as interpreters for those tribes whose language they spoke.

Besides the Dwamish Treaty (cited above), other treaties negotiated by Stevens (a couple jointly with Joel Palmer of Oregon Territory) were the treaties known as the Treaty with the Nisqually, Puyallup, etc. (1854, 10 Stat. 1132), Treaty with the S'Klallam (1855, 12 Stat. 933), Treaty with the Makah (1855, 12 Stat. 939), Treaty with the Yakima (1855, 12 Stat. 951), Treaty with the Nez Perces (1855, 12 Stat. 957), Treaty with the Quinaielt (1855, 12 Stat. 971), Treaty with the Flatheads (1855, 12 Stat. 975), Treaty with the Blackfeet (1855, 11 Stat. 657), Treaty with the Wallawalla, Cayuse (1855, 12 Stat. 945). Most all of these tribes, party to these specific Stevens' treaties, were of the nature to cross over, routinely, into what is now Canada. Each had established territorial interests and intertribal relationships established over the course of centuries of constant communication and exchanges amongst nations. The flight of Chief Joseph and his people toward Canada is an example of the Indians view of Canada, at the time.

We learn some about Stevens in "American Indian Treaties" by Francis P. Prucha (1994, pp.250-55). Isaac Stevens was very paternalistic. He was not going to negotiate with the Indians. He was simply going to impose the treaties upon them (using Chinook Jargon). He organized a commission to help design the approach based on the treaty pattern evident in the nation. This commission met December 7, 1854. Using Chinook Jargon the treaties were explained point by point. He was at Point Elliot January 22, 1855, at Point No Point on January 26 and at Neah Bay on January 31. He and Joel Palmer covered the near equivalent of four states (original Oregon Territory) in eighteen months and secured sixteen treaties (eleven by Stevens, five by Palmer). An example of Stevens' paternalism is found in the Point No Point records, as follows: "*This paper [the treaty] is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? This paper gives you a school. Does not a father send his children to school? It gives you Mechanics and a Doctor to teach and cure you. Is not this fatherly? This paper secures your fish. Does not a father give food to his children? Besides fish you can hunt, gather roots and berries. Besides it says you shall not drink whiskey, and does not a father prevent his children from drinking the "fire water?" besides all this, the paper says you shall be paid for your lands as have been explained to you.*" (See: pp. 250-55, American Indian Treaties, F.P. Prucha, 1994)

In U.S.vs. Washington (384 Fed. Supp. At 330), the Court found "*to the great advantage of the people of the United States, not only in property but also in saving lives of citizens, and to expedite providing for what at the time were immediate and imperative national needs, Congress chose treaties rather than conquest as the means to acquire vast Indian lands. It ordered that treaty negotiations with the plaintiff tribes and others in the Northwest be conducted as quickly as possible. Isaac I. Stevens, Governor of Washington Territory, proved ideally suited to that purpose for in less than one year during 1854-1855 he negotiated eleven different treaties, each with several different tribes, at various places distant from each other in this rugged and then primitive area. The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.*"

The Omaha Treaty was the model and under the diverse conditions and amongst the multitude of tribes called to conference at each encampment, the negotiators, using Chinook Jargon, were allegedly able to get all tribes to agree to basically the same words,

paragraphs, and cessions in each of the treaties. Each treaty would reference the Omaha Treaty language pertinent to creation of the reservations and restricted assignments of land to individual heads of households. Each treaty would give the U.S. claim to large aboriginal territories, reserving very little for the tribes' present and future uses. For the established Indian reservations, the treaties gave the U.S. rights of way across the reserves. The treaties assured citizen/foreign violators of the laws would be surrendered up to the proper U.S. authorities. The treaties promised the U.S. would provide education and health services to the people. Most importantly, the treaties reserved certain essential rights to hunt, fish, and gather at usual and accustomed grounds and stations. And, the treaty declared the condition of peace and friendship shall exist between the United States and the Indian tribes.

