



Tribal Regulation of Wetlands after Sackett A Tulalip Perspective

Presented By
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Gonzaga-SCBA Indian Law CLE





Tulalip Tribes of WA

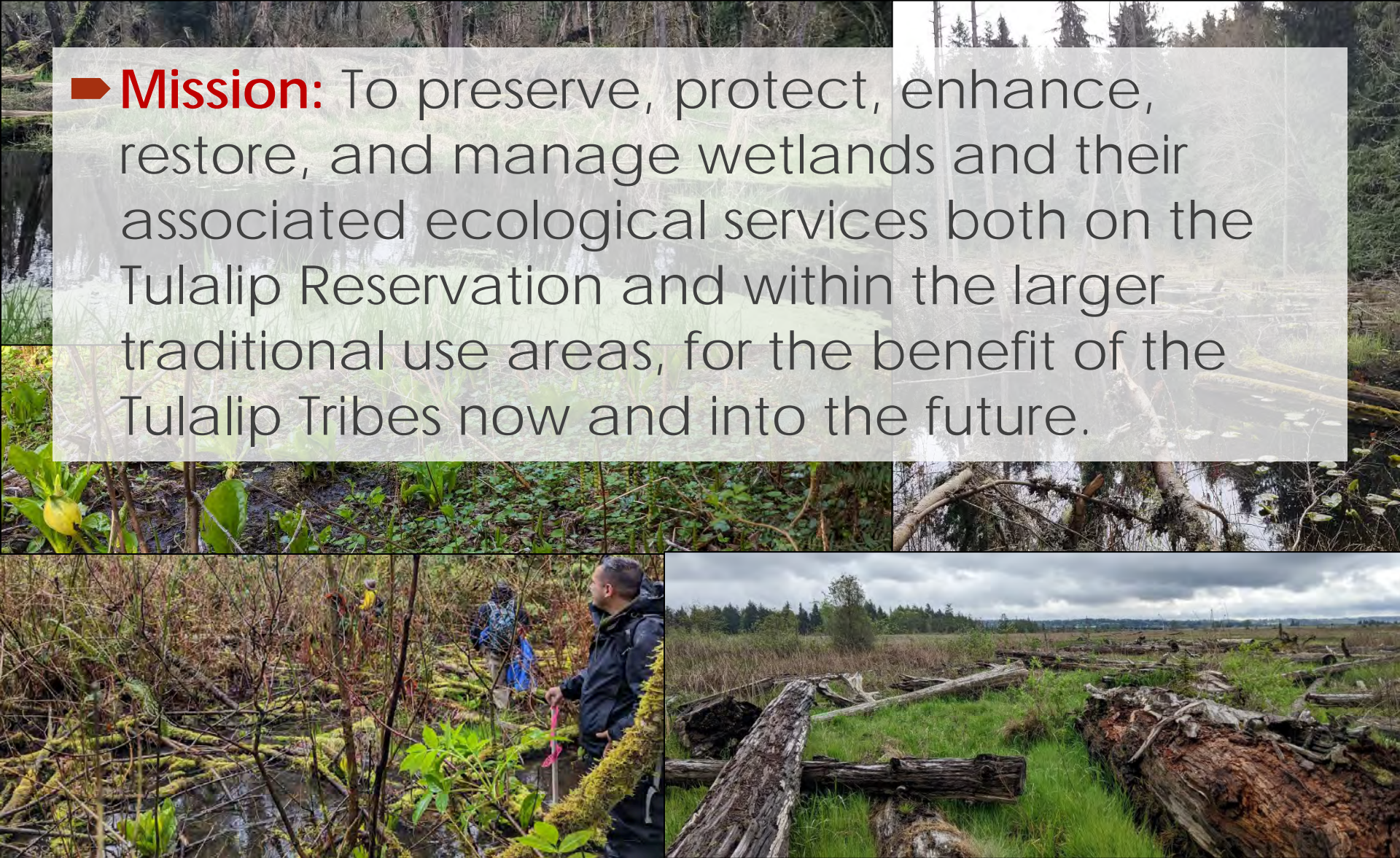
- Successors in interest to the Snohomish, Snoqualmie, Skykomish, and other allied bands signatory to the 1855 Treaty of Point Elliott





Tulalip Wetland Program

► **Mission:** To preserve, protect, enhance, restore, and manage wetlands and their associated ecological services both on the Tulalip Reservation and within the larger traditional use areas, for the benefit of the Tulalip Tribes now and into the future.





Key Points

- **Regulatory Confusion:** Sackett Decision is unclear and not based on scientific knowledge or standards
- **Capacity Constraints:** Tribal wetland programs already constrained by staffing, funding, and geographic scope
- **Data Constraints:** Existing data gaps leave uncertainty for wetland regulation and management

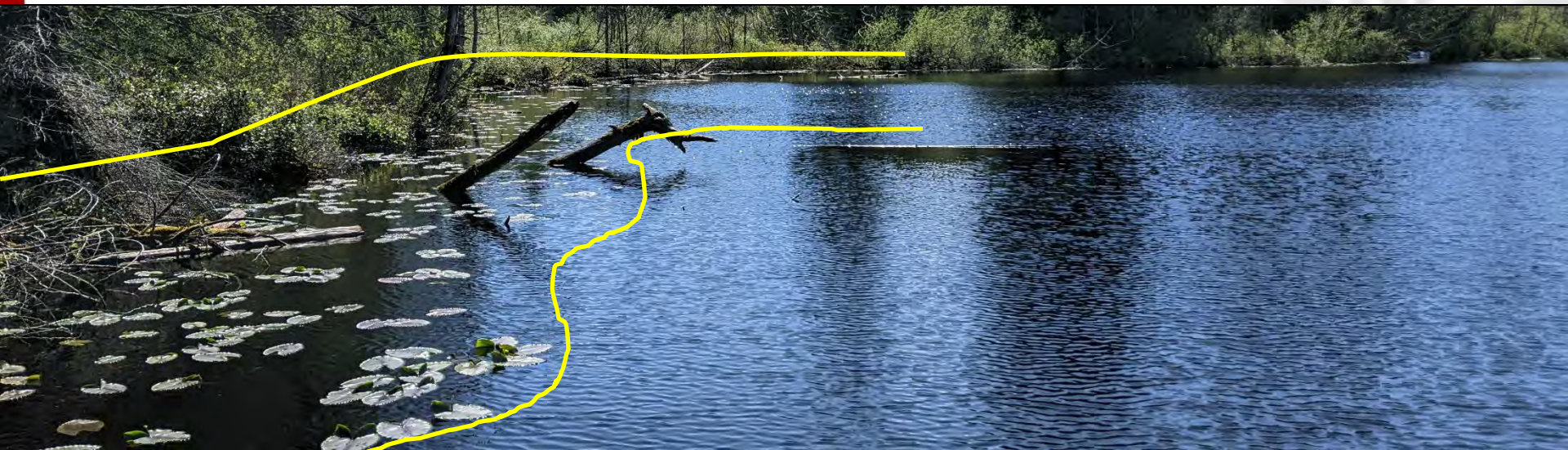


REGULATORY CONFUSION



“Jurisdictional adjacent wetlands”

