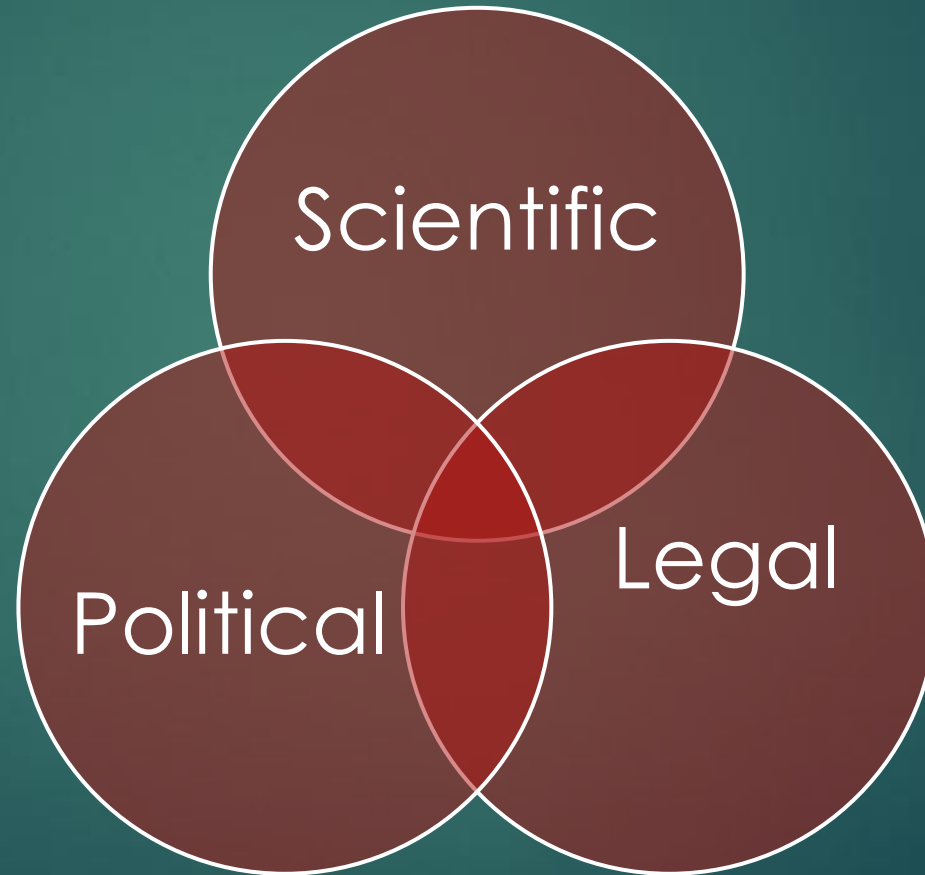




# A Tribal View on Managing Uncertainty

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# It's not all about the science



# Swinomish Indian Tribal Community

- Reservation is located at the mouth of the Skagit River in North Puget Sound
- It is the third largest river in the Western United States
- The Skagit supports sustainable wild populations of all 6 salmon species
- It contributes 1/3 the fresh water and 1/3 the chinook salmon to Puget Sound
- Salmon are all managed for wild production, with small hatchery operations in place
- Steelhead, Chinook Salmon, Bull Trout are all listed as threatened pursuant to the Endangered Species Act



Point Elliot Treat of 1855 were designed to reduce uncertainty

- Establishment of a Homeland
  - Fishing Rights
  - Water Rights
  - Hunting and Gathering Rights
- 