The U.S. Supreme Court recognizes that the tribes did not understand, most often, what was being conveyed in the treaty negotiations. Therefore, the Court has developed canons of construction of Indian treaties that requires interpretation of the treaties in favor of the tribes. (See: Choctaw Nation v. Oklahoma, 397 W.S. 620, 630, (1970), Jones v. Meinan 175 U.S. 1, 10-11 (1899), Worcester v. Georgia, 31 515 (1832), Tulee v. Washington, 315 U.S. 681, 685-86 (1942)). The interpretation of treaties was addressed in the 1905 Winans Case (198 U.S. p. 380, 25 S.Ct. p.664) in which the Court stated: "*And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality,' by the superior justice which looks only to the substance of the right, without regard to technical rules.*"

In the 1871 Appropriation Bill the House inserted a "rider" that claimed to limit the President's and Senate's treaty making power (16 Stat. 567). The House nullified the President's and Senate's ability to honor the treaty commitments. Theoretically the measure was not to affect treaties already made with the Indians. The 'rider' was codified in Title 25-Indians, United States Code, Section 71: Future Treaties with Indian Tribes. It provided: "*No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.*"

Still, even after this enactment, the treated-Indians never understood that their rights to cross the border were impaired by any specific part of or intent of words inserted in the treaties by the treaty commissioner (Stevens). In fact, the foreign treaties, entered into by the US (cited above), sought to secure the rights of the natives, to limit the United States in its relationships with the Indians and the subsequent claims of the United States over the territory defined. The right to cross over the international boundary is a reserved right of the specified Indian Nations, it was never surrendered, and is routinely exercised by tribal members enroute to their relatives homes and communities.

### **REGULATION POWERS ARE FEDERAL OR TRIBAL NOT STATE:**

The Coast Salish Indian Nations are better equipped to issue identifications to their membership. This aspect of tribal government is a joint effort between the tribes and the Department of Interior (BIA) that is highly regulated in light of the fishing rights court battles (See: Boldt Decision) and the trust land rights (See: Cobell) issues. The state is a non-Indian government that exercises its authority over its non-Indian citizens. The tribes regulate their authority over qualified tribal members. This is their sovereign right and

power. The Indian nations are modern governments that are well equipped to handle all applications and assure proper documentation of membership prior to acceptance of that membership and their certification by issuance of tribal identification cards.

The State of Washington was recognized under the Enabling Act of February 22, 1889, 25 Stat. 676. This enactment, as was the usual case of new statehood proceedings per the N.W. Ordinance of 1787, had a precondition that the people of the State forever disclaim all right and title to all lands owned or held by any Indian or Indian tribes and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and shall remain under the absolute jurisdiction and control of Congress. Washington conceded and was admitted into the Union on November 11, 1889 (26 Stat. Proclamations No. 8). The State abided by this admission precondition by inclusion within its constitution a Second Section under Article XXVI- COMPACT WITH THE UNITED STATES. This has commonly been called the "constitutional disclaimer clause." (See: pp.315-16, *The Evergreen Citizen*, C.H. Heffelfinger, 1943 Caxton Printers, Ltd.).

The United States depended upon entering treaty relationships to free up lands owned by the aboriginal tribes. Even though it claimed to have inherited the rights asserted by Britain under the Doctrine of Discovery, after the Revolution of 1776. It still did not have actual dominion or ownership over the Indian territories outside the original thirteen colonies. As it moved westward, toward the South Seas (the Pacific Ocean), it would come to assert rights under the Doctrine of Manifest Destiny (destined to rule all the way to the Pacific Ocean). But, first, Lewis and Clark would have to pave the way with exploration of the unknown territories and identification of un-contacted Indian nations. They were commissioned by President Jefferson to explore the western lands and report back. They went all the way to the mouth of the Columbia, into the territory of the Chinook- who was a prominent trading tribe amongst the Indians of the northwest (thus, Chinook Jargon). Their journey would open up the trail to Oregon and the eventually the flood of "Americans" seeking settlement or new gold fields (stimulated by the California Gold Rush, the Alaska Gold Rush, the Frazer River Gold Rush, which caused a movement toward the Manifest Destiny proclamation).

It is important to take notice that the United States, as shown above, held it imperative that the National Government control Indian Affairs and not the individual territories or new member states. As the people moved west, in search of gold or land, the federal government mandated that the individual territorial governments/state governments acknowledge that "Indian Affairs" is plenary to the national government, based on established constitutional foundations. Washington Territory (like Idaho, Montana, South Dakota, North Dakota, Wyoming) had to insert a constitutional disclaimer in their new state constitution, a mandated price paid for authorization to join the Union on an equal footing with the prior member states.