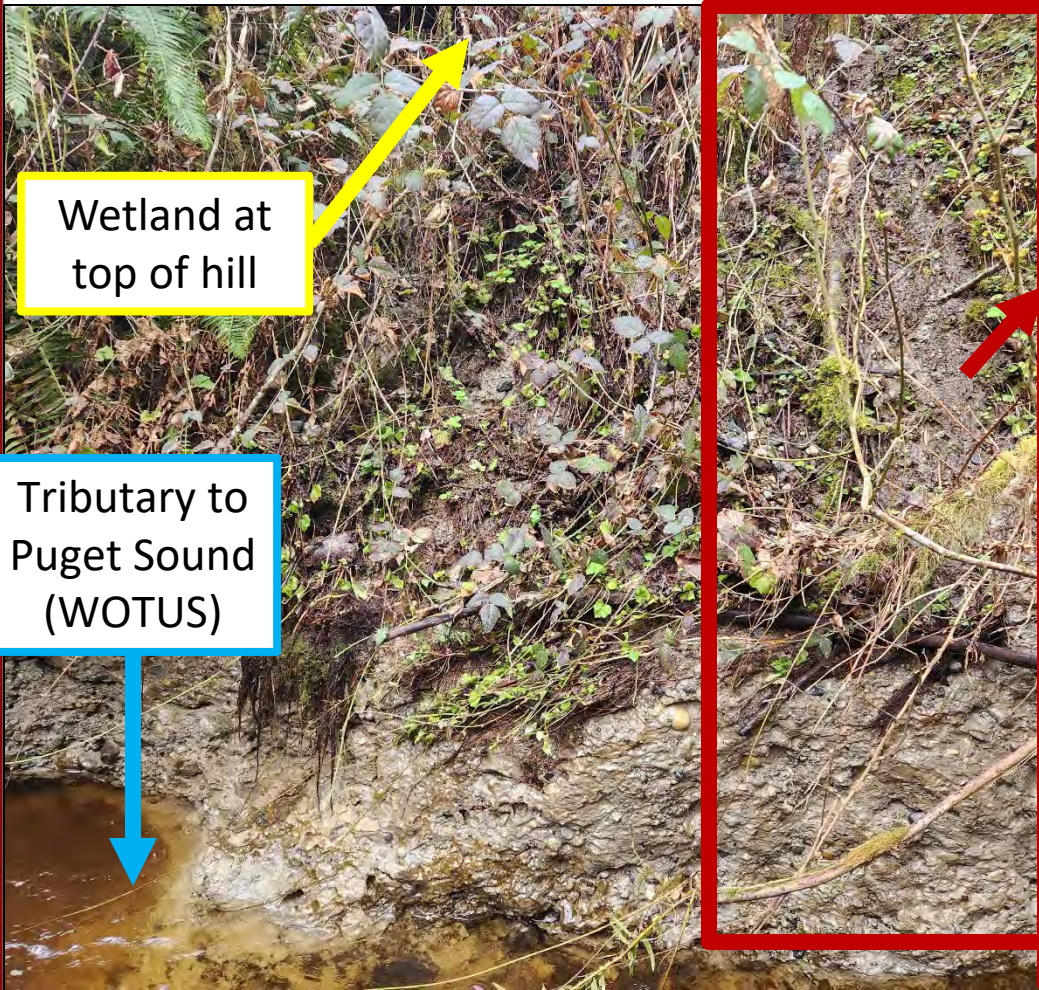
- Include only wetlands that are “indistinguishable from waters of the United States.” This occurs only when wetlands have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”





“Jurisdictional adjacent”

➤ What about other surface co



Wetland at top of hill

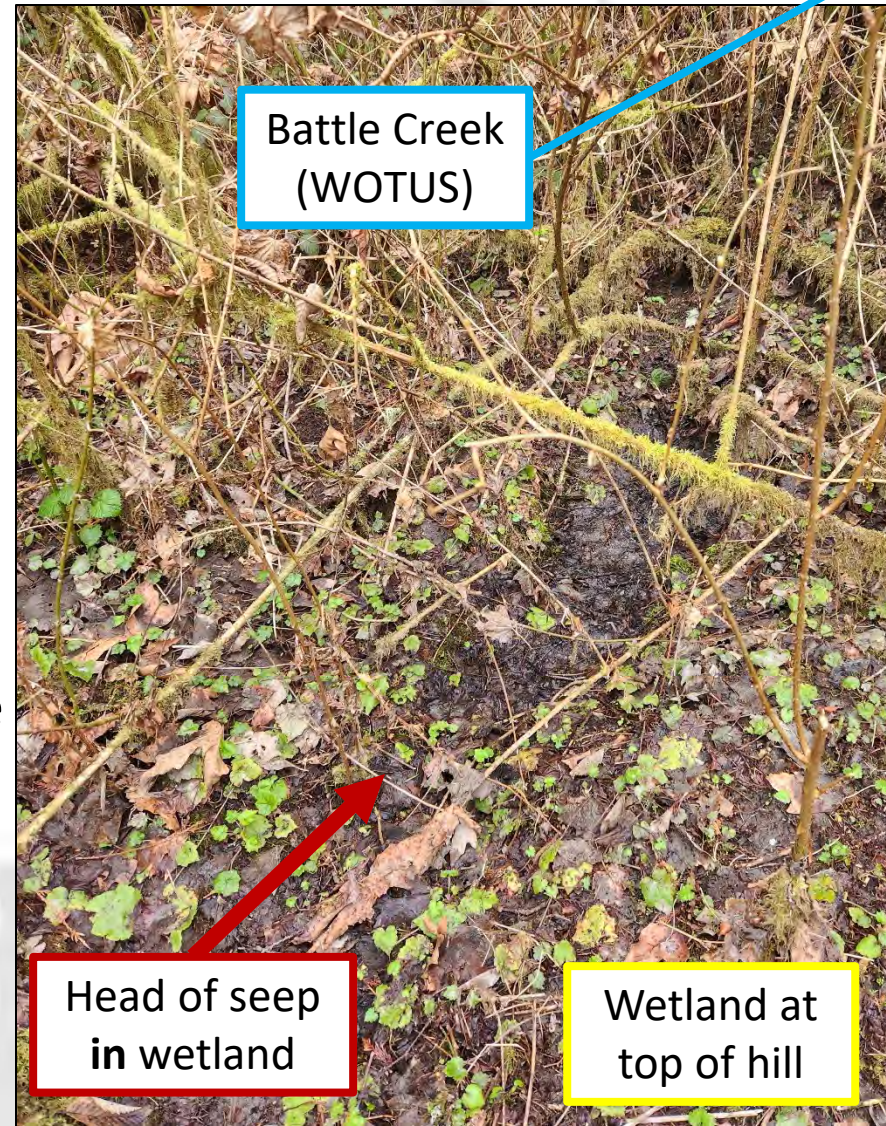
Tributary to Puget Sound (WOTUS)





“Continuous Surface Connection”

- A continuous surface connection means the adjacent wetland either:
 - **physically abuts or touches** the paragraph (a)(1) or **relatively permanent water**, or
 - **are connected** to the paragraph (a)(1) or **relatively permanent water** by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. (11/23 Updates for Tribes and States on “Waters of the United States”)



Battle Creek
(WOTUS)

Head of seep
in wetland

Wetland at
top of hill



“Relatively Permanent Standard”

- Have flowing or standing water year-round or continuously *during certain times of year*.
- Do not include flowing or standing water *for only a short duration in direct response to precipitation*.
 - No minimum flow duration has been established because flow duration varies extensively by region. (11/23 Updates for Tribes and States on “Waters of the United States”)
- Does a seep count?
 - Likely only seasonal flow when water table is high enough
 - What data are needed to establish “relatively permanent”?



