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WHEN TRIBAL TREATY FISHING RIGHTS BECOME A MERE OPPORTUNITY TO DIP ONE'S NET INTO THE WATER AND PULL IT OUT EMPTY: THE CASE FOR MONEY DAMAGES WHEN TREATY-RESERVED FISH HABITAT IS DEGRADED

BRIAN J. PERRON*

Salmon may be one of our greatest natural treasures. They have survived for two million years enduring floods, droughts, disease, volcanic eruptions, and even ice ages. Nowhere is the circle of life more apparent, tenacious and poignant. And nowhere else would the loss of this life cycle be so all encompassing, ecologically disastrous and economically devastating.¹

I. INTRODUCTION

A recurring theme in Pacific Northwest Indian mythology deals with malevolent individuals who blocked streams to prevent the salmon from returning to their spawning grounds.² Today, after a century of pollution, the myth has quite possibly become reality as overfishing and habitat destruction threaten salmon with extinction. Northwest Indian tribes are among the many stakeholders in the salmon's future. In 1855 several tribes and the federal government entered into treaties, in which the tribes reserved the exclusive right to take fish at all "usual and accustomed grounds," and in the "streams running through or bordering reservations."³ In culmination of nearly seventy-five years of litigation

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¹ Christine Gregoire, *Salmon Stakes*, SEATTLE POST-INTELLIGENCER, Nov. 8, 1998, at E1.

² See BARBARA LANE, POLITICAL AND ECONOMIC ASPECTS OF INDIAN-WHITE CULTURE CONTACT IN WESTERN WASHINGTON IN THE MID-19TH CENTURY 13 (1973).

³ Treaty with Nisquallys, Dec. 26, 1854, art. III, 10 Stat. 1132 (1855); Treaty with Dwámish Indians, Jan. 22, 1855, art. V, 12 Stat. 927 (1859); Treaty with S'Klallams, Jan. 26, 1855, art. IV, 12 Stat. 993 (1859); Treaty with Makah Tribe, Jan. 31, 1855, art. IV, 12 Stat. 939 (1859); Treaty with Walla-Wallas, June 9, 1855, art. II, 12 Stat. 945 (1859); Treaty with Yakimas, June 9, 1855, art. III, 12 Stat. 951 (1859); Treaty with Nez Perce,

over the scope of these treaty rights, a United States district court judge held that the treaties entitled the tribes to a sufficient quantity of fish to satisfy their moderate living needs, subject to a ceiling of fifty percent of the harvestable run.⁴ In a later phase of the case, a succeeding judge held that the right to take fish implied the right to environmental protection of fish habitat.⁵ The United States Supreme Court affirmed the harvest allocation decision,⁶ but the Ninth Circuit Court of Appeals, citing the absence of "concrete facts which underlie a dispute in a particular case," vacated the habitat protection decision.⁷ As a result, over twenty-five years after this litigation began, there is no definitive answer to the questions of whether the treaties contain the right of habitat protection and what remedies the tribes have if their treaty fisheries are forever destroyed.

Since the Ninth Circuit's decision, lower courts have consistently implied a habitat protection right and have provided tribes with various forms of injunctive relief. In many cases, however, injunctive relief and continued negotiation offer no solace to the tribes whose fisheries have already been destroyed. One federal district court judge recognized the habitat protection right, but nonetheless held that money damages are unavailable to compensate tribes for past losses sustained by fish runs at the hands of development.⁸ It is time for the courts to affirmatively recognize that the tribes' right to harvest fish includes a right to habitat protection that prohibits habitat degradation that significantly interferes with the tribes' ability to harvest sufficient fish to satisfy their moderate living needs. In defining the scope of the habitat protection right in such a way, the tribes would be entitled to sue the federal and state governments, as well as private parties, to recover monetary damages for habitat and run degradation. Alternatively, the tribes would be entitled to compel restoration and enhancement of fish habitat.

Recognition of treaty-habitat protection rights and a corresponding ability to bring claims for money damages for habitat degradation would

June 11, 1855, art. III, 12 Stat. 957 (1855); Treaty with Tribes of Middle Oregon, June 25, 1855, art. I, 12 Stat. 963 (1859); Treaty with Qui-Nai-Elts, July 1, 1855, art. III, 12 Stat. 971 (1859); Treaty with Flatheads, July 16, 1855, art. III, 12 Stat. 975 (1959) [hereinafter *Stevens Treaties*].

