No. 84716-9

WIGGINS, J. (dissenting) — The majority and the Court of Appeals hold that the State does not have criminal jurisdiction over Indians at the Maryhill Treaty Fishing Access Site (Maryhill). The majority ignores the historical background of Maryhill and the other in-lieu fishing access sites, which demonstrates persuasively that Maryhill is not within an "established Indian reservation." RCW 37.12.010. The majority also relies on our decision in *State v. Sohappy*, 110 Wn.2d 907, 757 P.2d 509 (1988) (*Sohappy* II), to hold that Maryhill is exempt from State criminal jurisdiction because it is a de facto reservation. But *Sohappy* II states that its holding is limited to the site at issue there, Cooks Landing. Moreover, we reached our decision in *Sohappy* II under the misimpression that federal jurisdiction over Cooks Landing preempted state jurisdiction. *Id*. I therefore respectfully dissent.

At the federal government's invitation, Washington assumed criminal jurisdiction in Indian country in 1963:

> The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but *such assumption of jurisdiction shall not apply to*

> *Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States* . . . .[1]

RCW 37.12.010 (emphasis added).

Our fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 229 P.3d 791 (2010). We determine the intent of the legislature primarily from the statutory language. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). If the language of the statute is plain on its face, we give effect to that plain meaning. *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). Statutory language is ambiguous only if it can reasonably be interpreted in more than one way. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000). To discern a plain meaning, we employ traditional rules of grammar. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). Finally, we generally construe exceptions to statutory provisions narrowly in order to give effect to the legislative intent that underlies the general provisions. *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999).

[1] The rest of RCW 37.12.010 lists exceptions to the limitation on Washington's assumption of jurisdiction that are not relevant here.

Here, RCW 37.12.010 provides a geographical exception to the State's general assumption of both criminal and civil jurisdiction. That exception applies

> to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States . . . .

RCW 37.12.010. To fall within the exception, an act must occur

- on tribal lands or allotted lands;
- within an established Indian reservation;
- and on land held in trust by the United States or subject to a restriction against alienation imposed by the United States.

As noted by the majority, the parties all read the requirement "within an established Indian reservation" to apply to both tribal lands and allotted lands. Majority at 7 n.3. The majority suggests that it would be possible to construe the statute so that "within an established Indian reservation" modifies only allotted lands, not tribal lands. *Id.* But reading RCW 37.12.010 as a whole demonstrates that tribal lands must be within an established reservation. The State assumed jurisdiction over "Indians and Indian territory, reservations, country, and lands . . . ." *Id.* If the exception to this jurisdiction included all "tribal lands," the statute would be left in an interpretive morass in which courts attempted to distinguish between Indian

territory/country and tribal lands.

The critical issue then becomes whether Maryhill is "within an established Indian reservation." The history leading to the creation of the in-lieu fishing access sites demonstrates that they are not "Indian reservations." We look to the history of a statute when interpreting the legislative intent. *State v. Harvill*, 169 Wn.2d 254, 263, 234 P.3d 1166 (2010). The history of RCW 37.12.010 reaches back to the treaty with the Yakama[2] Nation.

The Maryhill site was one of the in-lieu sites established to replace access points to accustomed Indian fishing places guaranteed by treaty but destroyed by the dams built on the Columbia River. Majority at 3. The treaty with the Yakama Nation created a "reservation" for the Yakama (and several other tribes) defined by a metes and bounds description. Treaty between the United States and the Yakama Nation of Indians art. II, June 9, 1855, 12 Stat. 951, 952 (Yakama treaty). The Yakama treaty explicitly refers to this land as a "reservation." *Id*. The Yakama treaty also guarantees the right to fish, both within the boundaries of the reservation and in accustomed fishing areas outside the reservation:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as

[2] The spelling of the name was changed from "Yakima" to "Yakama" in 1994 to reflect the native pronunciation." *United States v. Confederated Tribes of Colville Indian Reservation*, 606 F.3d 698, 701 n.2 (9th Cir. 2010).

> also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . .

Id. art. III, at 953. Without question, the Yakama reservation is an "established Indian reservation." More to the point, the Yakama treaty distinguishes between fishing within the reservation and fishing "at all usual and accustomed places," which are clearly not within the reservation. *Id*. art. III, at 954. The Yakama treaty also reserves a specific reservation expressly for fishing at a specific location:

> [T]here is also reserved and set apart from the lands ceded by this treaty, for the use and benefit of the aforesaid confederated tribes and bands, a tract of land not exceeding in quantity one township of six miles square, situated at the forks of the Pisquouse or Wenatshapam River, and known as the "Wenatshapam fishery," which said reservation shall be surveyed and marked out whenever the President may direct, and be subject to the same provisions and restrictions as other Indian reservations.