Sackett Ignores Science

- Isolated wetlands or wetlands with only ephemeral connections to other water bodies contribute to
 - Flood control
 - Water quality
 - Stream base flows
 - Aquifer recharge
 - Wildlife and fish habitat
 - And more!
- These functions impact WOTUS and treaty-reserved resources even without a “continuous surface connection” or being “relatively permanent”



CAPACITY CONSTRAINTS



Staffing Constraints

- ▶ Limited time, resources to dedicate to changes in WOTUS definitions and potential/actual impacts
 - ▶ E.g., ArcGIS software
- ▶ May not have wetland-specific personnel at all



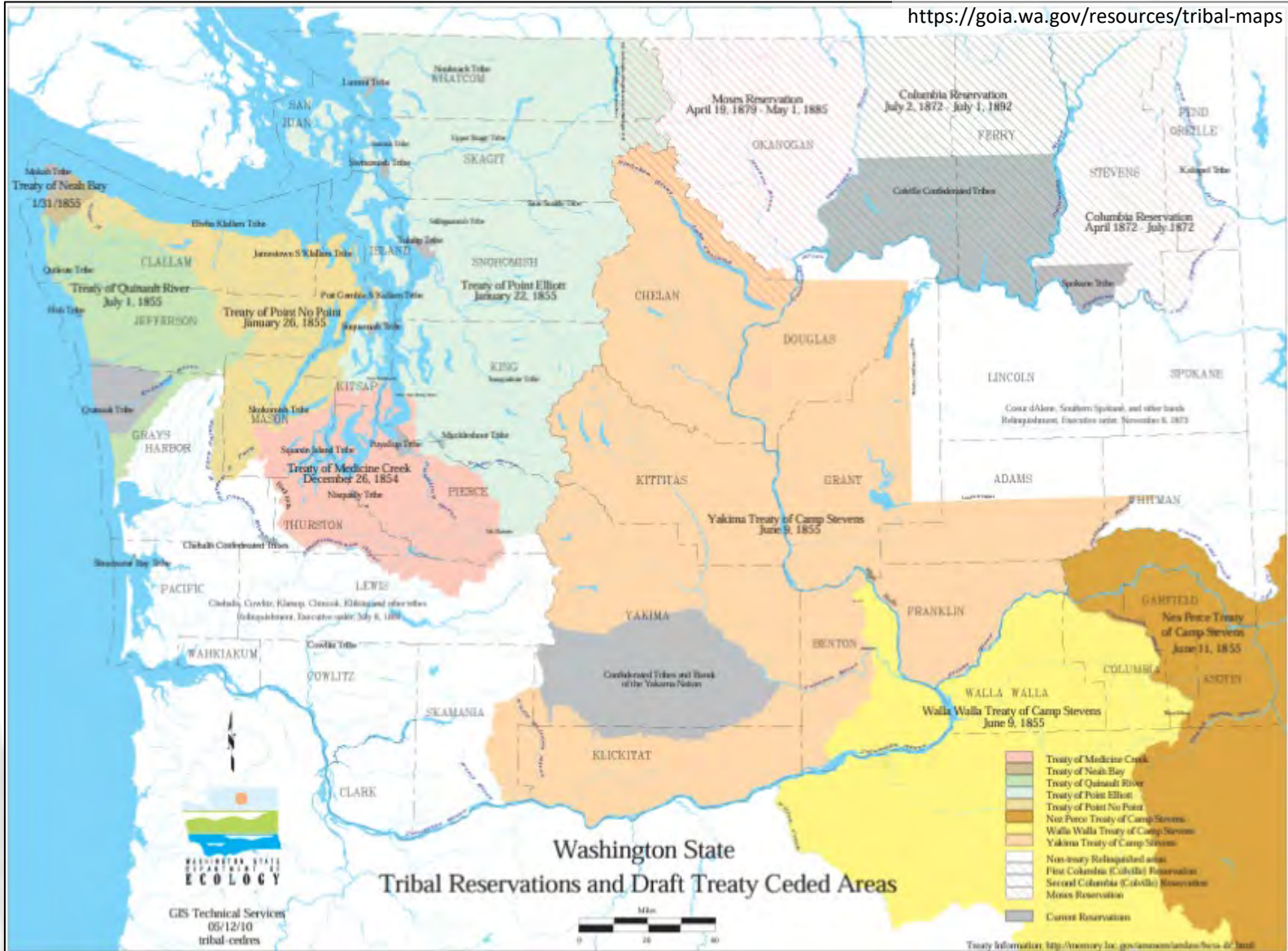
Funding Constraints

- Funded primarily or completely through grants
 - Often limited to specific projects/tasks
- Common grants include, but are not limited to:
 - EPA Wetland Program Development Grants [WPDGs]
 - Competitive
 - Implementation projects not eligible for funding
 - EPA CWA §106 Funding
 - Must have Treatment as a State under CWA
 - Water quality focused
 - Funds goes to tribal water quality programs that may or may not include wetland monitoring



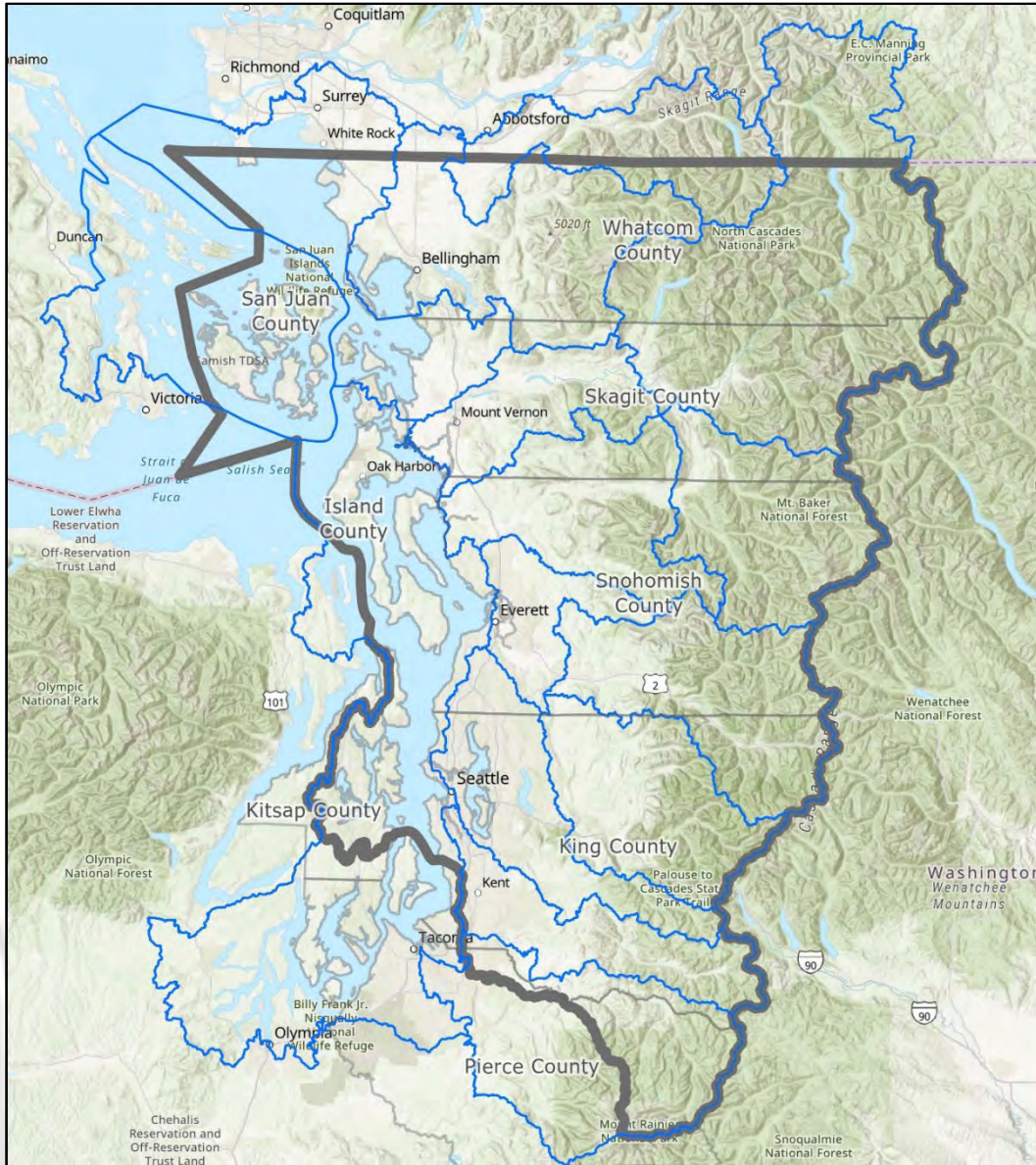
Geographic Challenges

<https://goia.wa.gov/resources/tribal-maps>



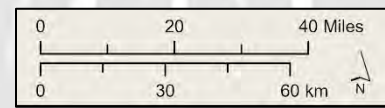


Jurisdictional Challenges



- Ceded lands
 - 1 country
 - 1 state
 - 8 counties
 - Over 20 cities
- Watersheds
 - 2 countries
 - 1 state, 1 province
 - 11 counties
 - Over 30 cities