⁴ See *United States v. Washington (Phase I)*, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *rev'd*, 935 F.2d 1059 (1979).

⁵ See *United States v. Washington (Phase II)*, 506 F. Supp. 187, 208 (W.D. Wash. 1980).

⁶ See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 (1979) [hereinafter *Passenger Fishing Vessel*].

⁷ *United States v. Washington (Phase II)*, 759 F.2d 1353, 1357 (1985).

⁸ See *Nez Perce v. Idaho Power Company*, 847 F. Supp. 791, 811 (D. Idaho 1994).

raise awareness of the losses that tribes will suffer if the salmon are allowed to disappear, as well as the losses the tribes have already suffered. Furthermore, the threat of great financial cost for compensating the tribes for lost treaty fisheries and degraded treaty-fish habitat could awaken the federal and state governments, as well as private parties, to the salmon's dilemma. Ultimately, recognition of the habitat-protection right could be used to enhance and protect Indian resources outside the Northwest.

Part II of this Note provides background on the tribal interest in salmon, the treaties in which the tribes reserved their all-important fishing rights, and the years of litigation that the tribes have endured to ensure their rights. Part III discusses why a definitive ruling on the habitat-protection right is necessary, while Part IV discusses judicial explications defining the scope of the habitat-protection right and how the current state of the law has blended those definitions. Part V, the center of this Note, discusses: why a money damages remedy is necessary to address treaty-fish habitat degradation, what the source of that remedy is in the context of claims against the government and private parties, and how money damages would be calculated in such cases. Part VI examines an alternative remedy: the right of tribes to compel fish habitat enhancement and restoration. Part VII discusses statutory causes of action that might preempt a treaty right to habitat protection. Part VIII discusses how the habitat-protection right might be applied to enhance and protect tribal resources outside the Northwest. Finally Part X concludes this Note.

II. BACKGROUND

A. Tribal Interest in Salmon

The Pacific salmon is a magnificent species.⁹ Prior to European settlement in the nineteenth century, Pacific Northwest tribes relied

⁹ There are five species of Pacific Salmonids: (1) *Oncorhynchus (O.) tshawytscha*, the chinook or king salmon; (2) *O. nerka*, the sockeye or red salmon; (3) *O. kisutch*, the coho or silver salmon; (4) *O. keta*, the chum or dog salmon; and (5) *O. gorbuscha*, the pink or humpback salmon. See R.J. CHILDERHOSE & MARJ TRIM, PACIFIC SALMON 25-26 (1979). The genus name "*Oncorhynchus*" means "hooked snout." The species names are derived from Russian because they were first described by a naturalist on the 1737 Bering expedition. See *id.* The steelhead trout (a sea-run rainbow trout), *Salmo gairdneri*, is more closely related to the Atlantic salmon, *Salmo salar*, than to the Pacific species, because it is a non-anadromous species. See *id.* Distinctive local groups within each species of salmon are called *stocks*. See *id.* A *run* is a common stock of fish on their way to breed in their freshwater home. See FAY G. COHEN, TREATIES ON TRIAL 25 (1986) (citing Wash. Dept. of Fisheries et al., *Joint Statement*, p. xx).

heavily upon salmon, an anadromous fish.¹⁰ As a migratory fish, salmon swim hundreds, even thousands of miles away from their place of origin, and eventually return to their homewater to reproduce and die.¹¹ Historically, salmon returned in such great numbers that a member of Lewis and Clark's expedition commented that one could walk across the Columbia River on the backs of salmon.¹² This abundance allowed salmon to become a central part of the tribes' diets, economies, religions and cultures.