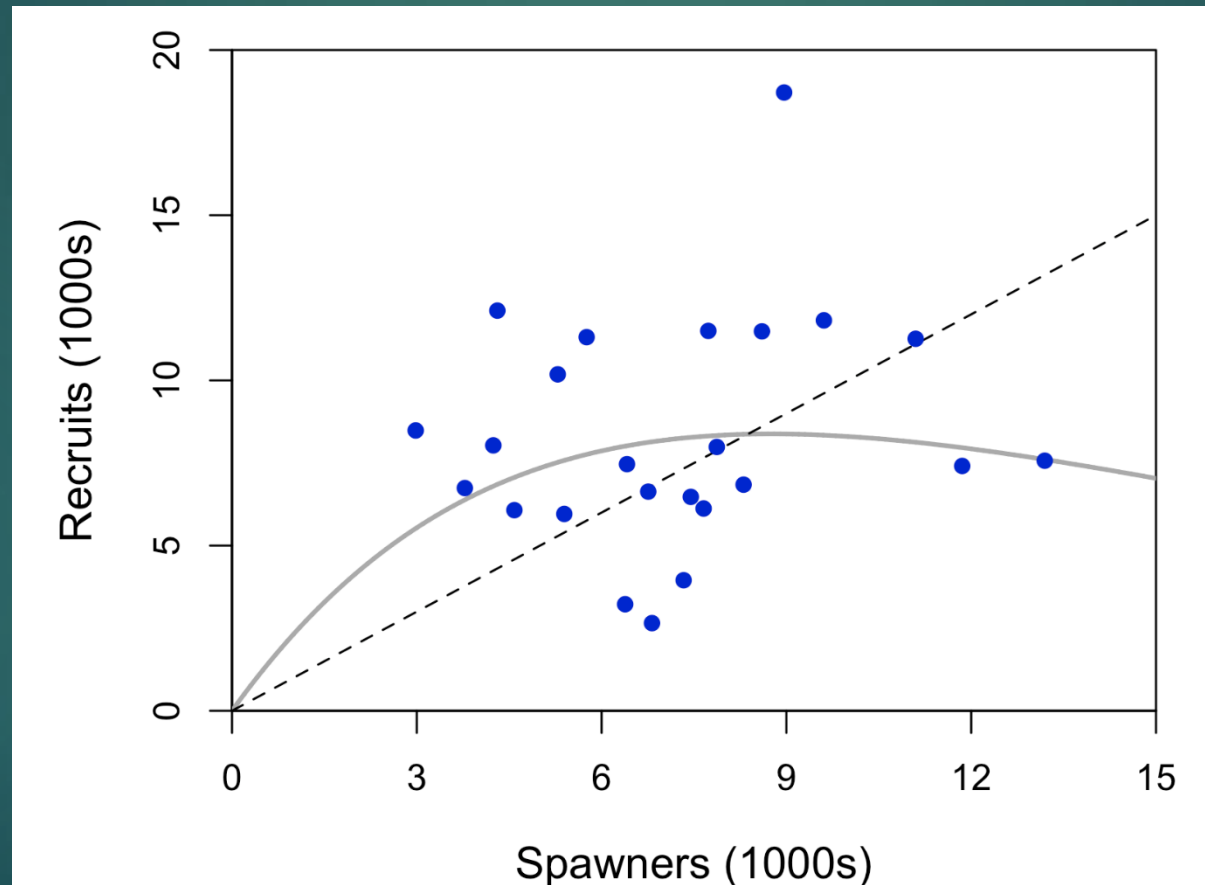
# How well did that work out?

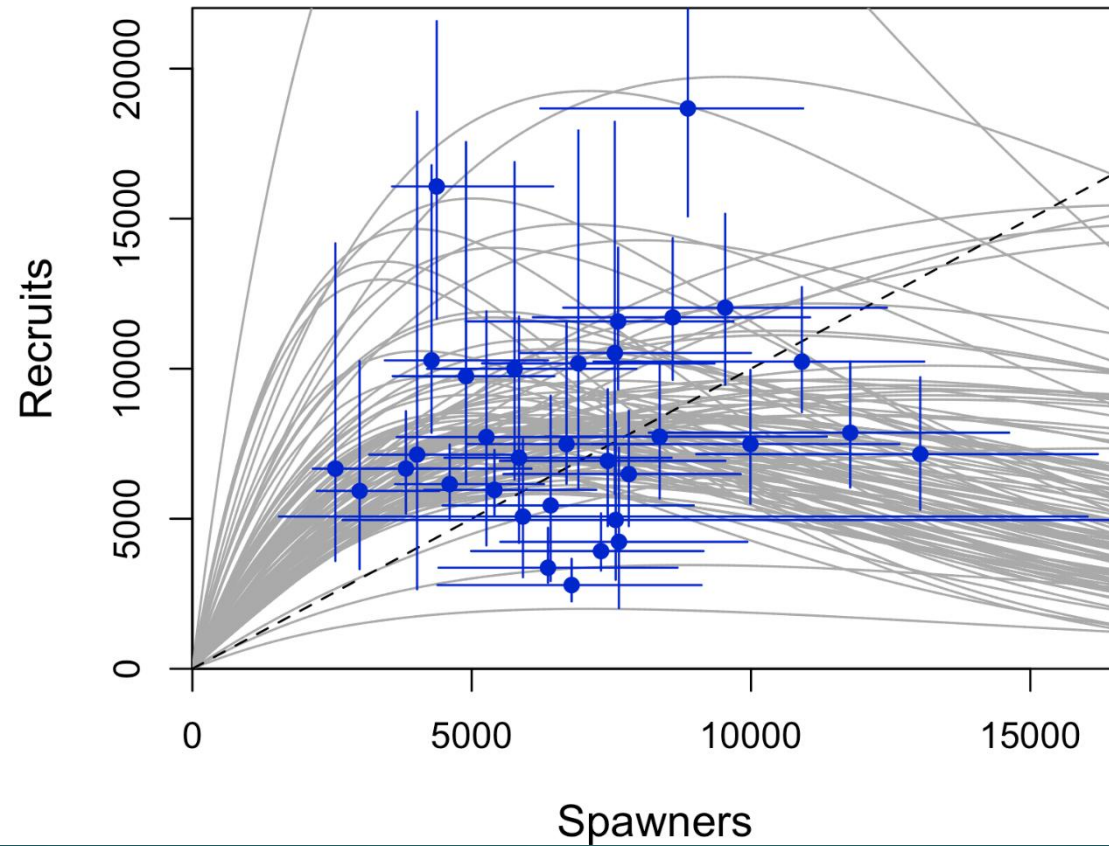
- ▶ By 1974, Tribes were catching 2% of the salmon in Washington State
- ▶ In 1974, US v Washington decision provided that the Tribes could, after providing for adequate escapement, harvest up to 50% of the “harvestable surplus”. Non-Indians harvest the remaining surplus
- ▶ 2015: Tribes are catching less fish than they were in 1973
- ▶ For over 100 years the State of Washington has permitted diversions and withdrawals with little regard to fisheries needs or Tribal water rights
- ▶ Numerous streams have been identified by State agencies as being overappropriated since the 1940’s
- ▶ Salmon fisheries have been severely constrained