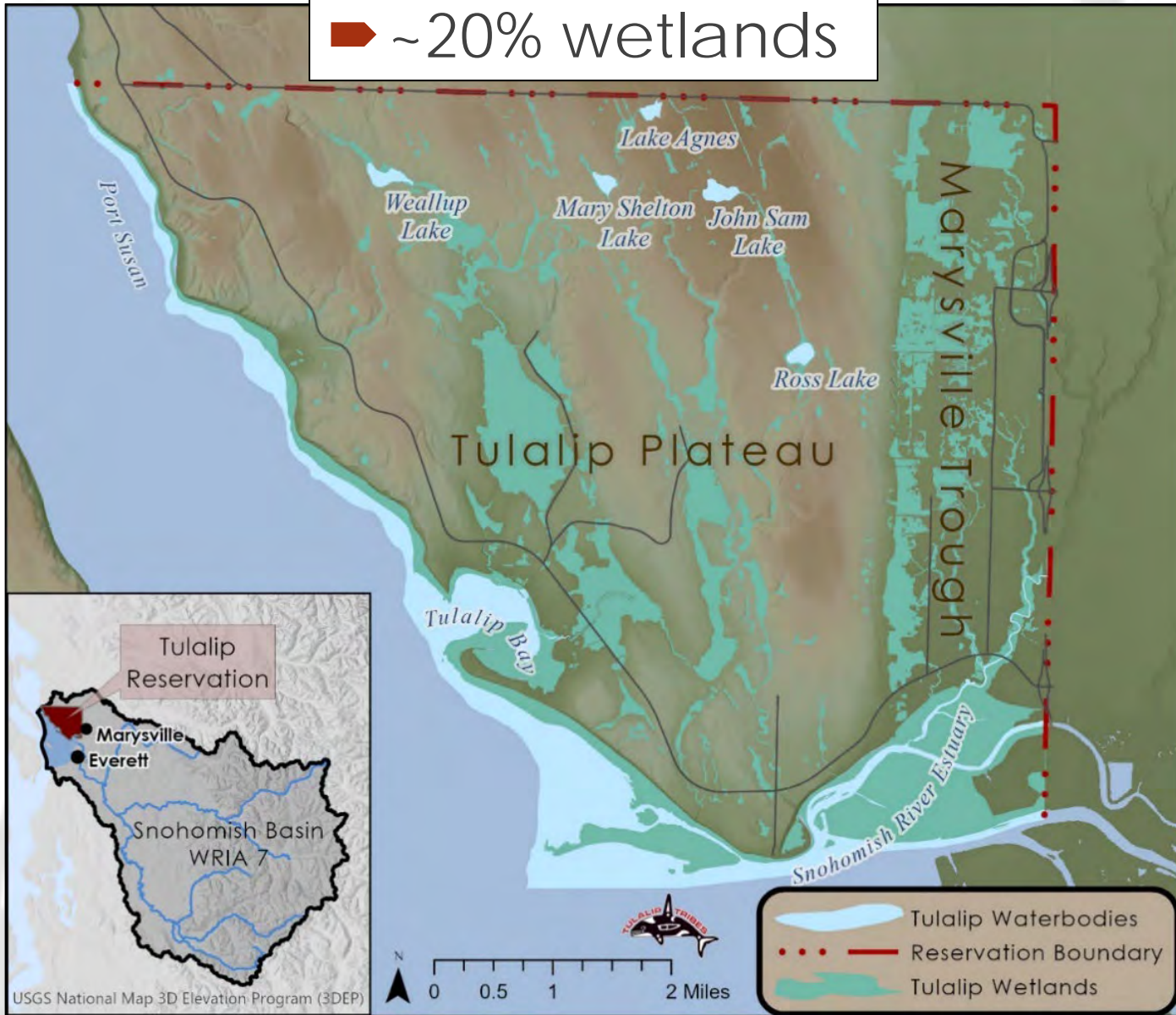
	HUC08 Watersheds
	Counties
	Treaty of Point Elliot, 1855 ceded lands





