Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Cherokee Nation v. State of Ga., 30 U.S. 1, 17

Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation

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I. Introduction

The exercise and expanse of Indian treaty fishing rights has been the subject of debate for over 150 years in Washington State.[3] While the tribes' right to fish where reserved by treaty is now well-established, the recognition of an attendant duty on the State to protect fish habitat necessary to sustain fish runs and habitat has only recently been recognized. The recognition of that concomitant right to habitat protection may be the device through which treaty-tribes can achieve the imperative habitat restoration and protection measures required to revitalize fish runs that continue to dwindle.

This article will briefly introduce the history of treaty-making with Indian tribes in the United States and then focus on the history of treaty-based

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[3] *See, e.g.,* Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish Under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 Am. Indian L. Rev. 41 (2006-2007); Michael C. Blumm, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. Colo. L. Rev. 407 (1998); Mariel J. Combs, *United States v. Washington: The Boldt Decision Reincarnated*, 29 Envtl. L. 683 (1999).

fishing rights cases in the context of the recent "culvert case" decision in *Phase* II of *U.S. v. Washington*,[4] and its utility as a basis for tribes to remedy habitat-degrading activities by the state and preserve treaty-protected resources.

The first section of the article will discuss the history of the expansive interpretation of the treaties to allow implied rights to access and adequate water. Next, it will outline the key court interpretations of the treaty rights and their culmination in the tribes' initial attempts to obtain recognition of a right to protect fish habitat as concomitant to the right to take fish. The article explores the implication of the decision for tribes' efforts to protect and remediate degraded habitat, and then examines questions that remain unanswered by the determination. Finally, the article discusses the potential implications for the state and local governments and municipalities.

II. THE POLICY AND DEVELOPMENT OF TREATIES WITH INDIGENOUS TRIBAL NATIONS

Early in the history of the United States, the government viewed treaties with indigenous tribes as an important aspect of its nation-building goals, and based its policies largely on those held by Great Britain through its nearly two centuries of experience dealing with Native Americans.[5] During that time, the word "treaty" was used as much to mean the "act of negotiating" as to mean a document.[6]

On July 4, 1776, the formal step of revolution was realized with the Declaration of Independence. Within roughly two years, on September 17, 1778, the country, still embroiled in the Revolutionary War, finalized the Treaty of Fort Pitt (Treaty with the Delaware).[7] The fledgling United States further promoted governmental control over Indian affairs in its Articles of Confederation in March of 1781, asserting that "[t]he [U]nited [S]tates in [C]ongress assembled

[4] United States v. State of Washington, ___ F. 2d___ (2007), No. CV 9213RSM, 2007 WL 2437166, (W.D.Wash., August 22, 2007)

[5] FRANCIS PAUL PRUCHA, S.J., AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 24 (University of California Press 1994). Prucha's book and other works are considered one of the best sources of historical and analytical discussion of Indian treaties (hereinafter PRUCHA).

[6] *Id.* at 24.

[7] Treaty of Fort Pitt, Sept. 17, 1778, 7 Stat. 13-15

shall have the sole and exclusive right and power of...regulating the trade and managing all affairs with the Indians...."[8] The importance of Indian affairs to the central government of the young nation was asserted.[9] With the adoption of the United States Constitution, Indian affairs again emerged as a priority. It established that Congress has the power to regulate Commerce with the Indian Tribes;[10] the President, with the advice and consent of the Senate, has the power to make treaties;[11] and that treaties are part of the supreme law of the land, laws of the states to the contrary notwithstanding.[12] The United States thus established its primacy over Indian affairs as a principle of Constitutional law.

Between 1777 and 1871, hundreds of treaties were executed in accord with the Constitution by Presidential execution and a two-third consent of the Senate, each treaty carrying the weight of an international treaty with provisions unique to each tribe.[13] Under the Supremacy Clause, treaties are superior slaw to the law of the states.[14] Treaty making is an exclusive power of the federal government, therefore rendering post-constitutional treaties between tribes and states invalid.[15]

Treaties vary greatly, but often include terms to reserve hunting, gathering and fishing rights. This reservation of rights implies additional environmental

[8] Articles of Confederation, March 1, 1781; Article IX, cl. 4.

[9] The Congress affirmed this assertion of power in a subsequent act in 1786. Ordinance for the Regulation of Indian Affairs" August 7, 1786.

[10] U.S. CONST. art. I, s. 8, cl. 3.

[11] U.S. CONST. art. II, s. 2, cl. 2.

[12] U.S. CONST. art. VI, cl. 2.

[13] Congress ended treaty making as a way of dealing with Indian tribes on March 3, 1871. 16 Stat. 567. The Act was the result of a jealous House of Representatives which disliked Indian affairs being handled by the President and the Senate, and by racist members of Congress who thought it a "disgrace" to sign treaties with "worthless, vagabond Indians." *See*, PRUCHA, *supra* note 3, at 307. By the time treaty making ended, some 367 Treaties had been duly executed and ratified. *See id.*, Appendix B, Ratified Indian Treaties, at 446-500. In addition, Fr. Prucha notes six additional treaties that should be considered valid although they are not usually listed in official lists because of some small infirmity such as the failure of the President to "proclaim" them even though they were signed and approved all around. *Id.*, at 501-02. Fr. Prucha also notes 73 ratified agreements, *id.*, Appendix C, Ratified Agreements with Indian Tribes, 1872-1911, at 506-16, and 87 unratified agreements, *id.*, Appendix D, Unratified Treaties, at 519. Many of these agreements have the force of law due to the result of court cases.

[14] Worcester v. Georgia, 31 U.S. 515, 531 (1832); U.S. CONST. art. VI, § 1, cl.2.

[15] Oneida County v. Oneida Indian Nation of New York State, 470 U.S. 226, 245-47 (1985).

protection rights necessary to preserve the existence of flora and fauna to be hunted, gathered or caught.

III. TENETS OF TREATY LAW AND THE "CANONS" OF TREATY CONSTRUCTION

The basic principles of treaty interpretation explain the historically expansive view courts have taken of treaty-based rights, the policy underlying courts' construction of treaties in favor of tribes, and underscore their potential as a tool to help protect the environment.

In addition, tenets of Indian law prescribe the forum and procedure for tribes' suits to enforce treaty-based rights. For example, in treaty litigation, time varied defenses such as the legal doctrine of laches, which prohibits claims after an unreasonable length of time, typically do not apply.[16] Therefore, tribes may make a legal claim to a treaty right at any time. It is on this basis that the Tribes sought clarification of their treaty fishing rights under the Stevens Treaties more than 100 years after the treaties were entered. The Tribes[17] subsequently sought to enforce an associated right to protection of fish habitat more than a quarter of a century after the decision recognizing that right to fish.

As with international treaties, Congress may abrogate or formally repeal treaties unilaterally without consent of the signatory tribe.[18] Congressional abrogation of property rights is actionable by tribes with recognized title as an unconstitutional taking under the Fifth Amendment, but the remedy has

[16] Board of County Comm'rs v. United States, 308 U.S. 343, 350-51 (1939). *But see* City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) (tribes long delay in seeking equitable relief based on violation of recognized treaty rights evoked the doctrines of laches, acquiescence, and impossibility).

[17] The Tribes of Washington State that are parties to the Culvert sub-proceeding include: Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallam, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Bands and Tribes of the Yakama Indian Nation, Quileute Indian Tribe, Makah Nation, and Swinomish Tribal Community. Where the article refers to the tribes in conjunction with the Culvert sub-proceeding, they shall hereinafter be referred to as "the Tribes."

[18] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

thus far been limited to a monetary award as "just compensation."[19] However, governmental action in violation of a treaty is not an abrogation, as abrogation of a treaty must be an express act, and not implied through action.[20] Moreover, where there is any room for doubt as to Congressional intent, the Supreme Court has indicated that it will go to considerable lengths to avoid the destruction of treaty rights.[21] As Supreme Court Justice Hugo Black said in 1960: *"Great nations, like great men should keep their word."*[22]

In that vein, the Supreme Court has explained that "canons of construction" applicable to Indian treaties require courts to liberally construe treaties to favor Indians.[23] In the context of interpretation of the rights of treaty-tribes, "the language used in treaties with the Indians should never be construed to their prejudice."[24] Additionally, rather than interpreting the technical meaning of treaty terms, the terms should be construed as they would have been understood by the Indians during negotiations.[25] Ambiguities in the law, including treaties, are to be resolved in the favor of Indians.[26] Moreover, the language should be interpreted to the benefit of a tribe, as the Indians would have understood the Treaty's terms at the time it was signed.[27] Importantly, the Court has also held that a treaty is to "be construed, not according to the technical meaning of its words to learned lawyers, but in a sense in which they would naturally be understood

[19] United States v. Creek Nation, 295 U.S. 103, 110 (1935). (United States must render or assume an obligation to render just compensation; anything else "would not be an exercise of guardianship, but an act of confiscation."). *See also* United States v. Shoshone Tribe of Indians, 304 U.S. 111; *cf.* United States v. Sioux Nation, 448 U.S. 371 (1980) (tribal lands are subject to Congress' power to control and manage the tribe's affairs; however, this power is not absolute and that it is subject to the limitations of a guardianship and certain constitutional restrictions).

