

HOUSE BILL REPORT

SHB 2080

As Passed House:
February 13, 2014

Title: An act relating to vacating convictions for certain tribal fishing activities.

Brief Description: Vacating convictions for certain tribal fishing activities.

Sponsors: House Committee on Community Development, Housing & Tribal Affairs (originally sponsored by Representatives Sawyer, Zeiger, Appleton, Angel, DeBolt, Blake, Haler, McCoy, Wilcox, Fitzgibbon, Hurst, Freeman, S. Hunt, Santos and Ryu).

Brief History:

Committee Activity:

Community Development, Housing & Tribal Affairs: 1/14/14, 1/17/14 [DPS].

Floor Activity:

Passed House: 2/13/14, 92-6.

Brief Summary of Substitute Bill

- Allows a person who claimed to be exercising a treaty right to apply to vacate a conviction related to a fishing offense that occurred before 1975.
- Allows a family member or tribal representative to apply to vacate a conviction on behalf of a deceased tribal member.
- Requires a sentencing court to vacate any pre-1975 fishing convictions of a tribal member who was exercising a treaty right.

HOUSE COMMITTEE ON COMMUNITY DEVELOPMENT, HOUSING & TRIBAL AFFAIRS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Appleton, Chair; Sawyer, Vice Chair; Johnson, Ranking Minority Member; Holy, Assistant Ranking Minority Member; Gregerson, Robinson and Santos.

Staff: Sean Flynn (786-7124).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background:

Indian Treaty Fishing Rights.

In the mid-1850s the United States negotiated and executed a series of treaties with several Indian tribes that inhabited lands within and around the Washington Territory. Through these treaties, the tribes ceded their interest in much of the lands in the territory in exchange for monetary compensation. Certain parcels of land were reserved for the exclusive use of particular tribes.

The treaties also reserved certain aboriginal rights outside of the designated reservations, including the right to engage in fishing and hunting activities. Regarding fishing rights, all the treaties provided substantially similar language, including "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States . . ." Treaty of Point No Point, January 26, 1855.

Over time, the state developed a comprehensive regulatory and enforcement code to manage and conserve the fish resource in the state. The interpretation of the treaty fishing rights became an increasing source of controversy between the treaty tribes in attempting to exercise their right to fish, and the state in maintaining regulatory authority over off-reservation fishing activities. As tensions grew in the 1960s and 1970s tribal members began testing the state's authority by fishing openly in violation of state law, which prompted state officials to arrest and prosecute tribal members in state court.

In 1970 the United States and several treaty tribes filed suit in federal court against the state for violating the tribes' treaty right to fish. After extensive litigation, the court ruled in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), that the treaties collectively entitled the tribes to a 50 percent share of the fish harvest in the state. The court further enjoined the state from asserting regulatory authority over treaty tribal members at off-reservation locations where a treaty fishing right existed. The court cited several state statutes and regulations, restricting the time, place and manner of fishing activities, which the state was barred from enforcing in a way that would regulate, limit or restrict the exercise of a tribe's treaty fishing right.

At the same time, the court recognized that the tribes had the authority to regulate the activities of their own members at these off-reservation locations. The court went on to establish a comanagement plan between the tribes and the state and retained jurisdiction over the case to resolve other on-going issues related to resource management.

Vacation of Convictions.

Misdemeanors and Gross Misdemeanors: A person convicted of a misdemeanor or gross misdemeanor who has completed all the terms of his or her sentence may apply to the sentencing court for a vacation of his or her record of conviction. The court has discretion to vacate the conviction, unless certain conditions are found, including:

- the conviction was for a violent offense, a driving while under the influence (DUI) related offense, a sex offense, or certain kinds of domestic violence offenses;
- the person has charges pending in any state or federal court;
- the person has been convicted of another crime or has had another conviction vacated;

- less than three years have passed since the person has completed the sentencing terms; or
- the person has had a protection or restraining order issued against him or her in the last five years.