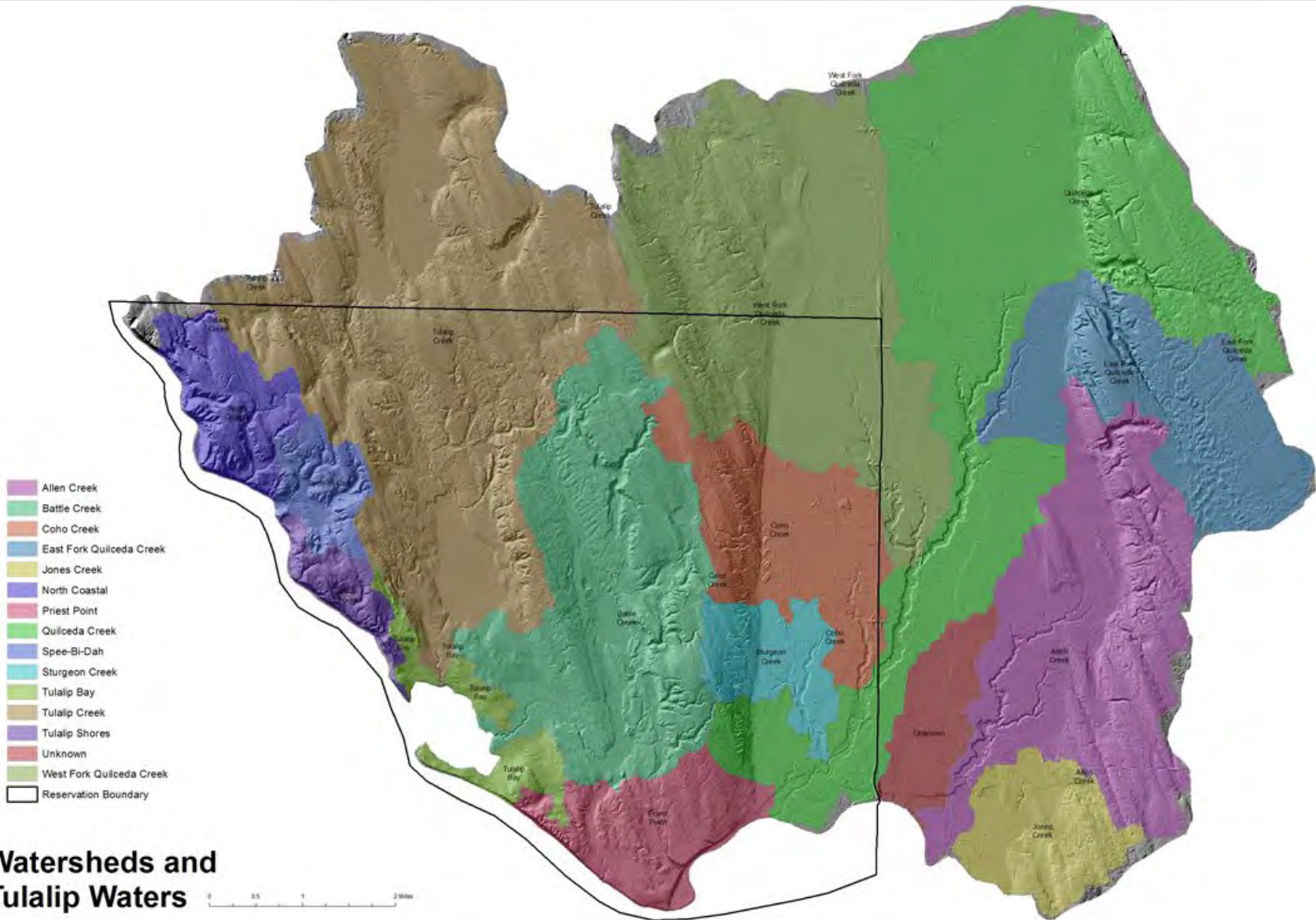
Tulalip Reservation

■ ~20% wetlands





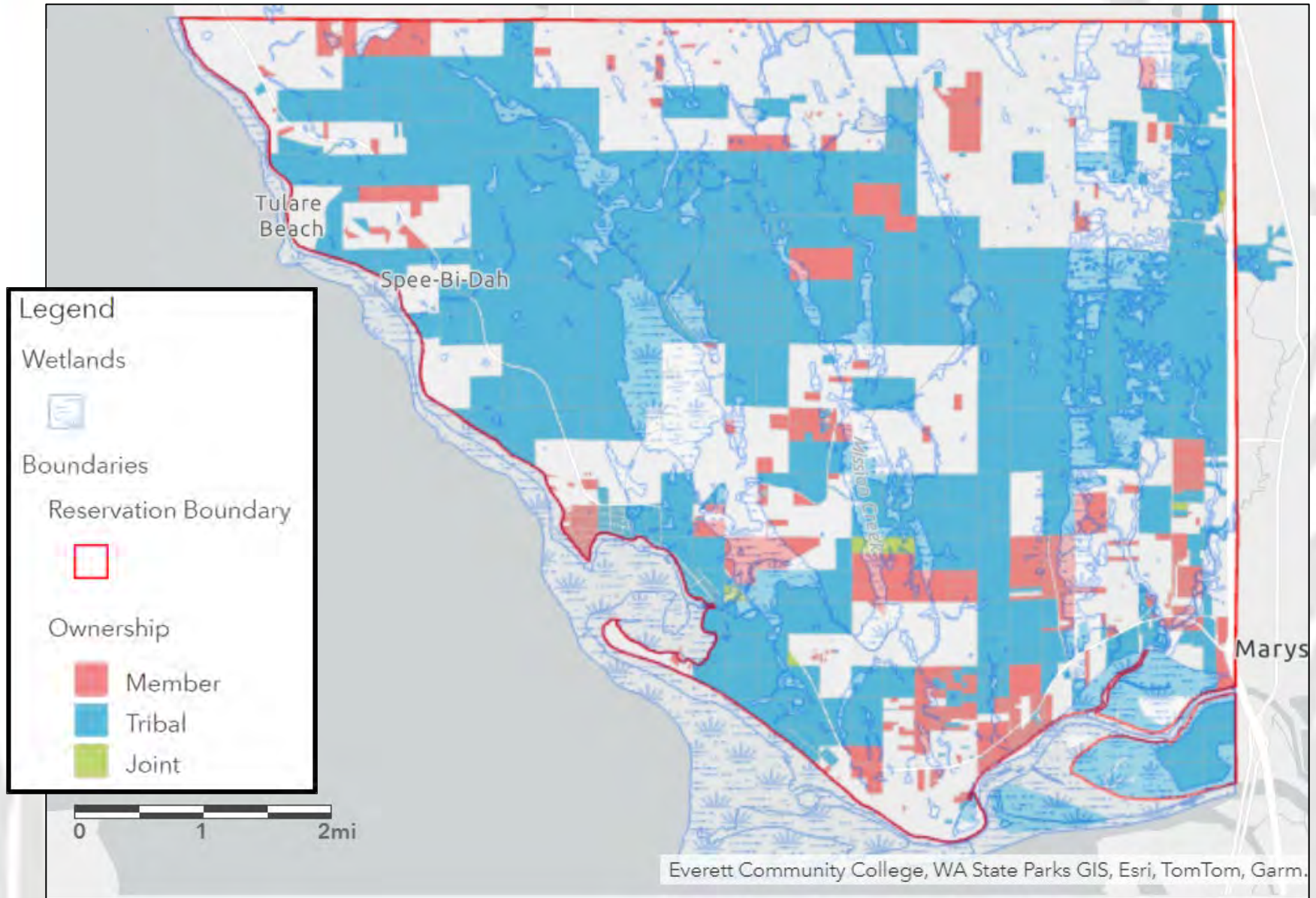
Tulalip Watersheds



**Watersheds and
Tulalip Waters**



Tulalip Reservation



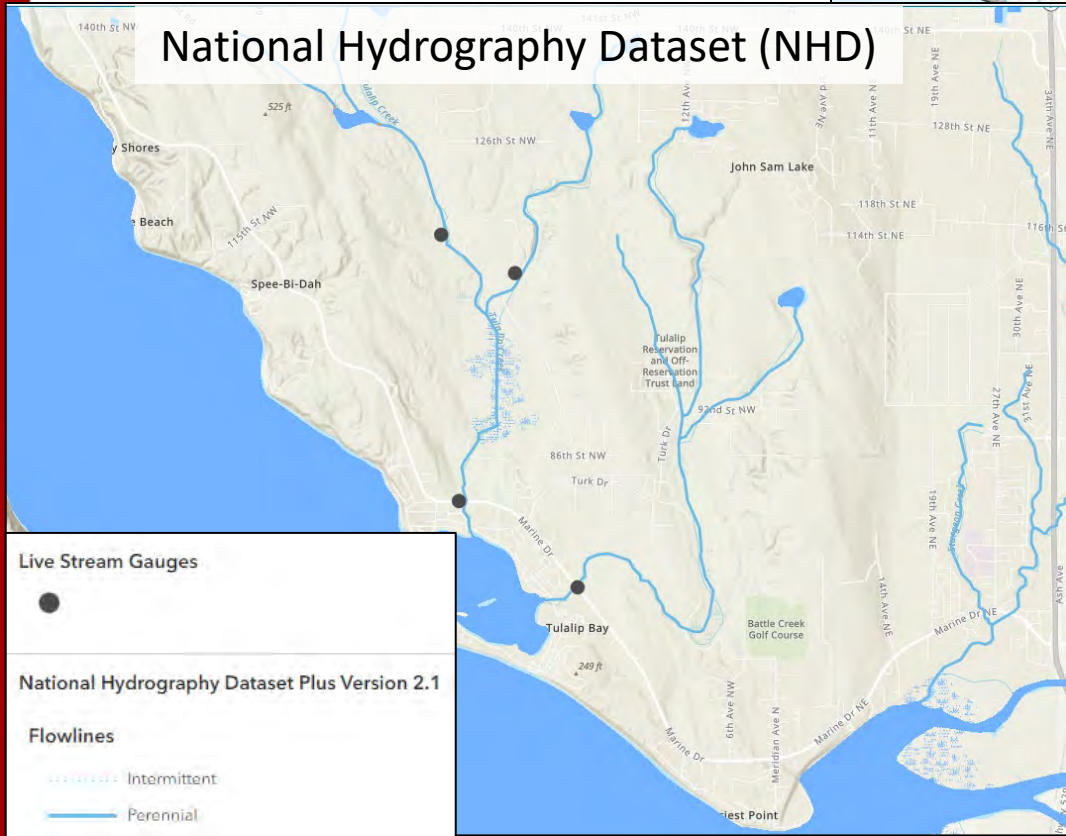
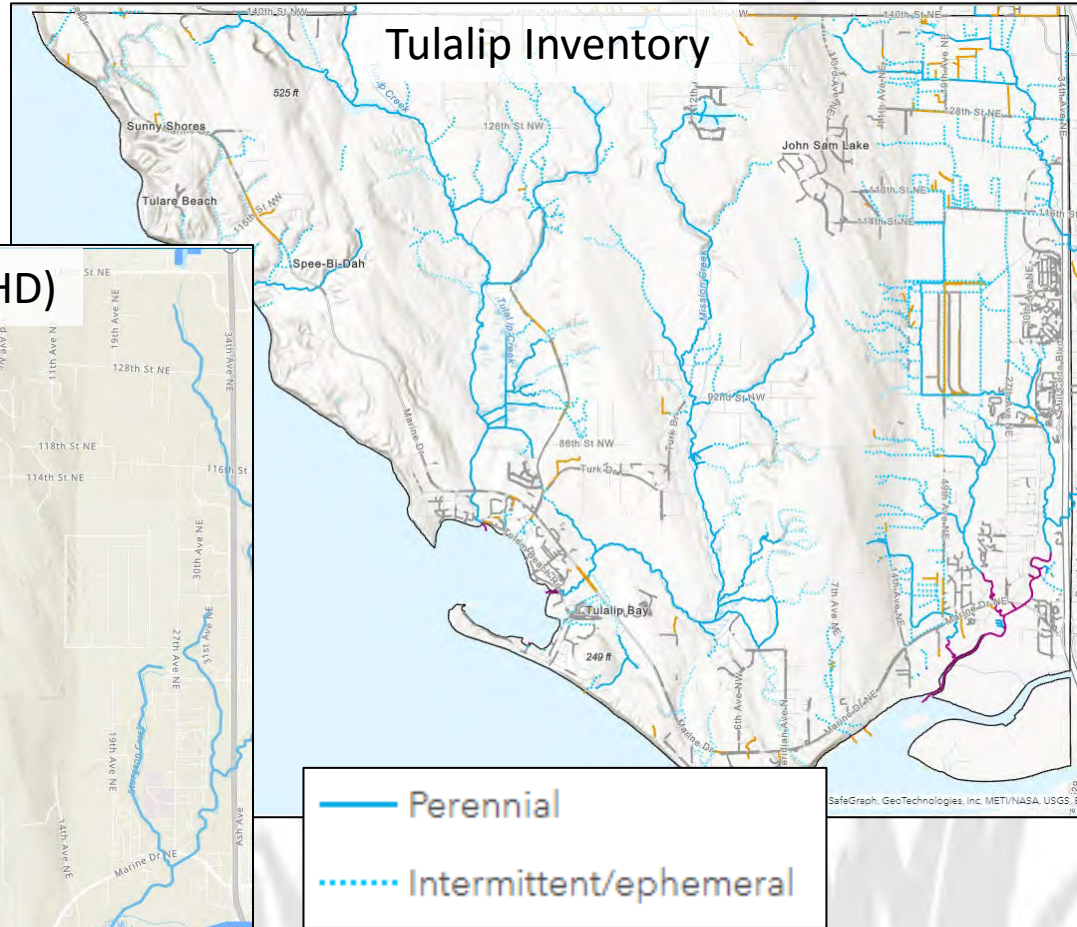


