

University of Colorado Law School

Colorado Law Scholarly Commons

Natural Resource Development in Indian
Country (Summer Conference, June 8-10)

1988

6-9-1988

Wildlife Management: State and Tribal Jurisdiction at Umatilla

Douglas Nash

Follow this and additional works at: <https://scholar.law.colorado.edu/natural-resource-development-in-indian-country>



Part of the [Animal Law Commons](#), [Aquaculture and Fisheries Commons](#), [Courts Commons](#), [Environmental Law Commons](#), [Indigenous, Indian, and Aboriginal Law Commons](#), [Indigenous Studies Commons](#), [Jurisprudence Commons](#), [Land Use Law Commons](#), [Natural Resource Economics Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Property Law and Real Estate Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Nash, Douglas, "Wildlife Management: State and Tribal Jurisdiction at Umatilla" (1988). *Natural Resource Development in Indian Country (Summer Conference, June 8-10)*.

<https://scholar.law.colorado.edu/natural-resource-development-in-indian-country/14>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



Douglas Nash, *Wildlife Management: State and Tribal Jurisdiction at Umatilla*, in NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1988).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

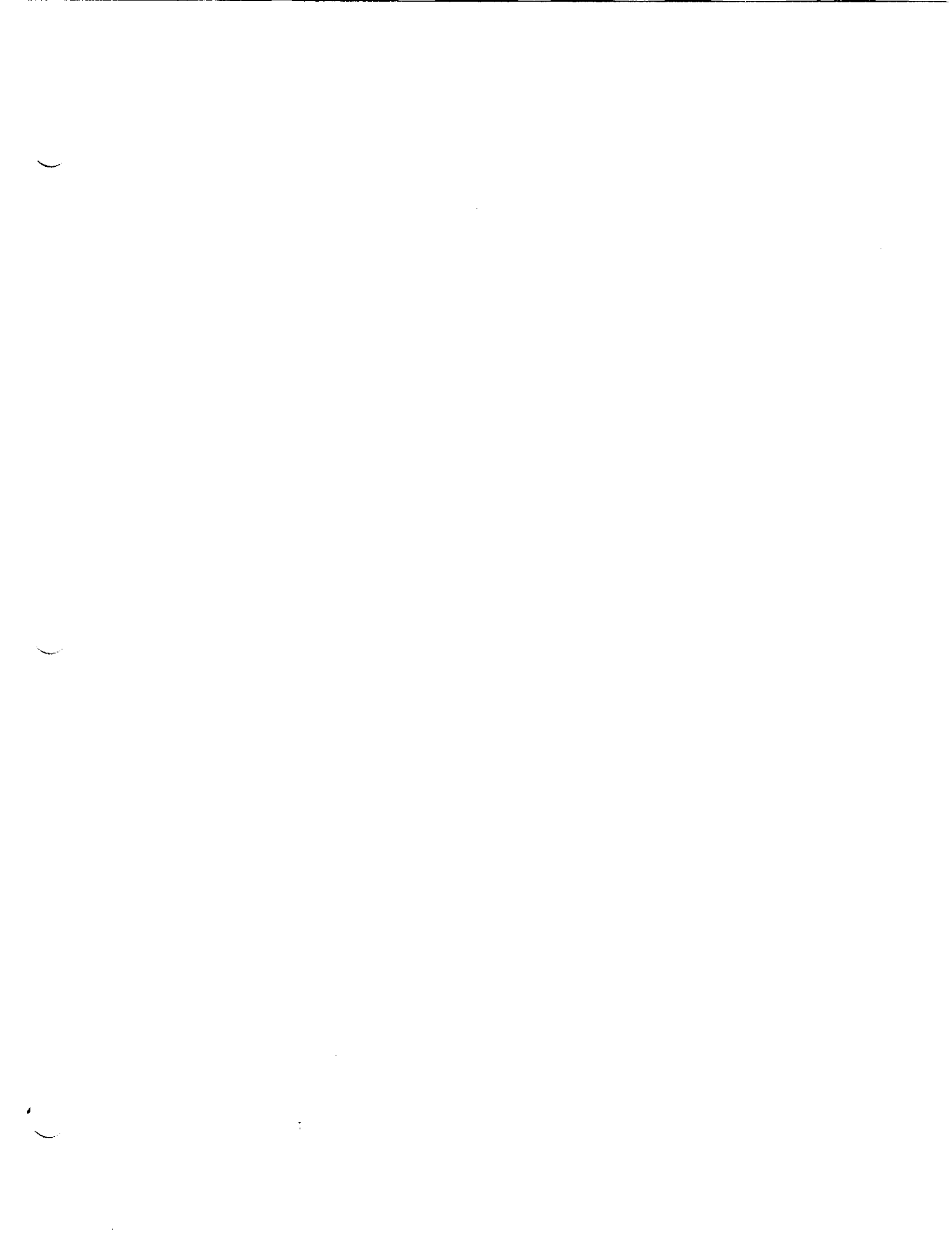
WILDLIFE MANAGEMENT: STATE AND TRIBAL
JURISDICTION AT UMATILLA

Douglas Nash
Attorney
Pendleton, Oregon

NATURAL RESOURCE DEVELOPMENT IN INDIAN COUNTRY

A Short Course Sponsored by the
Natural Resource Law Center
University of Colorado
School of Law

June 8-10, 1988



WILDLIFE MANAGEMENT: STATE AND TRIBAL JURISDICTION AT UMATILLA
Douglas Nash

I. Introduction

A. Summary

The Confederated Tribes of the Umatilla Indian Reservation, situated on the Umatilla Indian Reservation in northeastern Oregon, have treaty reserved rights to fish and wildlife resources that were, and still are, central to their culture and way of life. They have been diligent in the protection of these rights and, in addition to continual monitoring of all activities affecting them, have resorted to federal courts on numerous occasions over the years. In more recent years the Tribe has also become a leader in the study and enhancement of these same resources. Significantly, non-Indian neighbors have discovered that the Tribe is a valuable ally in natural resource protection and enhancement efforts. Innovative programs aimed at the re-establishment of anadromous fish runs long absent from the Umatilla River that bisects the reservation and elk herd management, among others, have begun to pay tangible dividends. With that success another problem is created - that of managing the harvest of these resources.