### **TRIBAL TREATY RIGHTS RECOGNIZED AS MATTER OF NATIONAL LAW- Post-Treaty:**

In 1948, the U.S. Congress authorized the creation of the Indian Claims Commission (25 U.S.C. Sections 70 to 70w) to hear the cases by the Indians against the United States. It was a political forum with quasi-judicial power. It was controlled by the United States- for protecting its interests and not that of the Indians. In the end, Indian tribes would not

receive justice. They would receive promises to pay for their lands at pennies-on-the-dollar of their value. The Lummi claim was referenced as "The Lummi Tribe of Indians vs. United States of America (1951). This case was an attempt to clearly identify the aboriginal territory of the Lummi People, which evidence showed clearly included the area of Point Roberts and the lands surrounding Boundary Bay. Other Pacific NW Tribes, that had funds and access to legal representation, filed their claims as well. In this document, Lummi is the primary focus and example.

The Lummi case was supposedly settled in 1972, on terms that the United States demanded. The BIA, as the guardian, asserted that the Lummi would have to accept the United States offer of \$57,000 for all of the San Juan Islands and Whatcom County, Washington. And, the US ignored any lands or water ways that the Lummis owned that were outside the boundaries of the United States and located in Canada. These aboriginal lands included lands up at Point Roberts, around the boundary bay and back down into the United States. The tribe has continuously rejected the US offer for payment for the lands- believing it was a substantial and damaging miscarriage of justice amongst nations. To the Lummis, their islands and mainland territory had been illegally confiscated. Allegedly included in the taking was all the marine and riverine water territories (which went up into the Fraser River). The federal government paid the lawyer that "represented" the Lummis from the alleged settlement, contrary to the Lummi position. The Lummi were insulted because their lawyer was dictated to by the U.S. Attorneys, and he failed to represent their best interests. Still, today, the Lummi Council passes a resolution each year rejecting the alleged settlement, as a means to continue to educate all new tribal leadership at to the unlawful taking of their territory. (See: History of Lummi Legal Action Against the United States by Ann Nugent, 1980).

Prior to the 1951 lawsuit, the Lummis participated in the case of Duwamish et.al. v. United States of America, 1927. The United States passed a Jurisdictional Act (February 12, 1925) that allowed Indian Tribes to bring suit in the Court of Claims. Out of the 155 Indians that testified, ten were Lummis. The lawsuit was all about the violations of the promises made in the treaty (12 Stat. 927). However, this was an adjudication proceeding that substantiated the Indian aboriginal lands and rights in dispute. The difficult part of these cases was the fact that the US controlled access to legal representation as well as the historical evidence and documentation acceptable to the court.

In the Pacific N.W., an Indian treaty fishing rights case (cited above as U.S. v. Winans, 198 U.S. 371 (1905)) came before the Court at petition of the Yakama Indian Nation. Article III of their treaty (12 Stat. 951) included the protection of their fishing rights (which was a common article in all the Stevens' treaties). They were being denied access to their sites and the harvests, as were all the other tribes with the same treaty rights. The Supreme Court interpreted the treaty to guarantee certain rights to the Indian tribes/nations, and a reservation of those rights not surrendered to or given to the United States. The Court ruled, "*The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them- a reservation of those not granted.*" This was an important case for treaty rights and the fishing tribes of Washington State. In this light, we never surrendered our

rights to visit our relatives of British Columbia or Vancouver's Island. It was reserved, with the US simply attempting to limit the 'trade' aspect of the relationship for the benefit of its own chartered companies. We fished in common with our British Columbia native relatives and this has been politically hampered by the US/Canada agreements.

For the "Sockeye Tribes" the adjudication of the rights to fish Fraser River salmon stocks further established their rights up to and around Point Roberts. Of course, prior to the Boldt Decision, these tribes culturally practiced fishing for the salmon right up at the mouth of the Fraser River. The prevention of US tribal fishers from going into the Fraser River mouth is a modern fishery management limitation that came out of the court case; but, it is primarily a compromised result of the US Commissioners involved in the International Pacific Salmon Fish Treaty that deals with Fraser River stocks.

As is evident, for Indian people in the northwest, there were special concerns about their rights to fish. "*The right of taking fish at usual and accustomed fishing 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....*" (Article 5 of Pt. Elliot Treaty of 1855) was essential to making the treaty right real. Denial of access and opportunity was a means to destroy the right, just as massive prior interception by the more mobile state fleet would after the turn of the century, with the perfection of the canning industry and their sponsored fleets. All the Stevens' treaties specifically provided protections for the abundant fish resources so treasured and respected by the tribal peoples. These resources served a functional role in their diets, their spiritual/ceremonial observances, as well as their trade & economy (U.S. v. Washington 384 F. Supp. 350 (1974)).