# LESSON LEARNED

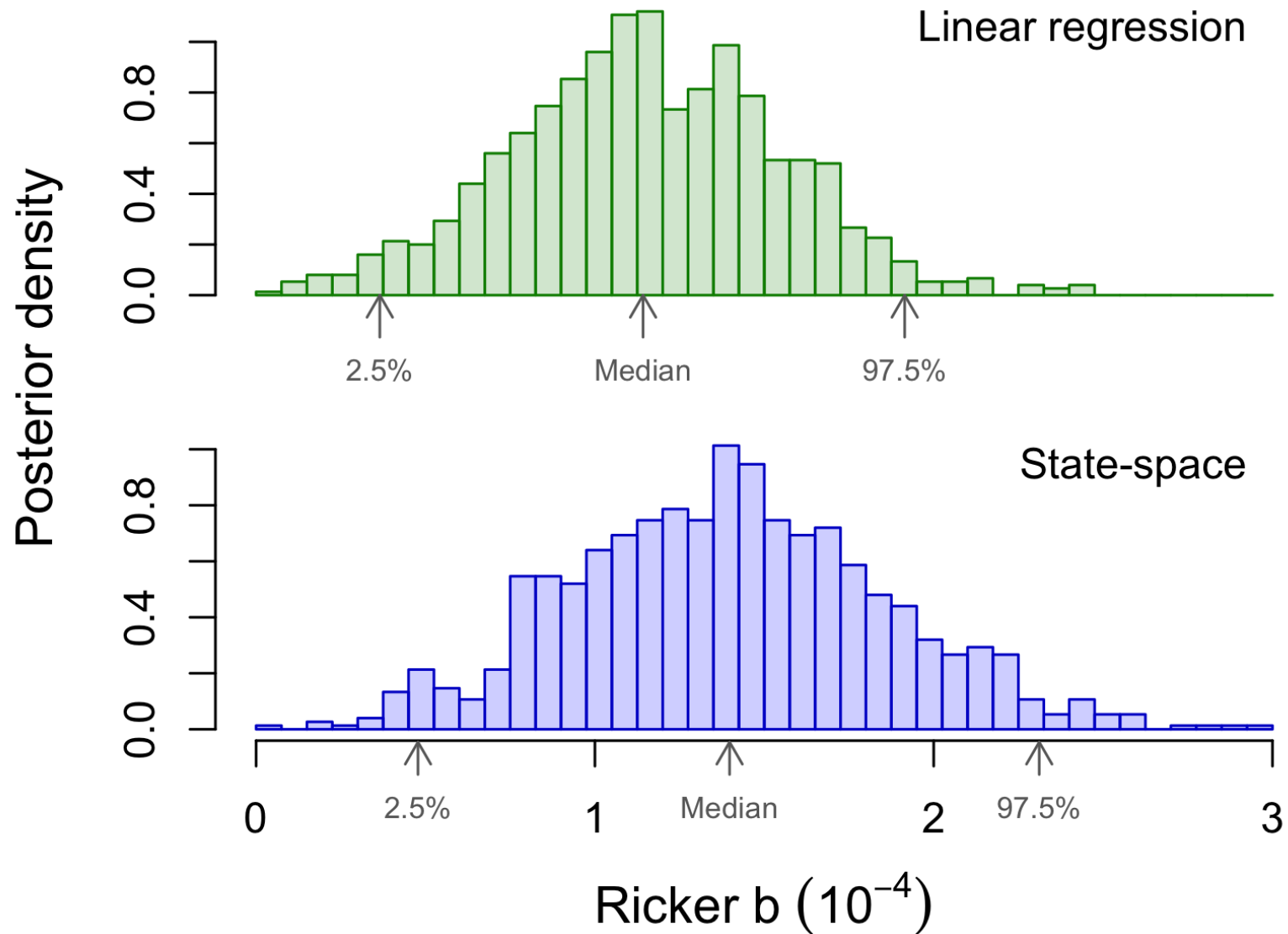
- ▶ The certainty that was supposed to flow from the Treaty was converted to the certainty that fish and flows would be gone without affirmative action.
- ▶ There is no such thing as certainty with regard to political promises or legal principles