Id. art. X, at 954. "The center of the Wenatshapam Fishery was the confluence of Icicle Creek and the Wenatchee River in north central Washington State near the modern-day town of Leavenworth." *United States v. Confederated Tribes of Colville Indian Reservation*, 606 F.3d 698, 701 (9th Cir. 2010). The Wenatshapam Indians were parties to the Yakama treaty and have also been known as the "Wenatchi" or "Wenatchee." *Id.* n.1.

In short, the Yakama treaty establishes a "reservation," guarantees

fishing rights on the reservation, guarantees fishing rights at accustomed sites off-reservation, and establishes a separate reservation at a specific fishing site. This tells us that the accustomed fishing sites not included in the metes and bounds description within the Yakama treaty are not part of the established Yakama reservation or the Wenatshapam reservation.

In 1988, Congress authorized creation of in-lieu fishing sites for use by the Indians. Pub. L. No. 100-581, § 401, 102 Stat. 2938 (1988). Congress directed that "[a]ll federal lands" within the areas described on maps on file in specific offices be administered "to provide access to usual and accustomed fishing areas and ancillary fishing facilities for members of the Nez Perce Tribe, the Confederated Tribes of Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakima Indian Nation." *Id.* § 401(a). In addition, Congress authorized the acquisition of six additional sites "for the purpose of providing access and ancillary fishing facilities" for the Nez Perce and the three confederated tribes. *Id.* § 401(b)(1).

Congress referred to these places as "lands" and "sites," but never as "reservations." This history of these sites contradicts any conclusion that any in-lieu site should be considered to be an "established Indian reservation." Surely Congress must intend to "establish" an Indian

reservation in order to have an "established Indian reservation." But there is not the slightest indication that Congress thought it was establishing a reservation by creating the in-lieu sites.

The majority errs by ignoring the qualifier "established." This leads the majority to find a reservation simply because Congress authorized the Secretary of the Army to purchase six in-lieu sites and improve them for access to fishing. Creation of an Indian reservation must be more purposeful than this. The majority again errs when it resorts to generalized dictionary definitions of "reservation," ignoring the requirement of establishment as a reservation.

The majority relies primarily on a federal interpretation of federal criminal jurisdiction in *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985) (*Sohappy* I), *cert. denied*, 477 U.S. 906 (1986). Majority at 10-12 The site at issue in *Sohappy* I, Cooks Landing, was acquired by the federal government in 1945 to replace Indian fishing grounds that were submerged or destroyed in the process of building the Bonneville Dam. *Sohappy* I, 770 F.2d at 823. Maryhill was established as a treaty fishing access site under a similar statute in 1988. *See* § 401, 102 Stat. at 2944. Cooks Landing was acquired for the "*use and benefit*" of certain Indian tribes, including the Yakama. *Sohappy* I, 770 F.2d at 823 (citing 59 Stat. 22 (1945)). Maryhill was established as part of an effort to satisfy the same

federal commitment that gave rise to Cooks Landing. *See* S. Rep. No. 100-577, at 22 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3908, 3912.

Sohappy I considered whether the Cooks Landing in-lieu fishing access site was within the definition of Indian country for purposes of chapter 53 of 18 U.S.C.: "the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . ." 18 U.S.C. § 1151. Acknowledging that the term "Indian reservation" was not defined by statute, *Sohappy* I relied on a prior United States Supreme Court case: "[T]he Supreme Court in *United States v. John*, 437 U.S. 634, 649, 98 S.Ct. 2541, 2549, 57 L.Ed.2d 489 (1978), suggested that land 'declared by Congress to be held in trust by the Federal Government for the benefit of the . . . Indians . . . [is a] "reservation," at least for the purposes of federal criminal jurisdiction [under 18 U.S.C. § 1153].'" *Sohappy* I, 770 F.2d at 822 (alterations in original).

We are not concerned here, as was *Sohappy* I, with determining federal criminal jurisdiction over Indian country. Rather, we are concerned with our own Washington statute written in light of treaties reached in Washington Territory in 1855 that clearly distinguish between established reservations and fishing rights off-reservation.