[20] *Oneida,* 470 U.S. at 246-47.

[21] Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968) ("the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress").

[22] F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J. dissenting).

[23] *See, e.g.,* Choctaw Indian Nation v. United States, 318 U.S. 423, 431-32 (1943).

[24] Choctaw Nation v. United States, 119 U.S. 1, 28 (1886).

[25] *Id.* "The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons, equally subject to the same laws. *Id.* at 28. *See also* U.S. v. Winans, 198 U.S. 371, 380-381 (1905).

[26] McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

[27] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n. 443 U.S. 658, 675 (1979) (hereinafter *Fishing Vessel*).

by the Indians."[28]

These canons permit courts to look beyond the four corners of a treaty into extrinsic evidence of the history and the parties' understanding of the terms of the treaty when it was drafted.[29] Thus, it is central to the interpretation of treaties to review the history and negotiations of the agreement.[30]

IV. THE STEVENS TREATIES

The tribal fishing rights at issue in *United States v. Washington* were reserved by the Tribes in what are collectively known as the Stevens Treaties. In April 1853, Congress established the Washington Territory and, in continuation of its policy, sought to gain control of all lands within the territory from the indigenous land owners.[31] Isaac Stevens, then-governor of the territory, was designated Superintendent of Indian Affairs and charged with the task of treaty-making with the Indian tribes.[32]

At the time the treaties were made, the "reservation" policy of treaty-making had been developed by George W. Manypenny, then Commissioner of Indian Affairs.[33] Manypenny believed Indians should be exposed to the new European settlers as a good example of civilized, agrarian society and provide the venue for the transformation of the native population into "civilized" people.[34] This intolerant and racist view of native culture and peoples set the context in which the Stevens Treaties were negotiated and ratified.

[28] Jones v. Meehan, 175 U.S. 1, 5 (1899).

[29] *Id.*

[30] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999). *Cf.* South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506-507 (1986) (the canon of construction regarding the resolution of ambiguities in favor of Indians does not permit reliance on ambiguities that do not exist); Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 774 (1985) (courts cannot ignore plain language that, viewed in historical context and given a "fair appraisal," clearly runs counter to a tribe's later claims).

[31] PRUCHA, *supra* note 3, at 25-51; *see also* CLIFFORD E. TRAFZER, ED., INDIANS, SUPERINTENDENTS, AND COUNCILS: NORTHWESTERN INDIAN POLICY, 1850 – 1855 (Lanham, Md.; University Press of American 1986).

[32] PRUCHA, *supra* note 3, at 25.

[33] John w. Ragsdale, Jr., The United Tribe of Shawnee Indians: Resurrection in the Twentieth Century, 68 UMKC L. Rev. 351, 352 (2000).

[34] *Id.*

In December 1854, Stevens convened the first treaty council to negotiate with the tribes of the Pacific Northwest for the cession of tribal lands to the Washington Territory.[35] On the following day, the first treaty was negotiated with the Nisqually, Puyallup, Steilacoom, Squaxin, and other tribes at Medicine Creek.[36] The Treaty of Medicine Creek was the first of eight treaties (Stevens Treaties) signed between 1854 and 1855.[37] In custom with federal mandate at the time, the Stevens Treaties ordered relinquishment of all tribal lands in the territory in exchange for the reservation of small tracts of land for homes. Each treaty contained a substantially identical provision to that in the Medicine Creek treaty: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory."[38]

V. A CASE HISTORY OF TREATY-BASED TRIBAL FISHING RIGHTS

The history of the Tribes' efforts to clarify and enforce their treaty-based fishing right is lengthy and complex, but provides important perspective to the Tribes' effort to obtain recognition of an implied duty on the part of the state to refrain from degrading fish habitat. This history provides not only the background for the *U.S. v. Washington* case, both the *Phase I* and *Phase II* decisions, but the context for how the district court's determination of a habitat right logically followed from adherence to the canons and the recognition of other implied rights rooted in the Treaties.

A. Fishing Rights Cases

Through an extensive history of case law considering the extent of treaty-based fishing rights, U.S. courts have consistently held that where the right to fish is reserved by treaty, that right may not be qualified by a state.[39] The

[35] Thomas R. Bjorgen and Dr. Morris Uebelacker, Wash. Dep't of Fish & Wildlife, Determination of the Southern Boundary of the Medicine Creek Treaty Ceded Area, *available at* http://wdfw.wa.gov/wlm/tribal/medcreekdetermination.pdf.

[36] Treaty of Medicine Creek, 10 Stat 1132.

[37] For a timeline of treaty history, see The Treaty Trail, Treaty Timeline Summary, Wash. St. Historical Soc'y, http://washingtonhistoryonline.org/treatytrail/treaties/timeline/timeline.htm (last visited Apr. 8, 2009).

[38] Treaty of Medicine Creek, 10 Stat. 1132; *see also* Treaty of Point Elliot art. V, 12 Stat. 927, Treaty of Point No Point art. IV, 12 Stat. 933 for examples of language [hereinafter *Treaties*].

[39] Puyallup Tribe v. Wash. Dep't of Game, 391 U.S. 392, 398-99 (1968).

courts have further held that tribes may have implied rights as concomitant to the express terms of the treaties, including the right to sufficient water for reservation purposes. Adherence to and expansion of these theories is the foundation of the determination in the culvert sub-proceeding and is central to analysis of that determination.

In 1905, the U.S. Supreme Court considered in *United States v. Winans*[40] whether white settlers who were granted a fish-wheel license from the State of Washington were in violation of the Stevens Treaties by their exclusion of treaty-fishermen from off-reservation waters.[41] The Court established in *Winans* that the treaty right to take fish was actually a property right,[42] holding that the right to take fish was preserved "in common with citizens of the Territory" as a shared right.[43] The Court further noted that the special provision in the treaty at issue for the exercise of the Indians' right to take fish made clear that the "contingency of the future ownership of the lands…was foreseen and provided for[.]"[44] Specifically, the provision was for the Indians to have the right to cross the land to the usual and accustomed places they had traditionally fished and to occupy the land for that purpose.[45] The right was intended to continue not only against the United States, but its grantees, the State, and the State's grantees as well.[46] In addition, the State's admission to the Union did not confer a right to dispose of lands without regard to binding agreements made by the United States during the time it held the land as a territory.[47]

The *Winans* Court went on to address the issue of unreasonable restraint or burden on the state in regulating the treaty right, noting that the right "only

[40] 198 U.S. 371 (1905).

[41] Brian Schartz, *Fishing for a Rule in a Sea of Standards: A Theoretical Justification for the Boldt Decision*, 15 N.Y.U. Envtl. L.J. 314, 323 (2007).

[42] Michael Blumm & Brett Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. Colo. L. Rev. 407 (1998).

[43] Schartz, *supra* note 40, at 323.

[44] *Winans,* 198 U.S. at 381.

[45] *Id.* at 383-384.

[46] *Id.* at 382.

[47] *Id.* at 382-383, citing *Shively v. Bowlby*, 152 U.S. 1 (1894).

fixes in the land such easements as enables the right to be exercised."[48] If habitat issues impair those rights, *Winans* will serve as important precedent to establish the extent to which the state has a duty to refrain from acts resulting in such impairment.

The property rights reserved in the Stevens Treaties and which apply to *U.S. v. Washington*, as well as treaty-based property rights reserved with similar language, can be described as a type of easement: a usufructuary right combined with a profit à prendre.[49] The usufructuary right is the agreement allowing Indians' use of the property of another for the purposes stated in the treaty.[50] The profit à prendre is the right to go on another's land and take away something of value from its soil or from the products of its soil such as mining, hunting, and fishing.