The jurisdictional structure on Indian reservations has always been confusing at best due to the interaction of three jurisdictional authorities - tribal, state and federal. The operation of a wildlife management program within such a jurisdictional structure is untenable. Within a given area there is not room for more than one wildlife management system. The Confederated Tribes of the Umatilla Indian Reservation have now taken the steps to address this aspect of wildlife management by amending the tribal Wildlife Code to assert regulatory authority over all wildlife on the reservation and over all persons, Indian and non-Indian, who harvest these resources.

The assertion of the Tribe's civil regulatory authority in this manner is for the purpose of effective wildlife management. The Tribal system is not yet finalized but it is expected to be operational by this fall. The outline that follows describes the background behind the development of the tribal regulatory system and the system itself as developed date.

II. Early Background

A. In prehistoric times the Umatilla, Walla Walla and

Cayuse Indian Tribes occupied most of what is now southeastern Washington and northeastern Oregon. They were dependent upon fish and wildlife resources of the area for subsistence, ceremonial and trading purposes.

B. By the Treaty of June 9, 1855, 12 Stat. 945, these three Tribes became a confederation. The Tribes ceded vast territories to the United States but reserved from those lands a parcel of land for a homeland. They also reserved the "exclusive right of taking fish in the streams running through and bordering" their reservation and at all other "usual and accustomed stations in common with the citizens of the United States." The "privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands" was also reserved by the Tribes.

C. The Umatilla Indian Reservation includes a variety of lands. It consists of 250,000 acres that includes mountain timber lands in the south, grass covered hills approaching the mountains and flat, dry land farm lands on the north. At the base of the mountains the Umatilla River runs from east to west and it joins the Columbia River approximately thirty miles below the reservation.

III. Recent Background

A. In post-treaty times a number of events occurred that had significant impacts upon the tribal rights to hunt and fish. These included, among others, the allotment of the reservation and the sale of any "surplus" lands, the purported diminishment of the reservation by order of the Secretary of the Interior, the veritable explosion of commercial fishing especially on the

Columbia River and, the creation of a federal reclamation project below the reservation that dewatered the Umatilla River at times of anadromous fish migration and court decisions limiting tribal criminal jurisdiction over non-Indians. There were, in addition, a combination of factors that result from growing populations and which cumulatively have an adverse impact on fish and wildlife habitat, namely farming, logging, railroads, roads, freeways and the like.