The Lummi, and other tribes signatory to the Stevens Treaties, would continue to assert their rights in court. In July of 1979, in the case Washington v. Washington State Commercial Passenger Fishing Vessel Association (443 U.s. 658-708), the Supreme Court confirmed U.S. v. Washington in favor of the tribes. The tribes did see the inclusion of on-reservation salmon harvests for ceremonial and subsistence purposes, as a part of the fifty/fifty sharing formula, as a lost. And, the Court saw the fifty percent share as the minimum the treaty harvests could be reduced to unless there were unforeseen future circumstances necessitating a reduction for conservation of the species.

We know that the first settlers depended upon a surplus supply of fish resources being secured from the Natives. This is what allowed the settlers to survive their first winters, until they became accustomed to the environments and could earn their own means of subsistence. However, what the settlers failed to learn was the deep respect the natives held for the salmon resources. Dr. Barbara Lane testified that: "*The symbolic acts, attitudes of respect and concern for the well-being of the salmon reflected a wider conception of the interdependence and relatedness of all living things which was a dominant feature of native world view. Such attitudes and rites insured the salmon were never wantonly wasted and that water contamination was not permitted*" (Dr. Lane, "Political and Economic Aspects of Indian-White Culture Contact in Western Washington in the Mid 19<sup>th</sup> Century." Anthropological Report submitted to U.S. v. Washington, May 10, 1973).

The Lummis had to bring earlier lawsuits to challenge for protection of their treaty rights. Alaska Packers Association had destroyed their rights of access. In United States, Hillaire Crocket, Captain Jack vs. Alaska Packers Association and Kate Waller (1897), the judge ruled the non-Indian interceptions of the salmon before they reached the Lummi Reefnets was no impact to the Lummis. More than eighty Lummi Indians petitioned the Commissioner of

Indian Affairs for protection of their rights but never received assistance. The Lummi illegally lost their rights at Point Roberts (via federal neglect) and the same was happening to their reefnet sites at Village Point on Lummi Island (See: History of Lummi Indian Fishing Rights, Ann Nugent, 1979). Of course, this bad decision was over-ruled by the Supreme Court (1979), but only after the salmon stocks have been driven to near extinction levels.

The Pacific Salmon populations and non-anadromous fish populations served the same functional basics of life to the coastal tribes/nations as did the buffalo herds for the Plateau and Plains cultures. The early explorers and traders noted the value of the abundant salmon resources; but, non-Indian interest was not commercially generated until the perfection of the canning industry. Once this emerged, then the newly emerging Washington State (1889) and its citizens quickly proceeded to over-harvest the stocks to the point of near extinction of all the species, under state made laws and contrary to the treaties and constitutional mandates that were intended to protect the treaty rights of the Indians. Harvests by Canadian non-native fleets were even more deadly to the species.

For the Indian tribes this meant starvation and the resulting rapid decline in their tribal population base. Laws passed by the individual states (e.g., Washington and Oregon) and the corresponding neglect of the United States to fulfill its treaty committed word, resulted in the Indian people being deprived of their fishing resources. They were restricted to the reservations and denied access to their usual and accustomed fishing grounds and stations as well their traditional hunting territories. Both the United States and Canada were 'starving the Indians' into submission, much as was leveled against the Plains/Plateau Indians and their dependency upon the Buffalo. Poor and hungry Indians did not cross borders easily or readily.

Settlers claimed and homesteaded the traditional Lummi lands and quickly imposed "private property Keep Out" as the law. Along the shorelines the Indians were denied access to the traditional fishing sites, as non-Indians claimed the marine uplands. The reservation economy and traditional subsistence society collapsed because of its dependency on access to the off-reservation natural resources. Without access there could be no harvests (See: U.S. v. Winans, 1905). The Indians could no longer even gather basic subsistence levels off the treaty rights. The Pacific N.W. became a haven for the new settlers- who lived and boomed off the fat of the land and waters while the natives were starved into submission. The very Indians that were considered some of the wealthiest in the United States upon "discovery" were left in total impoverishment under U.S. and state laws and economies at the turn of the century, lasting until the Boldt Decision (1974).

The Point Roberts area, which is now a part of the United States, was a common meeting grounds of the tribes that exercised fishing rights on both sides of the International Border. This site was extremely valuable when it came to the intertribal interests in salmon harvesting. Tribal peoples from many of the Coast Salish nations would gather, fish, and celebrate their common ancestry and ceremonial inheritance at this site, erecting temporary shelters all along the shoreline. As noted in the Alaska Packers case, the Lummi held major rights and interests to the area. The Boldt Decision, as confirmed by the US Supreme Court, imposed management burdens upon the Washington Tribes as regards identification of membership for purposes of exercising modern fishing rights in the area of the international border, and throughout their usual and accustomed fishing/hunting/gathering grounds and stations.