# Swinomish Tribe's Approach to Managing Scientific Uncertainty









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- ▶ Sound ecological principles must be applied even if we don't have site specific data
- ▶ Recognize that those that don't like the decision will attack the science regardless of the quality of the data or analysis.

# Skagit Instream Flow Rule adopted in 2001

## ▶ Major Elements

- ▶ Monthly flows adopted based on IFIM , not based on hydrology
- ▶ Limitations applied to insure that cumulative diversions did not adversely effect migration or channel forming flows
  - ▶ Decided that we couldn't reduce mean monthly flow by more than 10%
- ▶ Flows to maintain fish forage capabilities in the estuary established
  - ▶ Chinook move from isolated channels to mudflats to forage during high water and high tide. We decided that we would not reduce their forage time by more than 10%



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Wa Dept of  
Ecology photo



## LESSON LEARNED

- It was necessary to incorporate ecological principles even in the absence of site specific data or previously established criteria. Technical uncertainty was addressed
- Climate Change was not considered which was a mistake
- People incorrectly expect that instream flows will be met all the time. They don't understand that flows are set high enough to protect the benefits of high flows, which means that they are unmet part of the time when there are median or low flows
- Public concern was not significant until flow limitations were actually imposed, 12 years after the adoption of the rule. Public does not engage until it affects them personally

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- ▶ Political decision making rarely manages for the long term
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  - ▶ Overtime, politics catches up to science.
- ▶ Existing laws are ephemeral, particularly in the face of adverse legal decisions
  - ▶ State law required fish passage, Tribe litigated, law changed
  - ▶ State Growth Management Act required environmental protection, Tribe litigated, law changed to eliminate protection
  - ▶ Instream flow rule established and a multitude of laws were proposed to eliminate protections

# LESSONS LEARNED

- ▶ Having the law on your side does not necessarily provide the certainty you seek.
- ▶ Science and scientific accuracy is merely one factor that determines political outcome. Frequently, scientists believe that the facts will prevail. This is not borne out by experience
- ▶ The one thing politicians are very good at counting is votes. They have low tolerance for low accuracy in this regard. Laws tend to catch up with the science. A strategy is necessary to sustain the resources in the interim, and develop an affirmative strategy to expedite the change
- ▶ Handshake agreements don't work. Get it in writing. Be specific. Hold people to their agreements.
- ▶ Be prepared to be in it for the long haul. Adjudications take decades

# MANAGING LEGAL UNCERTAINTY

The Swinomish Tribe's general approach is to litigate if someone breaks an agreement or breaks a law that impacts our resources. This approach seems to have created certainty in the minds of our adversaries that this is the path we will take. This has avoided some bad decision making on the part of others.

- ▶ We weigh the potential benefits of a negotiated solution against what we might gain or lose with a court decision.
- ▶ With a willing opponent, it is better to negotiate and arrive at agreeable terms rather than to have the uncertain outcome of a court decision. It is important to recognize this is not always possible



# LESSONS LEARNED

- ▶ The facts do not always prevail.
- ▶ Judges consider social/political ramifications
  - ▶ It is rare that water litigation results in actually taking water away from those who already have it
- ▶ Costs are certain to be high
- ▶ The process will always be slower than you anticipate
- ▶ Litigation changes the political dynamic in a watershed. Long lasting effects may reduce the likelihood of resolution on other related or unrelated issues
- ▶ Your negotiating space is reduced once a court has ruled.
- ▶ Federal decisions generally have more permanency than State or local decisions