In the case of the tribes, the profit à prendre is an easement in gross, benefiting a particular person (any tribal members with identification) who does not need to own any land on the servient estate.[51] As the Supreme Court has noted, the profit à prendre created in the Treaties exists in perpetuity.[52] When the Indians transferred title to the United States by treaty, this restriction was imposed on the federal government's title, stipulating that Indians would "continue to enjoy usufructuary rights on these ceded territories."[53] Consequently, when the federal government granted or patented lands in those ceded territories to private individuals and owners, "the treaty under which the government acquired the property continued in force and constituted a restriction on private title in the land, a profit à prendre retained by the Indians."[54] The government could not transfer a property right it did not acquire as a result of the treaties and consequently, subsequent private property owners are bound by the same land right allowing

[48] *Winans,* 198 U.S. at 384.

[49] State v. Tulee, 7 Wash.2d 124, 136, 109 P.2d 280 (1941).

[50] Black's Law Dictionary (8th ed. 2004).

[51] *Id.* at 549 (citing C.J.S. Easements §§ 4, 10-11, 20).

[52] *Tulee*, 7 Wash.2d at 134-36.

[53] Stephen P. Dresch, *Indian Usufructuary Rights in Ceded Territories, Private Property Rights and the Reach of State Regulation* (1996) http://www.forensic-intelligence.org/poldocs/usufruct.htm) (last visited Apr. 10, 2009).

[54] *Id.*

Indians to exercise the reserved usufructuary rights.[55] The reserved property rights allowing Indians access to the "usual and accustomed" places of taking fish extended not only to expressly ceded lands, but also lands that had never been part of the reservations.[56]

The attempt of the treaty tribes of the Pacific Northwest[57] to exercise the treaty fishing rights granted by the Stevens Treaties has led to substantial litigation. From the time the treaties were entered through the 1960's, tribes faced significant resistance from State authorities and private landowners in exercising their treaty-based fishing rights. Frequently, tribe members were stripped of their fishing gear, fined, and harassed. Meanwhile, the numbers of fish steadily decreased.[58] The Tribes, seeking recognition of their right to fish in the usual and accustomed places, attempted to protest the State's regulation of that right in the 1960's. During this period, known as the "Fish Wars," the Tribes undertook symbolic protests at the sites, appearing with single nets. They were met by task forces "equipped with air-craft, boats and walkie-talkies."[59] When the Tribes' efforts failed to produce movement toward recognition of their treaty rights, and instead resulted in arrests and harassment, they sought relief through the courts of the United States.[60]

The United States Supreme Court addressed the issue of fishing rights under the Stevens Treaties in the cases that became known as *Puyallup I* and *Puyallup II*. The Court found that state regulation of fisheries for the purpose of

[55] *Id.*

[56] *Winans*, 198 U.S. at 379.

[57] Including the Hoh Indian Tribe, Jamestown S'Klallam Tribe, Lower Elwha Klallam Tribe, Lummi Indian Tribe, Makah Indian Tribe, Muckleshoot Tribe, Nisqually Indian Tribe, Nooksack Indian Tribe, Port Gamble S'Klallam, Puyallup Tribe, Quileute Indian Tribe, Quinault Nation, Sauk-Suiattle Tribe, Skokomish Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Suquamish Tribe, Swinomish Tribe, Tulalip Tribe, and Upper Skagit Tribe.

[58] MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY, HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 32-52 (BookWorld Publications 2002).

[59] John Terence Turner, Seattle Magazine, *Washington's Other Niggers* 38 (December 1970)(on file with author).

[60] For a tribe-based perspective on the quest for recognition of fishing rights, and the Fish Wars in which tribal members fished in violation of state laws prohibiting their exercise of the treaty right, browse the Nw. Indian Fisheries Comm'n website, http://www.nwifc.org/about-us (last visited Apr. 9, 2009).

conservation could be upheld so long as "appropriate standards" were met, with "fair apportionment" of fish between Indians and non-Indians.[61] While affirming that "the right to fish 'at all the usual and accustomed places' may, of course, not be qualified by the state,"[62] the Court held that certain aspects of fishing can, however, be regulated in the interest of conservation, so long as the regulation does not discriminate against Indians.[63]

Through these cases the Court has made clear that the treaty-based right to take fish may only be limited for purposes of preservation of fish runs. No other reasons for limitation were given by the Court. In fact, a district court considered the issue of fishery management by the State, and held that the State cannot manage the fishery so that "little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located."[64]

The Tribes retained the treaty right to a make a living from fishing, not just the right to view "museum" fish protected from extinction. The commercial value of the fishing right to Tribes is significant. The State of Washington estimates that the total price received for commercially landed fish for non-tribal fisheries in 2006 was $ 65.1 million.[65] Since the Tribes are entitled to one-half of that fishery, it can be presumed that the monetary value of the fishery to the Tribes is of the same order.

The preceding cases establish that the State has a clear duty not to degrade treaty-based fishing rights through its actions.[66] Moreover, because treaties between the United States and Indian tribes are the "supreme law of the land"[67] the duty undertaken by the federal government is also imposed on the

[61] *Puyallup I*, 391 U.S at 398, and *Puyallup II*, 414 U.S. at 48-49.

[62] *Puyallup I*, 391 U.S. 398.

[63] *Id.*

[64] *Sohappy*, 302 F.Supp. at 911 (1969).

[65] TCW Economics, *Economic Analysis of the Non-treaty Commercial and Recreational Fisheries in Washington State*, ES-2 (Dec. 2008) (with technical assistance from the Research Group, Corvallis, OR) *available at* http://wdfw.wa.gov/commission/econ_analysis.

[66] *See, e.g., Winans*, 198 U.S. 371 (holding that the right to take fish requires grantees of the state to allow tribe members access to the usual and accustomed fishing sites); *Winters*, 207 U.S. 564 (holding the tribes had a treaty-reservation right for water, for the purposes of the tribal reservation (including fishing)).

[67] Breard v. Greene, 523 U.S. 371, 376 (1998) (per curiam).

state and its officials, binding federal, state, and local authorities equally to the provisions of the Treaties.[68] Those rights are not only vital to the Tribes' identities and culture, but of significant economic value.

B. The Right to Harvest Shellfish

In continuing litigation in *United States v. Washington*, the courts affirmed that the treaty right to fish includes the right to harvest shellfish embedded in the state's tidelands and bedlands.[69] The Court held that usual and accustomed places for shellfish harvesting are the same as for salmon and include "all bedlands and tidelands under or adjacent to those areas."[70]

The treaty right to harvest shellfish within usual and accustomed grounds and stations exists whether or not the underlying bedlands or tidelands are in private ownership.[71] The right does not extend, however, to shellfish beds which are deemed to be "staked or cultivated" as those terms were used at treaty times.[72]

For the Treaty right to harvest shellfish to have continued viability, just as with other fishery resources, the environment must be protected. For example, coastal estuaries are home to the highest densities of juvenile Dungeness Crabs and are important habitat for juveniles and subadults.[73] Estuaries are particularly vulnerable to human activities that alter substrate, decrease juvenile cover, increase pollution, and impair water quality.[74] The Tribes' ability to exercise the right to harvest shellfish is therefore proportional to the State's adherence to its duty to refrain from actions that harm the environment and cause diminishment of the resource.

[68] United States v. 43 Gallons of Whiskey (United States v. Lariviere et al.), 93 U.S. (3 Otto) 188 (1876); Worcester v. Georgia, 31 U.S. 515 (1832).

[69] United States v. Washington, 157 F.3d 630 (9th Cir. 1998).

[70] United States v. Washington, 873 F. Supp. 1422, 1431 (W.D. Wash. 1994).

[71] *Id.* at 1442–46.

[72] *Id.* at 1431. What constitutes a "staked or cultivated" bed is beyond the scope of this article.

[73] Wendy Fisher & Donald Velasquez, *Management Recommendations for Washington's Priority Habitats and Species,* 2 (Wash. Dep't of Fish & Wildlife, Dec. 2008), *available at* http://wdfw.wa.gov/hab/phs/dungeness_crab/2008_dungeness_crab_phs_recs.pdf.