DATA CONSTRAINTS



Streams

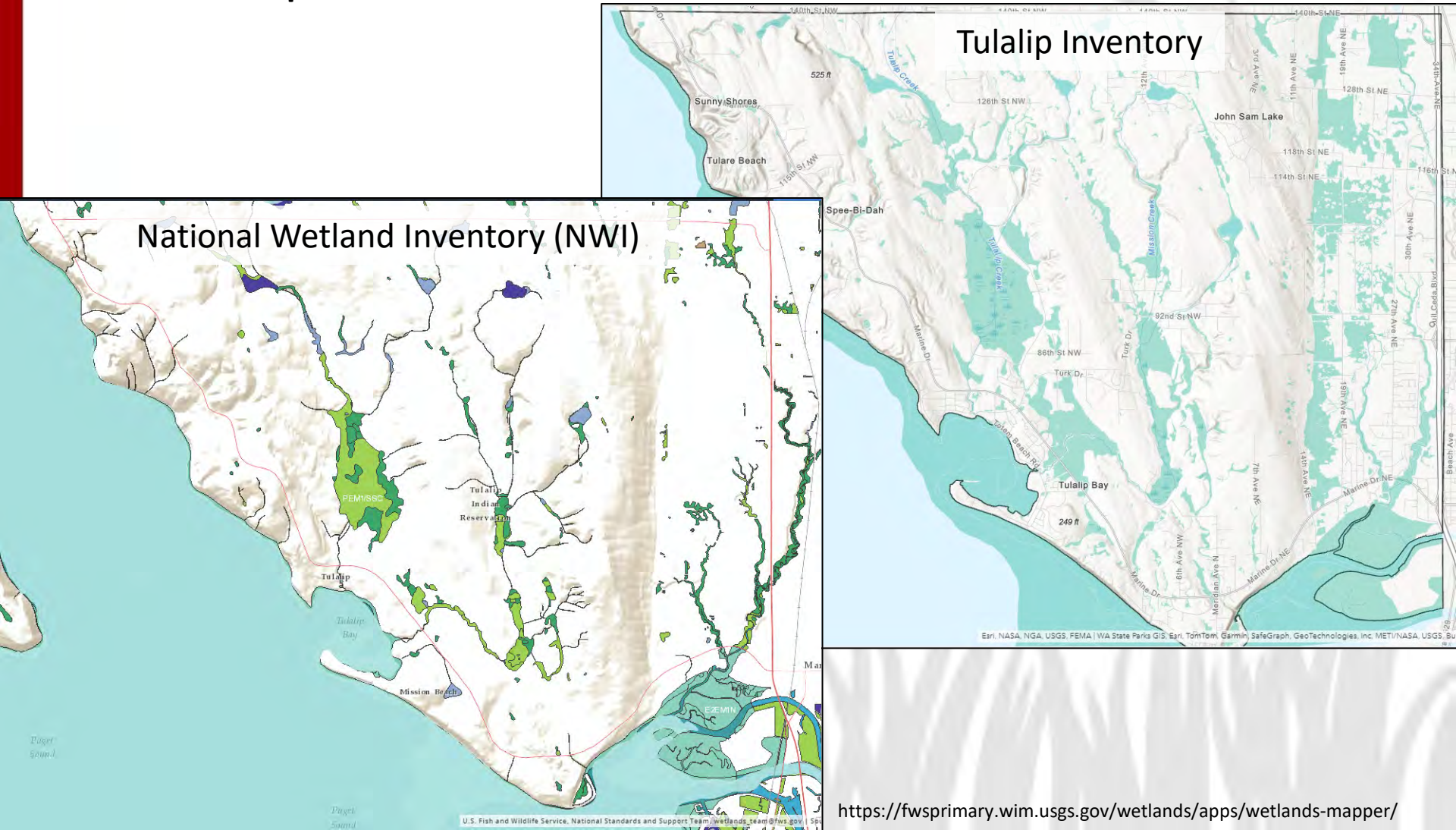
- Lack of flow data for small streams, especially under forested canopies