B. The Confederated Tribes of the Umatilla Indian Reservation have regularly turned to the federal courts to protect and preserve the rights reserved by treaty. U.S. v. Brookfield Fisheries, Inc., 24 F.Supp. 712 (D. Ore. 1938); The Confederated Tribes of the Umatilla Indian Reservation v. Maison, unpublished opinion, Civil No. 8004 (D. Ore. 1956); The Confederated Tribes of the Umatilla Indian Reservation v. Maison, 186 F.Supp. 519 (D. Ore. 1960), aff'd 314 F.2d 169 (9th Cir. 1963); The Confederated Tribes of the Umatilla Indian Reservation v. Maison, 262 F. Supp. 871 (D. Ore. 1966), aff'd, 382 F.2d 1013 (9th Cir. 1967); Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969); The Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Ore. 1977).

C. Not being content with simply moving to protect what had been reserved too them, the Tribe began to take affirmative steps toward the protection and enhancement of the resources themselves. Non-Indian neighbors began to see that the Tribe was a valuable ally in efforts to protect and preserve fish, wildlife

and their habitat. The Tribe began adding professional staff, developing tribal plans, enacting tribal laws and providing for the enforcement of them and carrying out programs in pursuit of tribal goals. In doing so they became a leader among fish and wildlife interests in the region.

D. The Tribe is credited with several key and innovative programs in the area.

1. In a cooperative effort with the Oregon Department of Fish and Wildlife, the Tribe has engaged in what is one of the largest elk radio tagging projects in the country. This study of habitat use and seasonal movements is moving into its seventy year. Approximately 135 animals were fitted with radio collars and are monitored by periodic flights. The elk population migrates on and off the reservation during the year. It is not uncommon for the reservation to support 5,000 to 7,000 elk during the winter season.

2. Studies of whitetail and mule deer habitat use and seasonal movements have also been undertaken on the reservation. These studies are being done in house.

3. Studies have been undertaken of the upland game birds and pheasants on the reservation. This area of study has included the introduction of a nonresident species of game bird in the area on a trial and experimental basis.

4. The Tribe has constructed two anadromous fish acclimation facilities on the reservation. These facilities are designed to hold juvenile salmon or steelhead and allow them to imprint the particular source of water into their systems that

will lead them back to the same area when they spawn. Under a cooperative agreement with the State of Oregon juvenile fish are supplied from state hatcheries for rearing in these facilities.

5. The primary problem with re-establishing anadromous fish runs in the Umatilla River was the lack of water at times of fish migration. Alternatives, including litigation, were explored and considered. Ultimately, it was decided to attempt to seek a resolution that would not disrupt existing water users and which would still supply water needed for fish migration, spawning and rearing. The result is the Umatilla Basin Project which, under the auspices of the Bureau of Reclamation, will provide the needed water. This project has unanimous local and regional support and congressional authorization in the immediate future will allow advance planning to proceed.

F. All of these studies and projects are moving toward what is being called an "Integrated Natural Resources Management Plan" that will encompass the management of fish, wildlife, range, forestry and agriculture, hopefully for the betterment of all.

IV. Past Tribal Wildlife Management System

A. The tribal wildlife management system was embodied in the Tribal Wildlife Code that contained relevant tribal laws and which provided for criminal penalties for violations. In addition, the Fish and Wildlife Committee has delegated authority to enact temporary rules and emergency rules. The Committee, with the advice of appropriate biological staff, annually

establishes seasons, gear limitations, bag limits and other regulations for a particular season.

B. The jurisdictional structure on a reservation is such that there is no inherent tribal criminal jurisdiction over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 55 L.Ed. 2d 209, 98 S.Ct. 1011 (1978). Consequently, the tribal Fish and Wildlife Code's criminal sanctions could only be applied to Indians who violated the code on the reservation. The tribal code allows certain types of hunting and fishing by non-Indians who purchase a tribal license and also provides regulations for such activities even though there could be no criminal sanctions through the tribal criminal justice system.