[74] *Id.*

C. Treaty Hunting Rights

Treaty hunting rights similarly require sufficient habitat to support the animal resources if the exercise of the hunting right is to remain viable. The Northwest treaties negotiated by Governor Stevens in the mid-1800's contain provisions reserving a hunting right on lands ceded under the treaty.[75] The geographic scope of this hunting right is not clear.[76] Most Tribes maintain that there is no geographic limit because the Treaties state none. However, while the issue is generally not considered settled at the federal level, the Washington Supreme Court held that the "open and unclaimed" land language of the Point Elliott Treaty applied only to land within a tribe's "ceded" areas under the treaties or other "traditional" areas.[77]

Presumably "open" land, even if "claimed," may still be subject to Indian rights. The issue may turn, however, on whether property transactions, subsequent to the treaty or agreement originally reserving the right, were intended to abrogate the reserved right. In *United States v. Hicks*, the district court denied a motion to dismiss a criminal proceeding for violation of federal statutes barring hunting in the Olympic National Park. The court held that federal legislation creating the park terminated the "open and unclaimed" nature of the land, and that subsequent legislation prohibiting all hunting in the park terminated the "Indian Hunting Privilege."Further, even if claimed and not "open", Treaty hunters may have a defense if the "claimed" nature of the land is not apparent. In State v. Chambers,[78] the Washington Supreme Court held that access to hunt contrary to state law was not preserved where the land on which the Indian was hunting was fenced and there was an unoccupied house nearby. That land was no longer "open." However, the court noted that private ownership must be readily apparent from observation to defeat the reserved right.

The common law history of treaty interpretation establishes that reserved rights create a duty in the federal and state government not to interfere with or violate the treaty rights. The state is thus bound by the provisions and must refrain

[75] Treaty of Point Elliott, January 22, 1855, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 927, Art. V.

[76] *Id.*

[77] State v. Buchanan, 138 Wash.2d 186, 978 P.2d 1070 (1999), *cert. denied*, 528 U.S. 1154 (2000).

[78] 81 Wash.2d 929, 506 P.2d 311.

from actions in violation of that duty. These early cases were also illustrative of the factors at work to degrade the continuing viability of the Tribes' exercise of those rights beyond simply discriminatory legislation or failure to preserve the Tribes' fair share of fish runs.

D. Implied Grant Cases: The Water Right

The Supreme Court has, in addition to recognizing expressly preserved treaty rights, recognized implied rights preserved to the tribes beyond those expressed within the four corners of the treaties themselves. In *Winters v. United States*,[79] the Court considered whether the Tribes inhabiting the Fort Belknap Reservation in Montana had a treaty-reservation right for water for the benefit of the tribal reservation, despite the fact that water was not expressly reserved in the treaty.[80] Winters and other settlers were sued by the United States which sought to enjoin them from constructing water projects that would divert water from the reservation. The settlers argued that the treaty reserved only land for the Tribes, and not the right to water flow. Rejecting these arguments, the Court found that the treaty contained an implied reservation of water and diversion by private parties which denied needed water to the Tribes was a violation of that implied reservation.[81]

The Supreme Court reaffirmed the *Winters* doctrine in *Arizona v. California*,[82] and in *Cappaert v. United States*,[83] in which the Court held:

> ...when the federal government withdraws its land from the public domain and reserves it for federal purposes, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the

[79] 207 U.S. 564 (1908).

[80] *Id.* at 567.

[81] *Id.* at 576. The implied reservation of water right established in *Winters* "reserves only that amount of water necessary to fulfill the purpose of the reservation." *Id.*

[82] Arizona v. California, 373 U.S. 546 (1963).

[83] Cappaert v. United States, 426 U.S. 128, 138 (1976).

> date of the reservation and is superior to the rights of future appropriators . . . The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.
>
> . . . .
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.[84]

The Ninth Circuit affirmed the *Winters* doctrine and followed *Cappaert* in the landmark case *United States v. Adair*.[85] The Klamath Tribe reserved the right to fish through its 1864 treaty with government,[86] and the right remained vested in the tribe when they ceded the land to the United States through the Klamath Termination Act.[87] The United States and the tribes brought suit in *Adair* for a determination of whether the reserved hunting and fishing rights also carried an implied reservation of water rights as necessary to the habitat and the existence of fish and game.[88] The district court found that it did, and further concluded that the converse was true: a reservation of water use could also carry an implied fishing and hunting reservation.[89]

Similarly, in *United States v. Anderson*[90] the Ninth Circuit found that where a fishing reservation and a water reservation were retained by the tribe, the amount of reserved water is the amount necessary to preserve fishing.[91] In the case of the native trout in question in *Anderson*, the court made a key finding

[84] *Id.* at 138-39.

[85] 723 F.2d 1394,1408 (1983).

[86] Kimball v. Callahan (*Kimball I*), 493 F.2d 564, 566 (1974).

[87] Kimball v. Callahan (*Kimball II*), 590 F.2d 768, 775 (9th Cir.); *Kimball I*, 493 F.2d at 569.

[88] *Adair*, 723 F.2d at1408.

[89] *Id.*

[90] United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

[91] *Id.* at 1362.

that the reservation of water included water flow sufficient to maintain the water temperatures necessary for trout propagation.[92]

This willingness on the part of the courts to infer rights which are not expressly stated in the treaties, combined with the courts' mandate to consider such disputes in favor of the Indian tribes, has resulted in the extension of both a right of access, and a right to reservation of water. The federal courts have now partially based the decision in U.S. v. Washington, Phase II, on the same principle, and granted a right to protection of fish habitat from specific harms.

VI. *Phase I* – Fair Share of Harvestable Fish

In 1970, the United States, as trustee on behalf of seven Indian tribes, initiated a suit against the State of Washington to determine the off-reservation tribal rights granted in the Stevens Treaties of 1855.[93] In *Phase I* of the case, Judge George Boldt ruled on the issues of the Indians' rights to take fish and the apportionment of available fish, but reserved the issue of habitat destruction for later determination.[94] However, the *Boldt decision* set the groundwork for the eventual finding of a habitat right against specific harms, and for expanding recognition of tribal treaty rights to include attendant rights to sufficient water to maintain fisheries, and protection of fish habitat.

In *Phase I*, Judge Boldt clarified the meaning of "fair apportionment" and the "right to take fish," terms coined by prior court decisions and treaty terms.[95] The court apportioned the fishing opportunity between tribal and non-tribal fishermen, and held that the Indians were entitled to take 50% of the fish runs passing through the Tribes' "usual and accustomed fishing grounds."[96] Because treaty negotiations were conducted in English, Judge Boldt adhered to the canons of treaty construction and determined that it was likely the Indians did not know the meaning of all the terms in the treaties. He concluded that regardless of the terms used, the Indians had bargained for the right to continue

[92] *Id.*

[93] United States v. Washington (*Phase I* or the *Boldt decision*), 384 F. Supp. 312 (W.D. Wash. 1974).

[94] *Id.*

[95] *See id.*

[96] *Id.* at 401.

fishing in the way they always had.[97] Finding that "usual and accustomed" places include every fishing location where members of a tribe fished prior to the drafting of the treaty, regardless the distance from the location of the tribe at the time of the treaty, Judge Boldt held that at every such location the treaty tribe had reserved, and its members retained, the right to take fish.[98]

Following the decision in *Phase I*, Congress established new laws for the co-management of the fisheries, and thus any discriminatory state laws contradicting the new mandate were void as against the provisions of the treaty and stricken under the supremacy clause.[99] The court took a clear stand against state or private action restricting the treaty fishing right:

> There is neither mention nor slightest intimation in the treaties themselves, in any of the treaty negotiation records or in any other credible evidence, that the Indians who represented the tribes in the making of the treaties, at that time or any time afterward, understood or intended that the fishing rights reserved by the tribes as recorded in the above quoted language would, or ever could, authorize the "citizens of the territory" or their successors, either individually or through their territorial or state government, to qualify, restrict or in any way interfere with the full exercise of those rights.[100]

The court explicitly noted that the exercise of a treaty tribe's right to take anadromous fish can be limited only by state regulation that is both reasonable and necessary to preserve and maintain the fish, and does not discriminate against the tribe.[101] Despite this rule, the court noted: "it is *not* within the province of state police power, however liberally defined, to deny or qualify rights which are made the supreme law of the land by the federal constitution."[102] Specifically, any

[97] O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing clause of the Stevens Treaties*, 27 Am. Indian L. Rev. 296, (2002-2003).

[98] *Phase I*, 384 F.Supp. at 332.

[99] *Id.*; 16 U.S.C. § 3301(b)(2006).

[100] *Phase I*, 384 F.Supp. at 334.

[101] *Id.* at 402.