Wetlands

➤ Incomplete wetland data sets





TULALIP CASE STUDY



Reservation Development

- Major increase in permitted projects and unpermitted activities





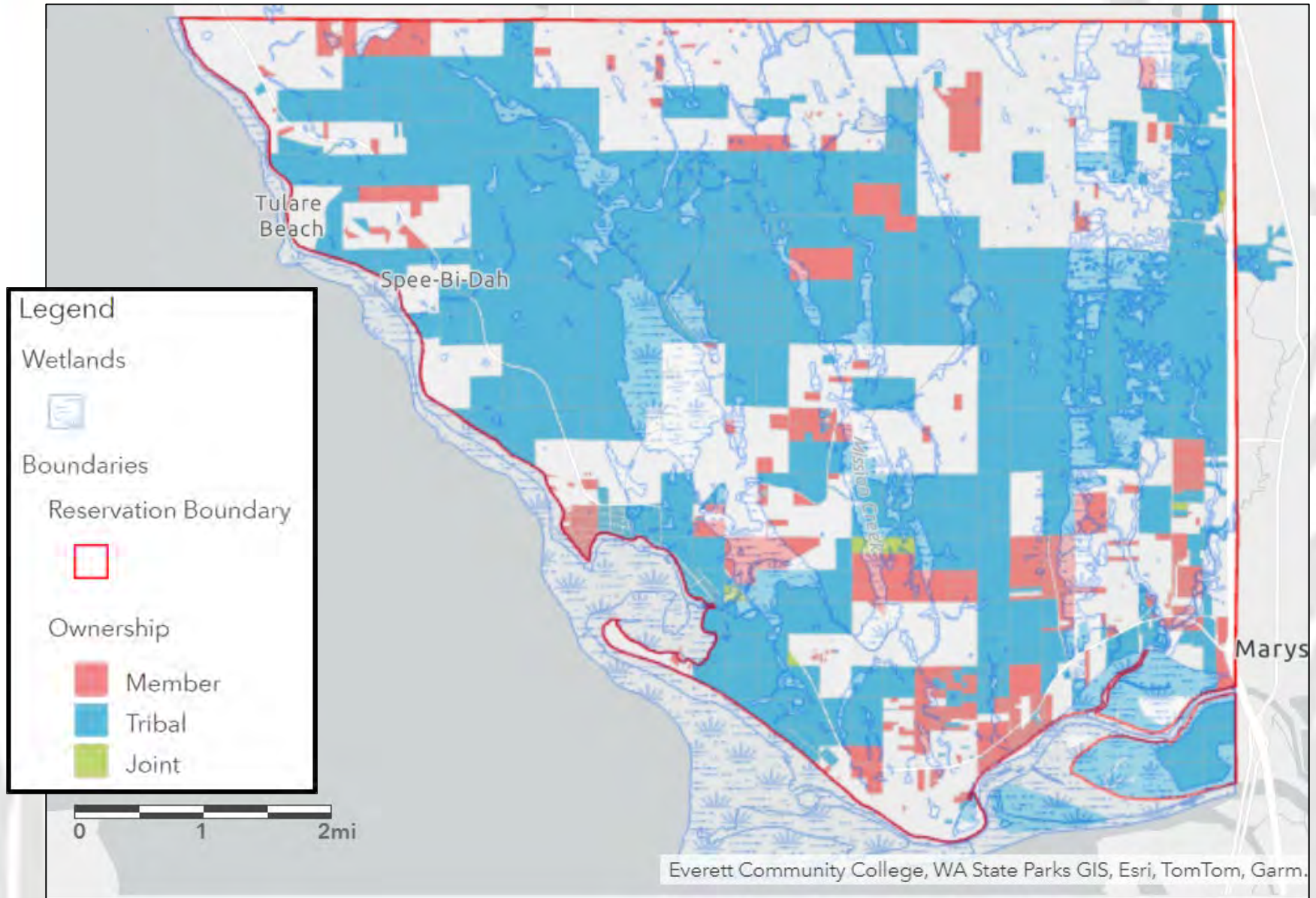
1995 - 2018

- **Net loss of 14.42 ac** of wetlands (0.63 ac/yr)
- **Total loss of 28.35 ac**
 - 48% (13.60 ac) of losses caused by residential development
 - ~55% (15.59 ac) of losses were on fee-simple, non-tribal lands





Tulalip Reservation





Tulalip Case Study

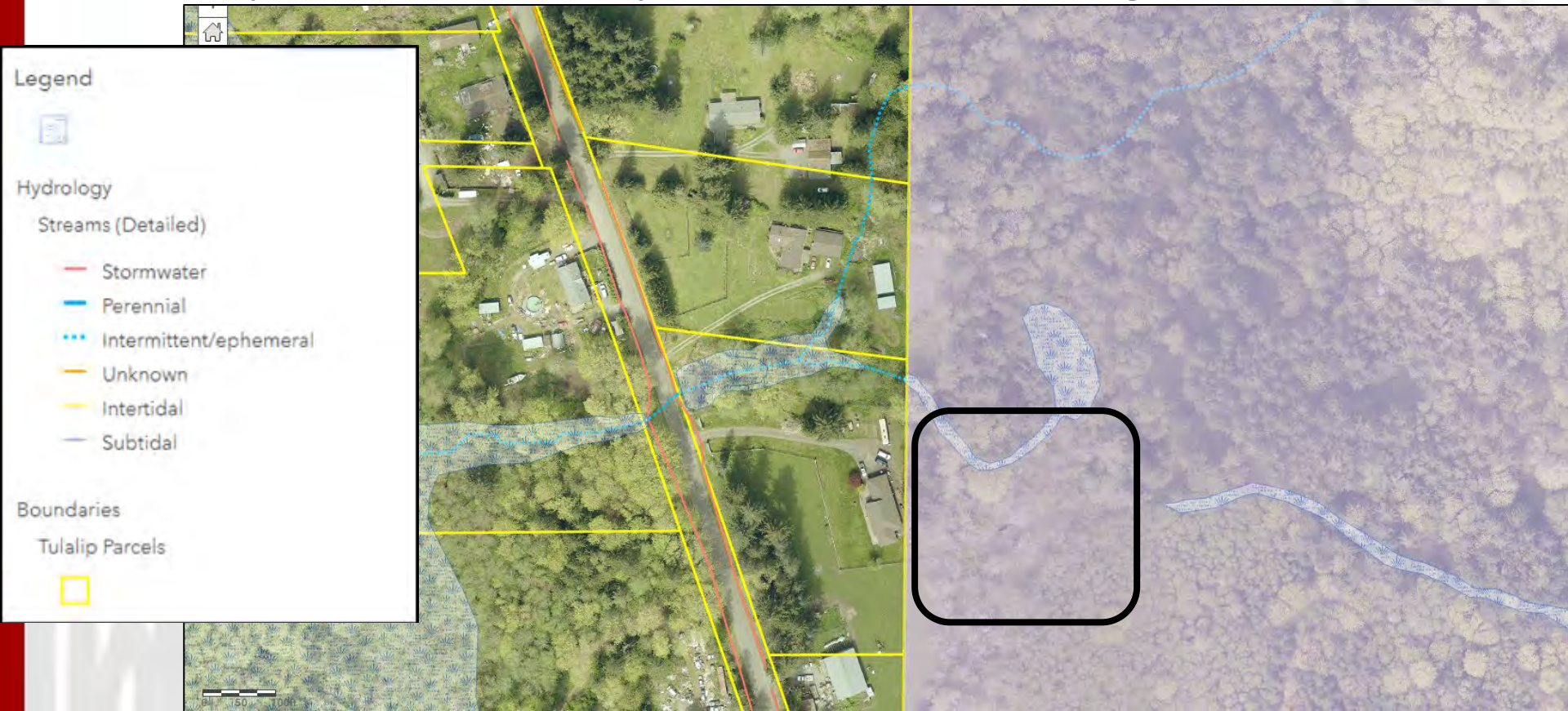
- Non-tribal property owner cleared and graded on Tribal lands behind house (unpermitted)
- Graded in very wet areas at base of a forested slope





Tulalip Case Study

- Mapped wetlands & ephemeral/intermittent stream
- WOTUS?
 - Eph./int. stream → perennial stream → Puget Sound





Tulalip Case Study

- ▶ Water flowing from above and through impact to the wetland below
 - ▶ During site visit in February
 - ▶ < 0.5" of precipitation recorded over preceding 2 weeks
 - ▶ Weather station is >5 miles away in Marysville





Tulalip Case Study

- Did they impact a WOTUS?
- Relatively permanent surface connection?
 - “Have flowing or standing water year-round or continuously *during certain times of year.*”
 - “Do not include flowing or standing water *for only a short duration in direct response to precipitation.*”





tig^wicid! (Thank you!)