C. Federal law provides several sources of enforcement authority however both have limitations that make them of limited utility. Under 18 USC Section 1165 a person may be prosecuted for trespassing upon trust lands for hunting, fishing or trapping purposes. It does not apply to non-trust land on the reservation. Under the relatively recent amendments to the Lacey Act, 16 USC Section 3403, a violation of tribal law regarding fish or wildlife is made a violation of federal law. Ultimately, a primary problem with the use of either federal statute is the caseload of federal prosecutors and federal courts which dictates against the prosecution of what are relatively minor fish and game cases.

D. The state purported to have and exercise jurisdiction over non-Indians on non-trust land on the reservation. Enforcement, when and if it did occur, could only be for

violations of state law. Thus, a non-Indian on non-trust land could ignore the mandates of tribal laws and regulations so long as his actions were in compliance with state law. Such practices would render the tribal management scheme meaningless in some instances.

V. Revised Tribal Wildlife Management System

A. In order to assert the type of control that would allow the pursuit and fulfillment of the Tribe's management plans it was necessary to develop a system under which the Tribe had the authority to effectively enforce its own laws and regulations. Guided primarily by Montana v. United States, 450 U.S. 544, 67 L.Ed.2d 493, 101 S.Ct. 1245 (1981), New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 76 L.Ed.2d 611, 103 S.Ct. 2378 (1983) and case law on the extent of tribal civil jurisdiction it was decided to develop a system that utilized civil penalties as the enforcement mechanism.

B. Proposed changes in a number of areas were made to the tribal code including a change in the penalty section making all violations of the code civil. Sanctions, in addition to civil fines, will include exclusion from the reservation and suspension or revocation of a person's right to obtain a license or exercise tribal hunting rights.

C. Violators will be issued civil citations to appear in tribal court. In instances where a person fails to appear a default judgment will be taken. If the person lives outside the boundaries of the reservation enforcement of the tribal court

judgment as a foreign judgment will be sought in the appropriate state court. The failure of a person to pay a fine or to take such other action ordered by the court will be subject to additional sanctions.

D. The concept of the Tribe regulating wildlife on the reservation by means of a civil code that applies to non-Indians is a novel idea in most areas. In many instances the application of tribal laws to non-Indians is met with suspicion, fear and resistance. Had this change been made ten or fifteen years ago on the Umatilla Indian Reservation, that no doubt, would have been the reaction. Over the years there has been developed a working relationship between the Tribe and state and local governments in which the role of the Tribe as a responsible governmental entity has been recognized as has the strength the Tribe can add to the efforts of other governments in areas of mutual interest and concern.

E. The Tribe has begun the process of discussing this change in tribal law with some representatives of state and local government to acquaint them with the idea and to obtain their input. Ultimately, a formal announcement will be made to all governments that will detail the changes in tribal law, the reasons for it and the expected results. Such an announcement will not take place until the revised tribal code is finalized and adoption and implementation is imminent and all key state, local and federal officials have been contacted regarding the change. Based upon experience thus far it is expected that there will be support for the Tribe's efforts.

VI. Conclusion

A. Upon review, the actual change in the jurisdictional structure over fish and wildlife on the Umatilla Indian Reservation is a very small part of a much bigger picture. It is, in essence, the punch line that comes at the end of a much bigger and longer effort. The development and preparation that is essential for the successful change in jurisdiction based upon teachings of past experience and case law, is the foundation upon which the assertion of tribal jurisdiction is based.

B. No government, obviously including tribal government, exists in a vacuum. The move by the Umatilla Tribe to assert its authority in the context of on reservation hunting and fishing is not just an exercise in jurisdictional territoriality - although the exercise of jurisdictional authority is an important aspect of sovereign governmental powers. It is a move toward effective management of resources that are critical to tribal existence and a way of life. But achievement of that ultimate goal depends, in part, upon the sound working relationship with state and local governments who are coming to recognize the value of this relationship. The Umatilla Tribe has recognized that there will likely be disagreements with other governments but also recognize that this should not deter cooperative efforts when possible elsewhere. The Tribe views implementation of a more effective system of wildlife management system as beneficial to all.