[102] *Id.* at 342.

restriction of treaty rights must be applied conservatively and limited to specific measures for conservation purposes.[103] Further, because the right to take fish arises from a treaty, it is a reserved right and thus "distinct from rights or privileges held by others, and may not be qualified by any action of the state."[104] Finally, the court concluded that laws restricting "the time, place, manner and volume of off-reservation harvest of anadromous fish by treaty tribes" are unlawful.[105]

In continuing litigation in that case,[106] the courts affirmed that the treaty right to fish includes the right to harvest shellfish embedded in the State's tidelands and bedlands.[107] The courts also held that usual and accustomed places for shellfish harvesting are the same as those for salmon and include "all bedlands and tidelands under or adjacent to those areas."[108]

While the *Boldt decision* affirmed the viability of the Treaties as a basis for the fundamental rights reserved by the Tribes, and clarified the apportionment of the fishing resource, it left undetermined the claim that the right to fish also included the right to have the environment and habitat protected so that fish might be available for a fishery

VII. *Phase II*, Round I: Judge Orrick – A Broad Habitat Servitude

In the initial complaints filed in *Phase I*, the United States government and tribal governments alleged that an "environmental" right to have the fisheries resource protected from adverse state action also existed by implication from the reserved right to harvest fish.[109] This issue was bifurcated for trial, and became known as *Phase II* of the litigation.

This bifurcated portion of the original fishing litigation was

[103] United States v. Washington (*Phase I* or the *Boldt decision*), 384 F. Supp. 312 (W.D. Wash. 1974; *see also* Sohappy v. Smith, 302 F.Supp. 899, 907–909 (D. Or. 1969).

[104] *Phase I,* 384 F.Supp. at 402.

[105] *Id.* at 403.

[106] *See* discussion, *infra*, Part V.B.

[107] United States v. Washington, 157 F.3d 630 (9th Cir. 1998), *cert. denied*, 526 U.S. 1060 (1999).

[108] United States v. Washington, 873 F. Supp. 1422, 1431 (W.D. Wash. 1994).

[109] United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).

assigned to the Hon. William Orrick of the Northern Division of California; the two remaining issues to be determined were whether hatchery fish were included in the equal sharing formula put forth by Judge Boldt, and whether the treaties placed an implied habitat servitude upon the state. On motions for summary judgment, Judge Orrick found an "implied environmental right" in the Treaties.[110]

Judge Orrick held that the right to have the fishery habitat protected from man-made despoliation is implicitly incorporated in the treaties' fishing clause, stating "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.[111] The court went on to note that, "there can be no doubt that one of the paramount purposes of the treaties was to reserve to the tribes the right to continue fishing as an economic and cultural way of life."[112] Judge Orrick added:

> It is equally beyond doubt that the existence of an environmentally acceptable habitat is essential to the survival of the fish, without which the expressly, or — reserved right to take fish would be meaningless and valueless. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause.[113]

Furthermore, the decision directly analogized the habitat right to which the tribes sought recognition to the right to an implied reservation of water necessary for the protection of fish recognized by the Winters doctrine.[114]

Upon appeal, the Ninth Circuit issued a number of rulings, initially upholding the decision. In April 1985, however, the circuit court issued an *en banc* opinion vacating the original opinion of the district court as inappropriate for a declaratory judgment action. The Ninth Circuit stated that the district court ruling was "contrary to the exercise of sound judicial discretion" in that the declaratory judgment procedure had been incorrectly used to announce legal rules

[110] United States v. Washington (*Phase II*), 506 F. Supp. 187 (W.D. Wash. 1980).

[111] *Id.* at 203 (1980).

[112] *Id.* at 205.

[113] United States v. Washington, 506 F. Supp. 187, 205 (W.D. Wash. 1980).

[114] *Id.*

"imprecise in definition and uncertain in dimension."[115]

To pass review, the court held that "the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute."[116] Ultimately, the court wished to avoid announcing an imprecise legal rule that would inevitably prove to not be in the best interests of either party. It therefore remanded the case to the district court for further proceedings based on specific factual situations. Not quickly finding a "particular dispute" to bring to the court, the *Phase II* sub-proceeding was ultimately dismissed without prejudice on motion of the Tribes.[117]

While Judge Orrick's recognition of a broad environmental servitude was generally rejected by the Ninth Circuit, the panel made clear that it would reconsider the issue if the parties brought a particular case concerning the habitat issue before it with proper facts upon which it could articulate the State's obligations.[118] The State viewed the Ninth Circuit's decision as a defeat of the habitat right, while the tribes continued their efforts at conservation and co-management with the State. When those efforts eventually proved unfruitful, the tribes went back to the courts with a particular cause to diminished fish habitat.

VIII. The Culvert Case Sub-proceeding

In 2001, the majority of Pacific Northwest Tribes[119] noted that the State had admitted that hundreds of culverts under State roads and highways were having a serious deleterious effect on fish habitat and fish populations. The State built and operated culverts to divert streams and storm runoff through covered pipes and structures under roads and highways. Many culverts were not designed or constructed to allow fish passage, and over time, other culverts became impassible as a result of silt and debris blockage or due to erosion below the culvert opening resulting in the culvert becoming perched several feet above the

[115] United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985).

[116] *Id.*

[117] United States v. Washington, No. 13291 (W.D. Wash. June 22, 1993).

[118] *Id.*

[119] *See supra*, note 15, for identification of the Tribes of Washington State that are parties to the Culvert subproceeding.

stream itself. With less and less area for spawning, fish runs were rapidly and continually declining.[120] At the time of the *Phase I* decision, the Tribes take was approximately 860,000 fish.[121] By 1985, the number had markedly improved to over 5 million fish per year; however, from 1985 to 1999, the numbers declined to 3-4 million fish.[122] By 1999, the number of fish was at pre-Boldt decision levels of about 575,000 fish,[123] which fisheries attribute to water temperature changes, obstructions in creeks and rivers, and toxicity of the decreasing water supply.

In the continuing case of *United States. v. Washington*, the Tribes filed a Request for Determination, claiming that the state has a treaty-based duty to preserve fish runs and habitat sufficiently for the tribes to earn a "moderate living."[124] Joined by the Tribes, the United States sought to enforce a duty on Washington State to "refrain from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced, which in turn reduces the number of fish available for harvest by the Tribes."[125] The Tribes an injunction to compel the State to repair or replace state constructed and operated culverts that were impeding anadromous fish[126] migration[127] and "refrain

[120] The State's own documents admitted that: "Prior to development, within the Washington portion of the Columbia River Basin, an estimated 4550 stream miles were accessible to salmonids. Today in that same area, primarily due to blockage by dams, only 3791 stream miles remain (Palmisano et al. 1993). Much of the remaining accessible habitat has been degraded from other impacts. Our network of freeways, city streets, and private roads has also taken a toll on salmonid habitat. WDFW (1994) identified about 2400 culverts at road crossings that blocked access to nearly 3000 miles of stream habitat across the state." Wash. Dep't of Fish & Wildlife, Final environmental impact statement for the Wild Salmonid Policy 95. (1997).

[121] Robert Anderson, Associate Professor, Univ. of Wash. & Michael Connel, Stoel Rives. ABA Teleconference CLE: Implications of the Culverts Case Ruling in *United States v. Washington* (Dec. 11, 2007).

[122] United States v. State of Washington, No. CV 9213RSM, 2007 WL 2437166, *3, n.3 (W.D.Wash., August 22, 2007).

[123] *Id.*

[124] *Id.* at *2. A "Request for Determination" is akin to a "complaint" and constitutes the mechanism set by the district court for bringing new issues to the court.

[125] *Id.*

[126] Anadromous fish spend all or part of their adult life in salt water and return to freshwater streams and rivers to spawn. Dep't of Commerce, Pacific States Marine Fisheries Comm'n, *Anadromous Fish Life History Profiles* (Mar. 23, 2007), http://www.psmfc.org/habitat/edu_anad_table.html (last visited April 8, 2009).

[127] Request for Determination, U.S. v. Washington, Civ. No. C70-9213 (W.D. Wash. 2001).

from constructing and maintaining culverts under State roads that degrade fish habitat so that adult fish production is reduced, which in turn reduces the number of fish available for harvest by the Tribes."[128] They alleged that the degradation of the fish habitat by the culverts was a violation of the Stevens Treaties in that the fish supply was being reduced to such an amount that the Treaty right to harvest fish was being illegally reduced. Specifically, the Tribes averred that a "significant reason for the decline of harvestable fish has been the destruction and modification of habitat needed for their survival,"[129] noting that the State's own estimate was that removal of obstacles presented by blocked culverts would result in an annual production increase of 200,000 fish.[130]

The habitat right for which the tribes sought recognition was both feared by the state as a potentially significant limitation to development and an enormous financial burden on the state, and recognized by all parties as one of the most important elements of resource conservation of salmon and other anadromous fish.