## **INTERNATIONAL RIGHTS OF CROSSING FOR SPIRITUAL PRACTICES AND CULTURAL EXCHANGE IS A NECESSITY:**

A people's understanding of the religious and spiritual tends to help form and mold their concepts of the sacred. The complexity and beauty of the complex world around us moves us, as human beings, toward believing that someone or something built and created all that we see and experience. All people were tribal at one time and lived with the earth. At one time they were connected with their immediate environment. Their songs, dances, ceremonials, and systems used to transfer sacred knowledge to subsequent generations and this knowledge became the foundations for their cosmic awareness. These common aspects of human social-thought process help develop the respective society's sacred philosophy over the long-term. Translated into the written word it becomes the foundation for their religious experience in that it, now, manifests the written word of 'god.' But, before that these experiences and sacred concepts of awareness molded the 'spiritual umbilical cord that tied the human being to the earth.' The evolution, as many writers will tell, of the recent 'Father/Son God Religions' has done much to disconnect us (Native American Indians) from our 'Mother Earth Spirituality.' Eventually, ethnocentrically, we began to see the 'others' as being 'blind' to what we know is the 'whole truth.' Euro-Americans came to understand that 'god' gave 'their race' dominion over the whole earth, superior to all others. The others become the "infidel" (in this case, the Native Americans/Canadian Aboriginals).

It is not simple to explain the difficulties faced by Pacific Northwest Indians, when it concerns their traditional, ceremonial practices and concepts of the sacred. However, what is true is that there has been a lot of damage caused by the contacts between native society and the non-Indian Euro-American societies. Preceding actual contact, of course, was the devastating effects of European diseases that spread from village to village, all across the continent, from the east to the western shores (Atlantic to the Pacific Ocean). The diseases were carried from one tribal group to another, as natives fled from village to village trying to escape the death that came to the people. This, in turn, spread the diseases more rapidly. Whole strands of knowledge were taken out of the traditional communities by the frequency of death- that struck the elders, children, and adults quickly. Whole villages were devastated or vacated as the people fled from this invisible killer of women, children, elders, and warriors. Life in the Pacific N.W. was already changing before the first physical contacts were made between the races.

Going back to our point of departure, contact with white (foreign) societies would institute rapid change in technology of the tribes- per the introduction of metal and other trade goods. However, the tribes continued to prosper on the harvest of their traditional foods and maintained their interdependence on the rich natural environment. Their traditional culture was based on an indigenous cosmology that incorporated respect for the natural balance of relationships. Song, dance, ceremony, and sacred knowledge was a part of the intertribal collective knowledge system that assured no one person over-harvested or took too much from nature or made a permanent, damaging impact upon it.

But, this relationship with nature was contrary to Christian doctrines that advocated dominance over nature- that man was to inherit dominion over all things. Indian belief systems were considered heathenistic, atheistic, agnostic, and if not the work of the devil then at least the beliefs of the uninstructed savage. Thus, missionary zeal was to overcome this state of affairs- to force or voluntarily secure the conversion of the savage tribal member, and to assure that they did not roam throughout the territory and especially into Canada. This

was believed a necessity that dates back to the debates that transpired right after Columbus discovered the Western Hemisphere. The conversion system was well entrenched by the time the Euro-Americans began to arrive in the Pacific Northwest. Forced conversion to the Christian dogmas were central to Indian/Non-Indian relationships for the prior three hundred years (1492-1792) and now entered the northwest.

Over time with post-contact shock, colonial and then federal and state non-Indian governments, and their churches, would force drastic and rapid changes in the Pacific Northwest Natives' concepts and understandings of the spiritual, the ceremonial, and the sacred. Each generation of tribal Indians have confronted complex and vicious social, political, legal, theological, and economical cycles of oppression that seemed to always target destroying the last fragments of native spiritual beliefs and practices- tribally and intertribally. If there really was a socio-cultural shock caused by the contact and interaction between the two races, then it was a shock created by the forced changes that transpired in tribal societies- especially in the concepts of the sacred and the value, rules, and ethics that governed over tribal peoples' relationships with the real world around them and between the nations.