Felonies: A person convicted of a felony who has been discharged upon completion of all requirements of the sentence may apply to the sentencing court for a vacation of the record of his or her record of conviction. The sentencing court has discretion to vacate the record of a felony conviction, unless certain conditions are found, including:

- the conviction was for a violent offense, offense against a person, or certain DUI offenses;
- the person has charges pending in any state or federal court or has been convicted of a new crime;
- less than 10 years have passed since the date of discharge for a class B felony; or
- less than five years have passed since the date of discharge for class C felonies, other than certain DUI offenses.

A vacated record of conviction releases the person from all penalties and disabilities resulting from the offenses and may not be included in the offender's criminal history for purposes of determining a sentence. For all purposes, including responding to employment or housing applications, the person may respond that he or she has never been convicted of that crime. However, a vacated conviction record may be used in a later criminal prosecution.

Summary of Substitute Bill:

Any person who was convicted prior to 1975 of misdemeanor, gross misdemeanor or felony offense related to fishing activity may apply to the sentencing court for the vacation of that conviction, if the person had claimed to be exercising a tribal treaty fishing right. A family member or tribal representative may apply on behalf of a deceased tribal member. The court shall vacate the conviction if:

- the person is a member of a tribe that has a treaty fishing right at the location where the offense occurred; and
- the state has been enjoined from enforcing the statute or rule that was violated, under a ruling in the *United States v. Washington* or other state supreme court or federal court decision, to the extent that such enforcement interferes with a treaty Indian fishing right.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) While this measure is small and does not do the issue justice, it is a starting point. Few things are more important to the culture of a tribe than fishing, which the state

stole from the tribes. This is an important part of history for tribes and to remember the tribal ancestors who fought for fishing rights.

Billy Frank was first arrested for off-reservation fishing when he was 14 years old, after his family was moved off their reservation land when Fort Lewis was established. Billy Frank continued to be arrested for off-reservation fishing until 1973, before the *Boldt* decision was decided and affirmed in 1979.

The bill also should include civil contempt convictions, which are not necessarily included within scope of this bill. Hank Adams served a year sentence for an offense that would not be covered by the bill. Some protesters were arrested for civil contempt violations. Six Nisqually members served 30 days in jail for civil contempt charges. Dick Gregory served the longest fishing sentence, six months, for defending fishing rights. Most charges in the fishing resistance were dismissed or acquitted in the 1950s and 1960s. Some of the history of that era should be capsulized in a bill report from the House. State courts must be made aware of these convictions.

The 80 convictions for state fishing violations before 1975 may not all be alive or all be tribal members. Indian culture must adapt to changes, but in many tribal customs the pain and burden of ancestors is passed along to future generations after their death. It is very important to wash away these burdens. It is important in tribal culture to own up to mistakes and to make matters right. This was a very dark chapter in Washington history and this bill is an opportunity to close that chapter and to open a new era where the state owned up to its mistakes.

Carrying unjust convictions has affected the ability of tribal members to become effective elders. One member could not travel to Canada because of a fishing conviction from before the *Boldt* decision. Another tribal elder was prohibited from adopting his granddaughter because of a past conviction.

(In support with amendment(s)) This bill should be amended to include a deceased tribal member who meets the criteria in the bill.

The *United States v. Oregon* and *Sohappy v. Smith* cases also should be recognized as defining the treaty rights of the four tribes on the Columbia River, including the Yakama Tribe.

(Opposed) None.

Persons Testifying: (In support) Representative Sawyer, prime sponsor; Billy Frank, Northwest Indian Fish Commission; Shawn Yanity, Stillaguamish Tribes; and Fawn Sharp, Quinalt Indian Nation.

(In support with amendment(s)) Hank Adams, Franks Landing Indian Community-Survival of the American Indian Society and Dawn Vyvyan, Yakama Nation.

Persons Signed In To Testify But Not Testifying: None.