In the August 2007 order, district court Judge Ricardo Martinez agreed with the Tribes, holding that the State cannot construct or operate state-owned culverts in a way that degrades the habitat of anadromous fish, thus decreasing the Tribes' eventual "take" of fish.[131] The court held that the State of Washington does have a duty to preserve fish runs,[132] and that the State currently owns and operates culverts that violate the duty.[133]

While the court did not impute a "broad environmental servitude or the imposition of an affirmative duty to take all possible steps to protect fish runs,"[134] the court cited Judge Orrick's opinion at length for the basis that such a servitude is implied. However, the court also reiterated the clear message of the Ninth Circuit *en banc* ruling: that a remedy will only be granted based on specific facts and

[128] United States v. State of Washington, 2007 WL 2437166, at *2.

[129] *Id.* ¶¶ 2.5, 2.6, 2.7.

[130] *Id.*

[131] United States v. State of Washington, 2007 WL 2437166, at *10.

[132] *Id.* at *10, n.5.

[133] *Id.*

[134] *Id.* at *5.

circumstances of a particular complaint.[135] Judge Martinez made the finding that the Treaties required the State to "refrain from building or operating culverts under state-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for tribal harvest."[136]

Judge Martinez further held that the treaty-based fishing rights included not only the right to fish, but the right to "take" fish.[137] The right to "take" fish is more than a right to simply put nets in the water; it is also the right to take a fair share of the fish at the usual and accustomed places in an amount that will support the Tribes' moderate living.[138] The State has a duty to ensure that the amount of fish within those runs is sufficient to meet the "moderate living" requirement.[139] It was the intent of the parties making the treaty that the Indians would be able to take fish in sufficient amounts "to meet their own subsistence needs forever, and not become a burden on the treasury."[140] The State had the burden of showing that "any environmental degradation of the fish habitat proximately caused by the State's actions (including the authorization of third parties' activities) will not impair the Tribes' ability to satisfy their moderate living needs."[141] The term "moderate living" was coined by the courts, as a measure securing fish in an amount "so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."[142] Judge Martinez would not go further in defining the term, but indicated that in the present case it was sufficient for the Tribes to have shown substantial diminishment of the resource and that the State's action was a cause of the diminishment, to support a finding that the treaty rights had been impaired.[143]

[135] *Id.*

[136] United States v. State of Washington, 2007 WL 2437166, at *10.

[137] *Id.* at *8.

[138] *Id.* at *7 (quoting declaration of Robert Thomas Boyd explaining meaninglessness of assurances of right to take if later action would significantly degrade the resource).

[139] *Id.* at *6.

[140] *Id.* at *9.

[141] United States v. State of Washington, 2007 WL 2437166, *4, W.D.Wash., August 22, 2007 (NO. CV 9213RSM) (citing United States v. Washington, 506 F. Supp. 187, 207(1990)).

[142] *Id.* at *6 (citing *Fishing Vessel*, 443 U.S. 658, 686 (1979)).

[143] *Id.*

On the basis of these assurances during treaty negotiations that tribes would retain the right to take fish, the court found that the treaties carried "the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource[144] and that [s]uch resource-degrading activities as the building of stream-blocking culverts could not have been anticipated by the Tribes."[145] Judge Martinez also indicated that the Tribes do not have to "exactly quantify the numbers of missing fish" so long as there is evidence that the culverts are responsible for some portion of the proven diminishment of fish runs.[146]

In summary, the profit à prendre established in *Winans* has now been held to include an attendant environmental right to protection of fish habitat, and the right of the Tribes to seek injunctive relief for violations of that treaty right. The Tribes can present sufficient facts on a narrowly-crafted environmental issue showing the State's actions to be a contributing cause of diminished fish runs.[147] The State has an affirmative duty not to degrade the fish habitat. Further, the court indicated there is no requirement for the Tribes to prove the exact amount of diminishment from the alleged habitat-destructive act to proceed with such a request.[148]

IX. The Effects of the Culvert Case Decisionon the Treaty Right and Future Claims

The 2007 decision has far-reaching implications for Indian treaty rights, concomitant water rights, and, most importantly, the tribes' ability to protect fisheries and fish habitat. The State and its proponents suggest that the decision creates a de facto environmental servitude by establishing that any factor sufficiently proven to be a cause of diminished runs is a potential target of future injunctive actions.[149] Despite the State's allegation, Judge Martinez's

[144] *Id.* at *10.

[145] *Id.*

[146] *Id.* at *3.

[147] United States v. State of Washington, 2007 WL 2437166, at *5.

[148] *Id.* at *6.

[149] *Id.* at *5.

confinement of the decision to only the issue of state-owned culverts and the clear indication that the decision should not be read to create such a broad servitude, effects precedential use of the determination only for similarly situated future actions where a specific factor contributes to a particularized injury to fish or their habitat. Presumably, the case could also apply where State action diminishes habitat of shellfish and hunted game and animals, where such resources are protected by a similar treaty right.

This somewhat narrow focus may make the decision less vulnerable to reversal by the Ninth Circuit. The original *Phase II* decision was struck down by the circuit court because it was too broad and created an environmental servitude. Until a remedy is in place, it is unclear what if any actions the State of Washington must take to correct or avoid a treaty violation. Still, the underlying ruling is that there is a habitat protection element in the Treaties. Thus, while there may still be additional litigation, including both broad challenges to the recognition of a habitat right under the treaty, and challenges concerning the extent of the duty on a case by case basis, it is clear that the fish runs on which the Tribes depended when the Treaties were signed cannot be destroyed or severely reduced without running afoul of the Treaty promises.

The decision is an important step in a tribal legal strategy more than thirty years in the making. The original *Phase II* decision, while vacated on technical grounds, provided some useful leverage to obtain greater habitat protections for some fifteen years. This decision should have at least as great a benefit.

That said, while Judge Martinez was careful to limit the decision to the particular facts of the case, the decision creates precedent recognizing a state duty to protect fish habitats against damage by state actors. One immediately evident application could be to the licensing and re-licensing of hydropower projects, in which the case would provide tribes with additional negotiating power to address factors in the operation of such facilities resulting in diminished fish runs.

While the determination clarifies for the Tribes and the State the fact that a duty to refrain from habitat-degrading activities is concomitant to the right to fish, the decision leaves other key questions unanswered. For example, the case seemingly establishes a low burden of proof for tribes to prove that a factor is "a

cause" of diminishment. The determination provides that any factor that is "a cause" of diminishment may be subject to injunctive relief. The implications for state actors in practical terms will include a duty to repair conditions contributing to diminished runs, and to consider implications of state and state-approved private actions on fish habitat. The fulfillment of that duty remains fraught with challenges including access to the lands where habitat is endangered by State or municipal action, decreasing water resources, and the increasing frequency of State funding deficits.

Moreover, Judge Martinez implicitly declined the State's invitation to define the "moderate living" standard, coined in United States Supreme Court review of Judge Boldt's decision, that the tribes had a right to one-half of the take of fish each year up to the point that the Tribes' needs for a moderate living standard were met. The State averred that a definition is needed in order to establish the extent of its duty. That unsettled term may give rise to future challenges concerning the ambiguity of the extent of the State's duty in a particular case.

A remaining challenge for the court is the determination of an appropriate remedy to the Tribes. The summary judgment decision did not determine the remedy for violating the Treaties be nor what the State must do to fix the culverts. The determination of a remedy will require either a trial, or an agreement between the parties. After a status conference in August 2007, the parties agreed to attempt to reach a negotiated settlement over what the remedy should be. However, as of mid-2009, the negotiations have been unsuccessful and the Court is planning a trial for the remedy phase beginning October 2009. The trial will involve the time table for culvert fixes, the standards to be applied, and the role of the Tribes in monitoring culvert status in the future. While the Tribes sought injunctive relief, the practicability of such relief with increasingly scarce and over-allocated resources is diminishing.

Because of these challenges, and as evidenced by the extensive but unproductive mediation between the parties on an appropriate remedy for the tribes, the decision may serve as a catalyst to recognition of non-injunctive remedies. Judge Martinez's holding, and the impending determination on the appropriate remedy, may have significant implications for the Tribes' ability to

enforce their treaty-based rights and seek alternative forms of relief.