There are parts of the treaties that are not written and the Indians have those rights that were not included in the treaty. These are reserved rights and this is as important to the Indians as must as the reserved rights the citizens (US and states) hold in relation to their delegation of powers under the respective popular sovereignty constitutions (state and national). Our rights to believe in our own religious way and to practice this spiritual freedom was not surrendered. At the treaty negotiations, Chief Seattle continued: *"We will ponder your proposition, and when we have decided we will tell you. But should we accept it, I here and now make this first condition: that we will not be denied the privilege, without molestation, of visiting at will the graves of our ancestors and friends. Every part of this country is sacred to my people. Every hill-side, every valley, every plain and grove has been hallowed by some fond memory or sad experience of my tribe. Even the rocks that seem to lie dumb as they swelter in the sun along the silent shore in solemn grandeur thrill with memories of past events connected with the fate of my people, and the very dust under your feet responds more lovingly to our footsteps than to yours, because it is the ashes of our ancestors, and our bare feet are conscious of the sympathetic touch, for the soil is rich with the life of our kindred."*

Neither the boiler-plate treaty of the Omahas, or the concluded Stevens (Washington Territory) or Palmer (Oregon Territory) treaties, included any articles that sought to limit the religious or spiritual freedom to the Coastal Indians. Nor did such treaties limit the intertribal, international communication and sharing that transpired pre-contact amongst the tribes of "Washington" and "British Columbia." Chief Seattle demanded acknowledgement of these were inalienable rights. Stevens promised to address it and assure it was included but he subsequently died at the Battle of Gettysburg (Civil War). But, still, it remains an inherent and reserved right that was obvious and noted in the acceptance speech of Chief Seattle. This right was never surrendered by the tribes' leadership.

For this to be understood as important in the native border crossing conflict, you must understand that the United States never convinced the Indian Nations to surrender their spiritual rights, beliefs, ceremonials, and practices. No civic leader could ever make an agreement for the tribal populace to surrender inherent rights to seek the divine truth. The same applies to the relationship between the Canadians and the Aboriginals. We, as Coast Salish, practice our ancestral ways and culture and being free to cross over the border and back again, unmolested, is essential to traditional cultural practices and continuity.

To be “molested” is key to understanding the importance of the access to border crossings by natives, from each side of the border. The use of sacred gear and regalia is the part of the process of practicing ancestral ceremonials. For the traditional people to have their gear striped off and gone through is best understood when you imagine the shame and disgrace the Romans sought to impose on ‘Jesus’ by striping, and then mocking him with a Crown of Thorns.

It should not be impossible to develop a system in which the “searches” can transpire in times of absolute fear that some type of “terrorist activity” is involved. The same hold true in the area of drug smuggling. If the ‘drug dogs’ do not detect anything then the traditionalists should be released without further molestation.

In Conclusion, we believe the Department of Homeland Security has the power to work with the Indian Nations directly for the following reasons:

- 1) The US/Canada Indian nations, each and everyone, have historical, sovereign rights to cross over the border unmolested;
- 2) The US Indian Nations have a government-to-government relationship based on the 1787 US Constitution;
- 3) The US, under the NW Ordinance, has a duty to honor and respect the Indian Nations and their rights;
- 4) The US has historical treaty obligations to Great Britain, Spain, and Russia that requires they honor and respect the rights of the Indians, and these duties were inherited as much as the US had inherited it’s claims under the Doctrine of Discovery;
- 5) The Indian Nations located in modern Washington State have established treaties with the United States, and what is not surrendered therein is reserved to the Indian nations and their people;
- 6) The Indian Treaties are binding upon the United States as Supreme Law of the Land as well as pertains to the Laws Amongst Nations;
- 7) The government-to-government relationship between the Indian Tribes and the Unites States is binding upon the Department of Homeland Security being it is a agency/entity of the US government, and the Indian Treaties are approved by the President and Congress;
- 8) The Indian Nations, as regards identification & certification of membership, have the complete right to issue tribal identification, and that their tribal administrative competency has been found acceptable by the Department of Interior (BIA), the Federal District Courts, and the State of Washington, per treaty fishing rights;
- 9) The Presidency and the US Congress have, as a matter of national law, recognized the rights of the Indian Nations to be Self-determining and Self-governing;
- 10) The rights of the Indian Nations to cross over the US/Canada Border is a matter that is important not only to their societal, familial, economic, and intertribal political relationships but is central to the continuity of their spiritual belief systems and ceremonial practices.