The value of tribal lands as a game and plant food collecting area was limited by the rugged hills and mountains and dense forests of the western Cascade region.¹³ Nasty weather often impeded travel, as did the terrain, and heavily wooded areas supported only a sparse wildlife population.¹⁴ As a result, for western Washington Indians, salt and freshwater resources were far more important for food than land resources.¹⁵ According to George Gibbs, the lawyer-ethnologist who helped draft and negotiate western Washington treaties, salmon, including steelhead where available, formed "the most important staple of sustenance" for the tribes.¹⁶

Despite the apparent benefit of the salmon's abundance, tribes faced a great challenge in that salmon could be taken in vast quantities, but only during a particular and limited time period.¹⁷ Tribes acquired food by fishing, hunting large sea-mammals, and collecting inter-tidal marine

¹⁰ Anadromous fish are those that ascend freshwater rivers and streams to reproduce after maturing in the ocean. See R.J. CHILDREHOSE & MARJ TRIM, *PACIFIC SALMON* 25-26 (1979).

¹¹ Salmon are always migrating, either in the rivers or the ocean. See John V. Byrne, *Salmon Is King—Or Is It?*, 16 ENVTL. L. 343, 344 (1986); see also COHEN, *supra* note 9, at 25.

¹² See *JOURNALS OF LEWIS AND CLARK* 251-53 (B. DeVoto ed., 1953); see also <http://www.onda.org/Projects/JohnDay/index.htm> (last visited Feb. 27, 2001) (describing oral and written history of Northwest pioneers and Native Americans who crossed rivers and streams "walking on the backs of salmon"); but see http://www.saveourdams.com/salmon_timeline.htm (last visited Feb. 27, 2001) (disputing contention that Lewis and Clark walked across the Columbia on backs of salmon).

¹³ See LANE, *supra* note 2, at 3, 6.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*; see also Barbara Lane, *Background of Treaty Making in Western Washington*, *AMERICAN INDIAN JOURNAL* 3 (Apr. 1977): 2-11. One Klallam tribal member, lamenting over the effect of the Elwha Dam on salmon migration, said, "the salmon was our food . . . the salmon was our culture. The salmon was our life." Patrick Joseph, *The Battle of the Dams*, *SMITHSONIAN*, Nov. 1998, at 53.

¹⁷ See LANE, *supra* note 2, at 7.

life.¹⁸ Salmon was the staple food, eaten either in fresh or cured form year-round.¹⁹ When winter weather conditions generally made fishing difficult, people lived primarily off of dried and smoked fish.²⁰ Tribal members developed a number of salmon recipes and a variety of cooking methods in order to avoid monotony in their diets.²¹

As a fish staple, salmon provides essential proteins, fats, vitamins, and minerals in the native diet. Salmon contains high levels of omega-3 fatty acids and its consumption reduces the risk of heart disease, benefits the diabetic, reduces blood pressure, assists prevention of arthritis, and lowers cholesterol and triglyceride levels.²² Such fatty acids are also important for brain development and function.²³ The loss of salmon has been blamed as one of the significant reasons for modern tribal health problems, such as obesity, which leads to diabetes, as well as heart and kidney disease.²⁴

Historically, salmon not only served the tribes' dietary needs, but their abundance also allowed the fishing trade to become the mainstay of the tribal economy. Salmon allowed Northwest tribes to become one of the world's few hunting and gathering societies with wealth beyond subsistence needs.²⁵ Tribal societies turned surplus food into wealth—canoes, blankets, slaves, and shell ornaments.²⁶ Trade beyond the local community, even over great distances, was facilitated by food preservation techniques, such as drying and curing, which allowed tribal members to easily store and transport salmon.²⁷ Trade was also carried on for salmon species which did not run in local streams,²⁸ and sometimes even for local-variety salmon because some people claimed to be able to taste differences

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See U.S. Army Corps of Engineers, Walla Walla District, *Lower Snake River Juvenile Salmon Migration Feasibility Study: Tribal Circumstances and Perspective Analysis of Impacts of the Lower Snake River Project on the Nez Perce, Yakima, Umatilla, Warm Springs, and Shoshone Bannock Tribes* 103, 127 (prepared Mar. 1999), available at <http://www.nww.usace.army.mil/html/offices/pl/er/studies/lrspublic/reports/tribal/tribaldoc.html> (last visited Nov. 5, 1999) (hereinafter *Tribal Circumstances*).

²³ See *id.*

²⁴ See *id.*

²⁵ See LANE, *supra* note 2, at 7.

²⁶ See *id.*

²⁷ See *id.* at 10.