A. The Determination: a Strong Basis for Tribes to Seek Remediation of Habitat Degradation

The need for more vigorous fish and wildlife habitat protection is clear. It is estimated that development has altered or eliminated 58% of the original wetlands in Puget Sound.[150] Four river deltas (Duwamish, Lummi, Puyallup, and Samish) have lost more than 92% of their intertidal marshes.[151] Dikes, port development, shoreline construction, bulkheads, dredging, and the filling of wetlands have all contributed to this decline.[152]

It is in this context that the weakness of other environmental laws intended to protect species becomes apparent. For example, the Endangered Species Act[153] is not designed to protect the treaty harvesting right because it is only targeted at protecting species "in danger of extinction."[154] This is a very low threshold and does not provide fish for commercial harvest nor extended ceremonial or subsistence harvest.

Similarly, the Magnuson-Stevens Act requires federal agencies to consult with the Secretary of Commerce on all actions, or proposed actions, "authorized, funded, or undertaken by the agency," that may adversely affect essential fish habitat.[155] The practical effect of the Act has not, however, resulted in preservation of habitat sufficient to prevent the listing of several species of fish as endangered or threatened. The 2005 Washington State Salmon Recovery Act, noted that repeated attempts through regulation and legislation to increase salmonid fish runs throughout the State of Washington had failed to avert the listing of salmon and steelhead as threatened or endangered.[156] Therefore, while

[150] Wendy Fisher & Donald Velasquez, *Management Recommendations for Washington's Priority Habitats and Species* 3 (Wash. Dep't of Fish & Wildlife, Dec. 2008), *available at* http://wdfw.wa.gov/hab/phs/dungeness_crab/2008_dungeness_crab_phs_recs.pdf.

[151] *Id.*

[152] *Id.*

[153] 16 U.S.C, §§ 1531-1544 (1973).

[154] *Id.*, § 1532 (6).

[155] Magnuson-Stevens Act, 16 U.S.C. §§ 1855(b)(2) (2000).

[156] Wash. Rev. Code § 77.85.005 (2009).

State and federal law clearly provide for the consideration of the adverse effects of governmental action on fish habitat and water resources, that consideration has failed to create any significant improvement in the situation of degraded fish habitat. As a result, a progressive degradation in the continuing viability of the treaty-based right to fish has persisted.

B. The Recognition of a Habitat Right and its Effect on State and Municipal Actions

Existing regulations may be amended and new regulations crafted to avoid problems in the future such as those presented by the fish passage blocking culverts. Counties and cities alone are responsible for more than 70,000 miles of roadway in the state, with the State Department of Transportation managing more than 3,000 culverts and 7,000 miles of roadways.[157] These numbers make clear the significance of the decision for state and local governments, and hint at the impact on private landowners and developers who own culverts at any point between those owned by government entities and the ocean.

While the Tribes carefully crafted their suit in the sub-proceeding to be brought against the State alone, in its proprietary capacity,[158] the determination may also extend to the State's regulatory capacity. If the State is to fulfill its prescribed duty to correct the actions of state actors and state-sanctioned private actors, it follows that the State must use its permitting and regulatory power to do so. Judge Martinez articulated this requirement when he noted that State action includes the State's authorization of third parties' activities.[159] Moreover, the State may require utilization of other tools in order to access land and water, including controversial measures such as its eminent domain power.[160] While

[157] Krista J. Krapalos, *Ruling Could Give More Say to State Tribes*, The Daily Herald (Everett, Wash.), Aug. 24, 2007, HeraldNet (8/24/07), http://www.heraldnet.com/apps/pbcs.dll/article?AID=/20070824/NEWS01/108240077/0/BIZ&template=printart.

[158] As owners and controlling entity over the operation of the culverts.

[159] United States v. State of Washington, 2007 WL 2437166, *4, W.D.Wash., August 22, 2007 (NO. CV 9213RSM)(citing 506 F. Supp. 187, 207).

[160] The power of eminent domain is an inherent power of the state. State v. King County, 74 Wash.2d 673, 675, 446 P.2d 193 (1968) (citing Miller v. City of Tacoma, 61 Wash.2d 374, 378 P.2d 464 (1963)). This power is limited by our state constitution and must be exercised under lawful procedures. *See id.* at 675.

state action implies state control or ownership of the land or water in question, the manifestation of those actions may occur downstream from the state-controlled lands, requiring corrective action to be taken on privately-owned lands or water.

The Washington State Court of Appeals considered a similar situation regarding the State's duty under the Salmon Recovery Act in Cowlitz County v. Martin. In Cowlitz, the court considered whether, in the interest of salmon under the Salmon Recovery Act, local and tribal governments may condemn private property in order to replace a culvert that was impeding fish passage.[161] The court first examined the text of the Salmon Recovery Act, which contained provisions requiring express consent from private property owners in conjunction with repairs or improvements.[162] It also recognized that while State eminent domain power is an inherent state power, that power is limited by the State constitution and must be expressly given or necessarily implied, and strictly construed.[163]

Ultimately the *Cowlitz* court found that the County, through its Board of Commissioners, must determine the necessity requiring the condemnation.[164] The court refused to consider purposes for condemnation articulated by the county's attorney, and not the Board of Commissioners.[165] In view of these facts, the state court found that the county did not have authority for such condemnation as necessary for public use.[166] However, the court did not render a determination as to whether compliance with treaty-based duties is a legitimate public use justifying condemnation of private property. The Cowlitz case, therefore, is not dispositive for the recognition of a condemnation right for the purpose of compliance with treaty provisions and duties.

Unlike the Salmon Recovery Act, treaty-based fishing rights reserved to Indian tribes have specifically been found to be binding on private parties,

[161] 142 Wash. App. 860, 862, 177 P.3d 102 (Div. II, 2008). *See* Salmon Recovery Act, Wash. Rev. Code 77.85.005 (2009).

[162] *Cowlitz*, at 865 (citing Wash. Rev. Code 77.85.050(1)(a) and Wash. Rev. Code 77.85.010(3), .050(1)(a), .060(2)(b)).

[163] *Id.* at 864 (citing State ex rel. King County v. Superior Court for King County, 33 Wash.2d 76, 81-82, 204 P.2d 514 (1949) and City of Des Moines v. Hemenway, 73 Wash.2d 130, 137, 437 P.2d 171 (1968)).

[164] *Id.* at 868.

[165] *Id.*

[166] *Id.*

with no express or implied requirement of consent from private property owners for the Indians' exercise of those rights.[167] The recognition and enforcement of agreements by the federal government with a sovereign nation can certainly be purported as a public purpose necessitating a taking, although such interest has received less than favorable views in current times. However, if the Board of Commissioners of a county finds the enforcement of such agreements to be a public purpose, the courts would be hard-pressed to find the Commissioners acted beyond their scope of authority in doing so.

C. The Scope of the Treaty-Based Fishing and Concomitant Habitat Right: the Moderate Living Standard

The *U.S. v. Washington* cases also raise significant questions regarding the definition of the phrase "moderate living." In *Phase I* of *U.S. v. Washington*, the United States Supreme Court interpreted the Tribes' fishing right to be 50% of the yearly take of fish, up to the point that the treaty-base guarantee of a "moderate living" to the tribes was met. Therefore, the duty of both State and State-sanctioned private actors to take mitigating action to protect fisheries and habitat would presumably end at the point that such a moderate living was achieved. In the culvert sub-proceeding, the State argued that if its regulation and duties are to be controlled by the measure of the "moderate living standard," the tribes must explain what this entails.[168] Judge Martinez rejected this argument, noting that the "moderate living standard" was created by the courts in apportioning the right pursuant to the treaties and thus any definition necessarily will be promulgated by the court.[169] Consequently, the Tribes are not required to establish the definition.[170] Judge Martinez did not feel it necessary to define the term in order to conclude that the Tribes had met their burden of showing that the State's action was *a cause* of the substantial diminishment of fish runs,[171] stating:

[167] *See, e.g., Winans*, 198 U.S. 371 (1905), *Winters*, 207 U.S. 564 (1908), *Adair*, 723 F.2d 1394 (1983).

[168] United States v. State of Washington, 2007 WL 2437166, at *5.

[169] *Id.* at *6.