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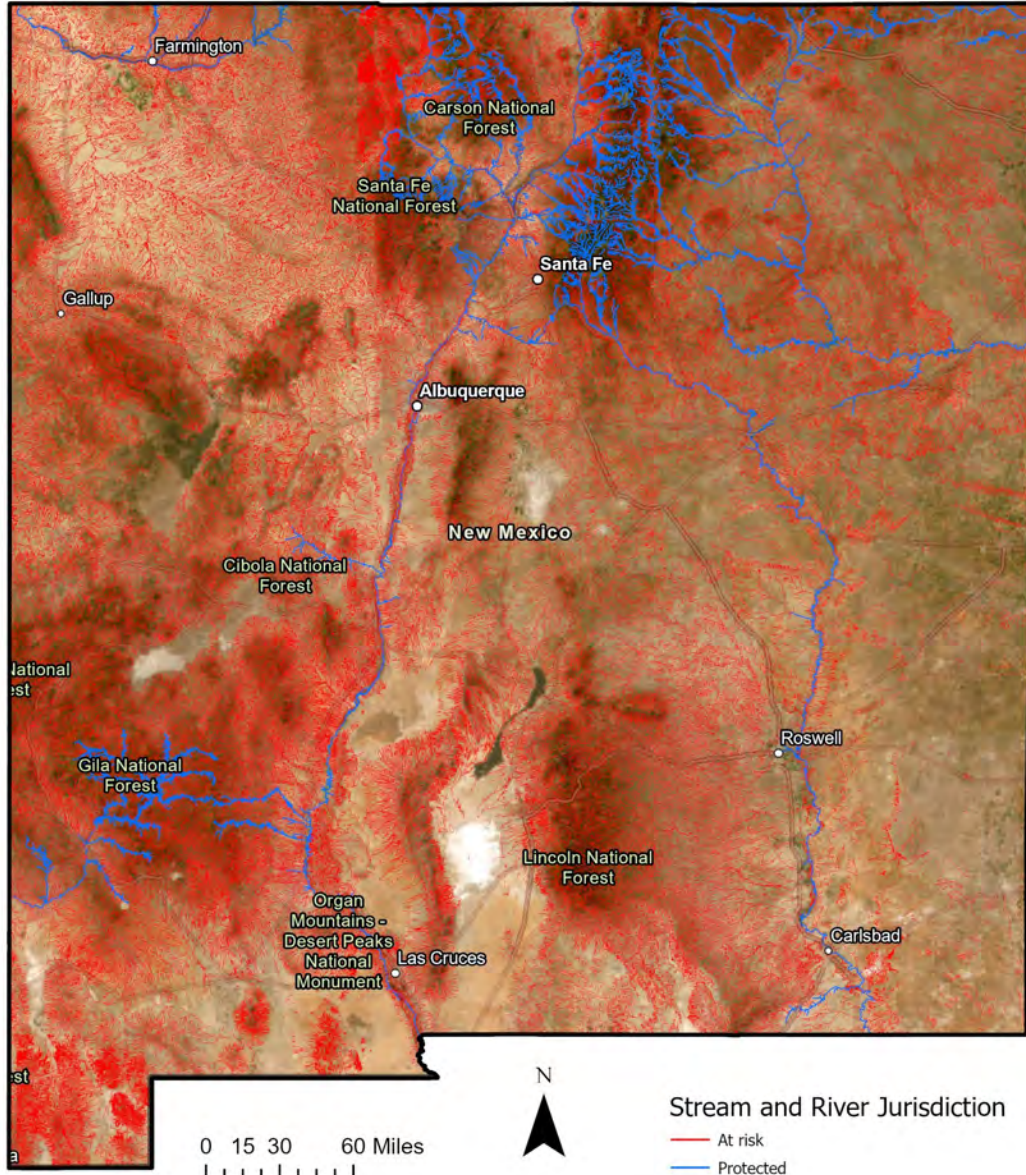




ADDITIONAL INFORMATION



NM NHD Streams & Rivers



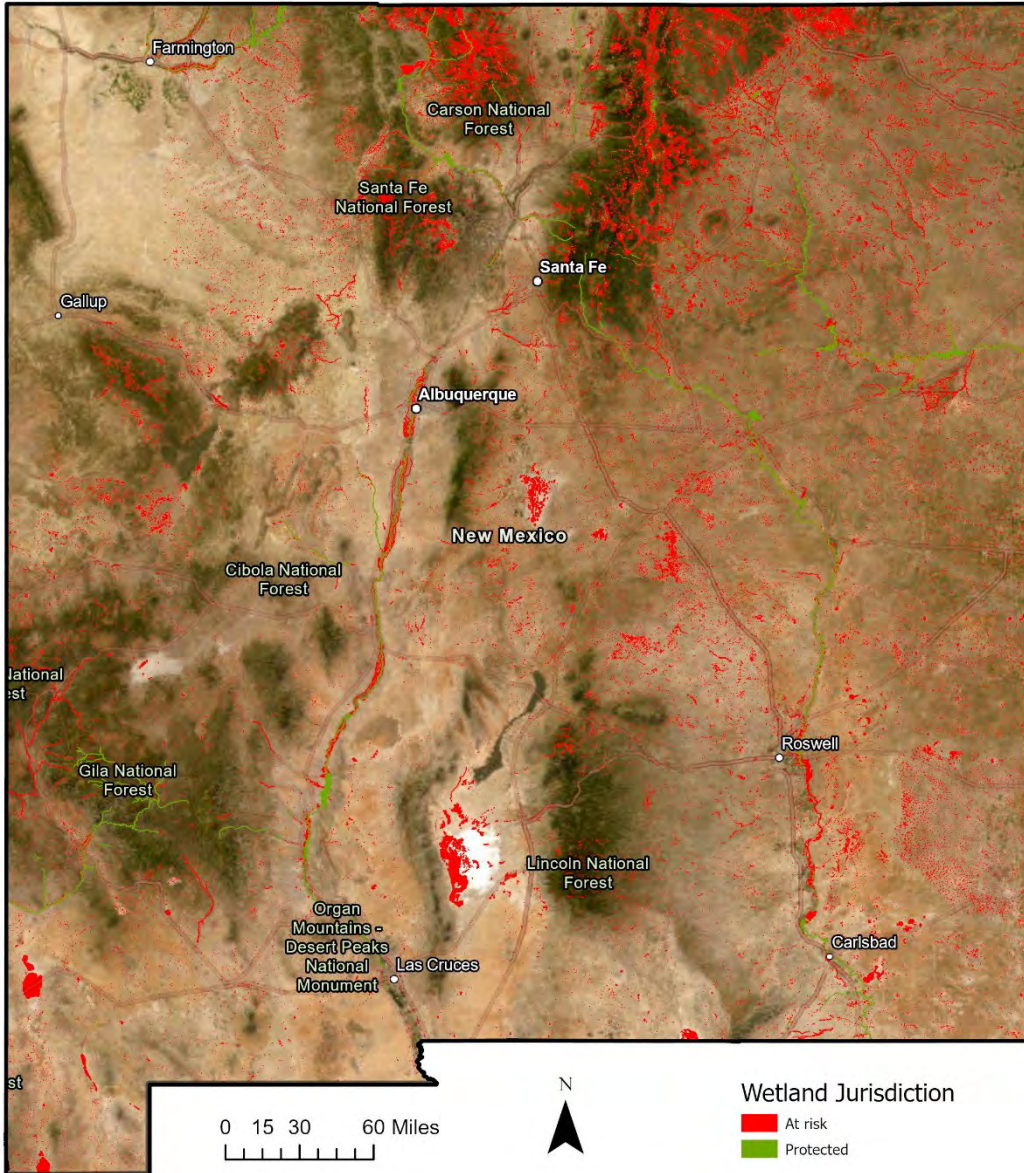
Worst-case scenario

95.36% at risk

4.64% protected



NM Wetlands



Worst-case scenario

88.4% at risk

11.6% protected



Ownership and Wetland Loss

Ownership Category	Acres Lost 1974 to 1995	Percent	Acres Lost 1995 to 2018	Percent
County	0.06	0.1	-	-
Fee-Simple, Non-Tribal	16.51	26.7	15.59	55.0
Marysville	0.14	0.2	-	-
Tribal	45.04	73.0	12.76	45.0
State of Washington	-	-	-	-
Totals	61.75	100.0	28.35	100.0