²⁸ See *id.* Makah tribal members traded for sockeye, because they did not have a sockeye fishery and valued the sockeye for flavor and fat content. See *id.*

between salmon of the same kind caught in different bays or streams.²⁹ Today, the tribes are unable to support themselves, as they once could through fishing,³⁰ but the tribal salmon business is still a competitive endeavor: tribes continue to fight amongst themselves over fishing resources³¹ that have fallen to less than ten percent of 1855 levels.³²

Fishing and salmon are also the centerpiece of tribal religion and culture. Historically, each tribe performed some sort of first-salmon ceremony, essentially a community- and species-based religious rite celebrated to ensure the salmon's continued return.³³ The tribes also sought to ensure the salmon's return by designating salmon running seasons and proscribing pollution before and during this season: no waste could be thrown into the river, and even foul canoe water was not to be bailed out into the river.³⁴ Today, salmon do not return in great enough numbers for tribes to use in traditional religious ceremonies.³⁵ The tribes view restored fisheries as a vehicle for building self-esteem and reducing the number of suicides.³⁶ Additionally, tribal members find fishing allows families to share time together and work through many of their family problems.³⁷ To many tribal members, the future of the salmon and Indian culture are now walking hand in hand.³⁸

B. *The Stevens Treaties*

In 1853 the Washington Territory was broken off from the Oregon Territory and white settlers began to move west, causing friction between Indians and settlers, and between settlers and the government.³⁹ Plans for

²⁹ See *id.*

³⁰ See Starla Kay Roels, *Borrowing Instead of Taking: How the Seemingly Opposite Threads of Indian Treaty Rights and Property Rights Activism Could Intertwine to Restore Salmon to the Rivers*, 28 ENVTL. L. 375, 376 (1998).

³¹ See *Feds Grant Snoqualmies Legal Status as a Tribe*, SEATTLE TIMES, Oct. 6, 1999, at A1 (describing how the Tulalip tribes opposed the Snoqualmie tribe's efforts to secure federal recognition, and hence inclusion within the group of tribes whose fishing rights are guaranteed by treaty).

³² See Stephen M. Pauley, Editorial: *Tribal Rights a Major Factor in Fish Recovery*, ID. STATESMAN, June 9, 1999, available in 1999 WL 15116535.

³³ See LANE, *supra* note 2, at 9.

³⁴ See *id.*

³⁵ See Roels, *supra* note 30, at 376 (citing Laura Berg, *Tribes Release Salmon Restoration Plan*, WANA CHINOOK TYMOO, Issues 2 and 3 1995, at 14.).

³⁶ See *Tribal Circumstances*, *supra* note 22, at 7, 127.

³⁷ See *id.*

³⁸ See *id.* at 82, 43, 195.

³⁹ See *id.* at 31, 32.

a northern route of a Pacific Railroad also developed and with these plans came the need to acquire tribal lands.⁴⁰ The federal government commissioned Isaac Stevens, the first territorial governor of Washington, to negotiate treaties with western-Cascade tribes with the purpose of extinguishing Indian title to land in the Washington Territory.⁴¹

Stevens was a young and ambitious politician, determined to quickly facilitate white settlement.⁴² His meetings with the tribes were less "negotiation" and more of an imposition on the Indians of the treaty provisions that Stevens had pre-drafted and brought with him to the meetings.⁴³ Backed by a superior military force, Stevens arbitrarily organized various "bands," or fragments of tribes, subordinated them under other "tribes," and appointed "chiefs" for each tribe who were more receptive to the whites' demands.⁴⁴ Stevens' interpreter spoke only Chinook jargon, a trade language of limited vocabulary and simple grammar, not a true Indian language. During negotiations, the interpreter read the treaties in the jargon, which was then re-interpreted into the various Indian languages by those Indians who understood the jargon.⁴⁵ Steven's use of the Chinook jargon and double translation inadequately expressed the precise legal language embodied in the treaties and resulted in the Indians receiving third hand information, thereby increasing the potential for confusion.⁴⁶ Within seven months, Stevens had completed nine treaties with roughly ten thousand Indians.⁴⁷ In the end, the Northwest tribes agreed to cede over ninety percent of their land—an estimated 64 million acres.⁴⁸

Although the Indians agreed to part with their land, they zealously sought to preserve their all-important fishing practices. The tribes made clear during negotiations that protection of their fishing rights was a condition to signing the treaties.⁴⁹ Stevens, himself, also recognized the importance of the Indian fishery: each of the Stevens Treaties contained provisions promising the Indians the exclusive right to fish upon their

⁴⁰ See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 250 (1994).