[170] *Id.*

[171] *Id.*

> To the extent that it needs definition, it would be for the Court, not the Tribes, to define it. No party has yet asked that the Court do so, and the Court finds it unnecessary at this time. The Tribes' showing that fish harvests have been substantially diminished, together with the logical inference that a significant portion of this diminishment is due to the blocked culverts which cut off access to spawning grounds and rearing areas, is sufficient to support a declaration regarding the culverts' impairment of treaty rights.[172]

The lack of a clear definition for what constitutes a "moderate living standard" however, makes it difficult to mark an end point to habitat improvement. For example, in the culverts sub-proceeding, the Tribes estimated that replacement, repair or removal of the offending culverts will result in an increase of approximately 200,000 fish, and open more than 400,000 square meters of spawning habitat and 1.5 million square meters of rearing habitat for young fish.[173] However, it is unclear whether completion of this vast project would meet the State's duty as the "goal" of a moderate living is not defined.

While the moderate living standard has yet to be defined by the courts who coined the term, the definition of that term remains a point of contention among the parties and a possible basis for challenge by the State.

D. The Continuing Viability of Injunctive Relief

Following Judge Martinez's ruling in August 2007, the case was stayed to allow the parties to negotiate a settlement concerning the appropriate remedy for the Tribes.[174] Importantly, the State had already established a schedule for repairing and replacing the culverts in question; however, that schedule followed a century-long execution schedule which the Tribes argued was too slow and inadequate.[175] After months of negotiations among the parties, discussions

[172] *Id.*

[173] United States v. State of Washington, 2007 WL 2437166, at *3.

[174] Lynda Mapes, *Culverts Add Obstacles to Salmon, State, Polics*, The Seattle Times, Jan. 24, 2008, *available at* http://seattletimes.nwsource.com/html/localnews/2004142062_culverts24m.html.

[175] *See, e.g.,* Suquamish Tribe's Mot. for Summ. J. Re: A&K Trust Tidelands at Chico Bay, United States v. Washington, No. 270CV09213, 2008 WL 2385904 (W.D. Wash. Mar. 27, 2008).

reached an impasse partially as a result of the enormous fiscal impact the State faced if forced to implement an expedited repair schedule for the culverts.[176] The court has therefore scheduled the remedy phase of the trial for October 2009.

The State's enormous budget deficits and the resulting failure of mediation efforts, reveal an underlying difficulty with injunctive relief for violations of the treaty fishing and habitat rights. While the profit à prendre resembles an easement on ceded lands, the Ninth Circuit has held that the only relief Tribes may presently seek for violations of the reservation is equitable relief.[177] Since the right arises under treaty law, relief must be aimed at ensuring compliance with the treaty.[178] Additionally, while tribes have attempted to seek monetary damages for violations, courts have previously refused to grant such relief, finding that neither prior cases nor the intent of the parties in entering the treaties contemplated an implied right of action for damages.[179] The possibility of monetary relief for such claims, however, has not been completely barred if the specific treaty in question includes an implied right to such relief.[180] Courts have noted that the Stevens Treaties are "self-enforcing" and thus require no separate legislation creating a cause of action for enforcement.[181]

Further, unless the language of the treaty supports such claims, there is similarly no claim for damages against a non-contracting party.[182] In *Skokomish Indian Tribe v. United States*, the Skokomish Tribe argued that the Supreme

[176] WASH. STATE OFFICE OF THE ATTORNEY GEN., FY 2009SUPPLEMENTAL BUDGET PROPOSAL (2008), *available at* http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Budget/FY2009%20Supplemental%20Budget%20Request.pdf (indicating the cost to taxpayers could be billions of dollars if a 5-year culvert repair deadline were granted).

[177] *See, e.g.,* Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005).

[178] *Skokomish*, 410 F.3d at 512.

[179] *Id.* (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284 (1998)) (stating that courts implying rights of action "have a measure of latitude to shape a sensible remedial scheme that best comports" with the relevant enactment).

[180] *Fishing Vessel*, 443 U.S. at 693 n. 33.

[181] *Id.*

[182] *Skokomish,* 410 F.3d at 513 (citing Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"), and Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979)) ("[O]ur task is limited solely to determining whether Congress intended to create the private right of action asserted.... And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself").

Court had held in a prior case that a cause of action may be implied against non-contracting parties, even absent express treaty provisions for such relief.[183] The *Skokomish* court did not expressly reach the issue however, avoiding a finding of an implied right to sue a non-contracting party for damages under a treaty.[184] Rather, the court limited its decision to finding that the "right of taking fish" secured the right to harvest a share of each run of fish passing through tribal fishing areas, not merely the right to fish on an equal basis with non-treaty fishermen.[185] The court did affirm that its order defining the scope of the treaty rights, and thus the duty of the State and its grantees, was enforceable by injunction.

Other cases have also failed to recognize an implied right to monetary relief under treaty-based fishing rights. The Supreme Court considered in early treaty-rights cases the extent of fishing rights under the Treaties and declined to hold that a private right of action for damages exists under the treaties.[186] In cases where the courts have found violation of an existing and previously unrecognized right to fish, the courts have not considered or held that the Tribes had rights of action for retroactive monetary relief.[187]

However, the failure of the courts to specifically address whether there is an implied right to monetary relief does not equate to a finding that there is no such implied right. In fact, the Court's failure to outright deny such relief may reflect an interest in preserving the ability to grant monetary relief in the future, should equitable relief ultimately prove ineffective or even impossible in an age of increasing scarcity of natural resources tied to fish runs (particularly, budgetary constrains, as in the instant case, and lack of available water).

Although the Ninth Circuit held in *Skokomish Indian Tribe v. U.S.*,[188] that monetary damages were not available to the Tribe, other circuits have not adhered to that issue, passing on the question. In addition, the current status of

[183] 410 F.3d at 513 (arguing that the Supreme Court established such an implied right of relief in *Fishing Vessel*, 391 U.S. 392).

[184] *Id.* at 514.

[185] *Id.* at 513 (citing *Fishing Vessel*, 443 U.S. at 674, 683-85).

[186] *Id.* at 514 (citing *Puyallup I*, 391 U.S. at 398).

[187] *Id.*

[188] 410 F.3d 506 (2005).

U.S. v. Washington illustrates of the problem with injunctive relief: the State of Washington had begun to repair culverts when the motion for declaration was filed, but with budgetary considerations and other constraints, the State was on pace to take almost 100 years to finish. Although it seems clear that, given Judge Martinez's declaratory order, the parties will negotiate a remedy that will provide a solution much sooner, budgetary and resource limitations will only continue to plague Washington State, and other states. There is an increasingly dissatisfactory nature to injunctive relief for all parties, and thus courts may become open to considering other types of relief notwithstanding the Ninth Circuit decision.

The Supreme Court has held that a plaintiff tribe could assert a claim for damages under federal common law for unlawful possession of land in *County of Oneida v. Oneida Indian Nation*.[189] While the basis of the decision in *Oneida* was centered on common law possessory land rights rather than treaty-based rights, the treaty rights under the Stevens Treaties have been analogized to and in fact specifically referred to by the court as easements.[190] Therefore, attempts to dissociate property rights from the scope of Treaty rights contradicts the Supreme Court's holding that the right to access is in fact a property right. Expanding on this relationship of property rights damages and relief for treaty violations may allow the court, if it deems necessary in the future, to expand the relief available to the tribes to include monetary damages.

X. Conclusion

Under Judge Martinez's opinion, the profit à prendre reserved to the Tribes through the Stevens Treaties includes the right to seek an injunctive relief against the State where the Tribes can present sufficient facts to show that a specific state activity is a factor contributing to diminishment of fish runs.[191] The court's holding may therefore be seen to extend the right to enforce the duty to protect habitat where factors contributing to diminishment of fish runs exist, regardless of

[189] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 236 (1985) (*County of Oneida II*).

[190] *Winans*, 198 U.S. at 384.

[191] United States v. State of Washington, 2007 WL 2437166, W.D.Wash., August 22, 2007 (NO. CV 9213RSM).

their proximity to the "usual and accustomed" places of fishing.[192]

The recognition of tribal fishing rights by the courts and state and federal governments has historically been slow and lacking the desired effect of improving degradation of fish habitat and fishery numbers. Judge Martinez's *Phase II* decision has affirmed the utility of injunctive relief for tribes seeking to protect treaty rights, and to compel state actors to meet their treaty-based duties. In addition, eminent domain to reach lands not otherwise available for making repairs and changes to existing problems may be an alternative method. Alternatively, courts have left open the possibility of allowing monetary relief in addition to injunctive relief. While there are limitations to the effect of the decision, the case provides a clear basis for tribes to seek enforcement of treaty provisions for factors proven to be a cause of diminished treaty-based resource rights, until such time as the un-defined "moderate living" standard is met.

[192] 587 F. Supp. 1162 (W.D. Wash. 1984).