The majority's reliance on *Sohappy* I, 770 F.2d 816, which

necessarily relies on *John*, 437 U.S. 634, ignores the differences between this case and *John.* The Indian lands in *John* had actually been declared an Indian reservation, albeit after their initial purchase. *Id*. at 649. Maryhill has never been declared an Indian reservation. And unlike the Choctaw land in *John*, Maryhill was set aside for the narrow purpose[3] of providing access to treaty fishing places.

The majority's adoption of the reasoning of the Ninth Circuit Court of Appeals in *Sohappy* I leads the majority to rely as well on our prior decision in *Sohappy* II, 110 Wn.2d 907.[4] Majority at 12. As the majority notes, we said in *Sohappy* II, "Our holding is narrowly limited to the in-lieu site here involved." 110 Wn.2d at 909. We limited our holding because we relied entirely on the decision of the Ninth Circuit in *Sohappy* I and because the State's briefing was "of no use to this court." *Id.*

A more important reason not to rely in *Sohappy* II is that we

[3] That narrow purpose is expressed in the federal regulations governing the site. *See* 25 C.F.R. § 247.7 (structures built on the sites limited); 25 C.F.R. § 247.9(a) (residential use prohibited); 25 C.F.R. § 247.19 (use of sites limited to fishing activities; other commercial uses prohibited). These limitations are incompatible with the general uses for which Indian reservations are created. Maryhill is different than other usual and accustomed fishing sites, in that Maryhill is set aside for the exclusive use of Indians rather than open for shared and equitable use. Majority at 15. But it is also fundamentally different from Indian reservations, in that its use is limited to treaty fishing and related activities.

[4] Although the defendants in both cases share the surname Sohappy, the individuals are not the same. The named defendant in the federal case was David Sohappy Sr., while the defendant in the state case was Steve Gary Sohappy. *Compare* 770 F.2d at 816, *with* 110 Wn.2d at 907.

assumed incorrectly that federal jurisdiction over Cooks Landing would preempt state jurisdiction:

> The in-lieu site obviously is not within the original boundaries of the reservation itself described in the 1855 treaty; however, it is a part of a reservation for purposes of application of our state jurisdiction statute. The Ninth Circuit has held that the Cooks Landing site is within an Indian reservation. This vests exclusive jurisdiction in the federal and tribal governments as stated by the United States Supreme Court in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, *supra*. It necessarily follows that RCW 37.12.010, by its terms, excludes state jurisdiction over this site.

Id. at 911. We held that the federal government had exclusive jurisdiction based on *Arquette v. Schneckloth*, 56 Wn.2d 178, 182–83, 351 P.2d 921 (1960). We failed to note that *Arquette* was decided before the legislature assumed jurisdiction over Indian country in RCW 37.12.010. At the time of *Arquette*, Washington would assume jurisdiction over an Indian reservation only if the tribe voluntarily ceded jurisdiction to the State, which had not happened in that case. *See State v. Squally*, 132 Wn.2d 333, 937 P.2d 1069 (1997) (discussing historical background).

Thus, this court held in *Sohappy* II that Cooks Landing was a reservation for purposes of state law because *Sohappy* I preempted the application of state law. With the passage of RCW 37.12.010, the analysis of *Sohappy* II is no longer valid.

Common sense also tells us that the Maryhill fishing access site is

not a reservation. It makes sense for the State to refrain from enforcing state law on an established reservation because the tribe can maintain law and order through a regular police force. But there is no regular Indian police force at an isolated site like Maryhill. Law enforcement officers also need clear boundaries within which they can exercise the power of the State. Established reservations provide such clear boundaries; a potpourri of in-lieu fishing access sites does not.

The majority seeks to bolster its conclusion by mentioning that the Bureau of Indian Affairs "expressed its agreement that 'the States do not have regulatory jurisdiction or authority over the in-lieu fishing sites.'" Majority at 15 (citing Use of Columbia River Treaty Fishing Access Sites, 62 Fed. Reg. 50,886, 50,867 (Sept. 29, 1997)). We do not defer to the Bureau of Indian Affairs in interpreting Washington statutes, particularly a bureau declaration issued four decades after Congress authorized Washington to assume jurisdiction over Indian country and three decades after Washington assumed that jurisdiction.

When Washington assumed criminal jurisdiction over Indian territory, it limited this jurisdiction to Indian reservations. Because I believe that we must perform our own analysis of Maryhill's reservation status, and because I do not believe that Maryhill is an Indian reservation, I respectfully dissent.

I dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:
Chief Justice Barbara A. Madsen
Justice James M. Johnson