⁴¹ See LANE, *supra* note 2, at 9.

⁴² See 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, 426 (1996).

⁴³ See PRUCHA, *supra* note 40, at 250.

⁴⁴ See LANE, *supra* note 2, at 10, 11.

⁴⁵ See *id.*

⁴⁶ See *id.* at 11.

⁴⁷ See Blumm, *supra* note 42, at 426.

⁴⁸ See *id.*

⁴⁹ See *id.* at 429.

reserved lands, as well as off the reservations at all "usual and accustomed grounds and stations. . . ."⁵⁰ In reserving fishing rights and stations without restrictions as to purpose, time, or method of taking, the tribes intentionally retained property rights and access to traditional fishing places regardless of land ownership.⁵¹ As competition over the diminishing resource increased, numerous disputes and lawsuits arose over interpretation of the treaties' imprecise language.

C. *One Hundred Years of Litigation—Recognition of a Right to Habitat Protection*

The tribes have been embroiled in almost one hundred years of litigation against the states and private parties in an effort to enforce their treaty rights. In the years immediately following the signing of the treaties, controversy over the fishery did not arise because the resource was abundant and white settlers engaged in little fishing.⁵² By the late 1880s, however, technological developments, like the canning process, led many non-Indians to fish.⁵³ Competition between resource users grew and the tribes began to be deprived of access to the fish they had bargained to keep in the treaties.⁵⁴ Accordingly, the tribes turned to the courts to enforce their treaty rights. Between 1905 and 1942, only three cases reached the Supreme Court.⁵⁵ Since 1968, however, federal and state courts have heard numerous cases. The cases involved disputes concerning access to usual and accustomed stations,⁵⁶ state regulation of

⁵⁰ See *id.* at 430; Stevens Treaties, *supra* note 3. Some of these treaties use the term "places" instead of "grounds and stations." See AMERICAN INDIAN LAW DESKBOOK 252, (Joseph P. Mazurek ed., 2d. ed., University Press of Colorado 1998).

⁵¹ See LANE, *supra* note 2, at 10.

⁵² Native Americans harvested salmon long before the "discovery" of the Pacific Northwest. See Byrne, 16 ENVTL. L. 343, 346 (1986). Fishing was not a lucrative business for white settlers because of low market demand for salmon due to inadequate preservation techniques and slow transportation facilities. See *United States v. Washington* (Phase I), 384 F. Supp. 312, 352 (W.D. Wash. 1974).

⁵³ See Charles F. Wilkinson & Daniel Connor, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. KAN. L. REV. 17, 27 n.45 (1983) (citing L. CRESSMAN, PREHISTORY OF THE FAR WEST 1-2 (1977); COURTLAND L. SMITH, SALMON FISHERS OF THE COLUMBIA 501 (1979)).

⁵⁴ See Blumm, *supra* note 42, at 434.

⁵⁵ See, e.g., *Tulee v. Washington*, 315 U.S. 681 (1942); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *United States v. Winans*, 198 U.S. 371 (1905).

⁵⁶ See *Winans*, 198 U.S. at 371.

off-reservation treaty fishing rights,⁵⁷ allocation of fish between Indian and non-Indian fishermen, and habitat protection for the fishery. In the next section, I will discuss, although by no means exhaustively, the development of case law concerning the treaty right of habitat protection.

1. The *Winans* Doctrine

The first fishing rights case to reach the Supreme Court was *United States v. Winans*.⁵⁸ In *Winans*, a private company operated a fish wheel⁵⁹ at a Yakima fishing site near Celilo Falls⁶⁰ on the Columbia River, upon the authority of a Washington State license and federal homestead patents to adjacent shorelands.⁶¹ The company argued that the treaties conferred tribal fishing rights to the same extent that a white man would have rights on privately owned shoreland, and that as private property owners, they had the power to exclude Indians from the river.⁶²

After recognizing that the canons of Indian treaty construction required that treaties be interpreted as the tribes understood them,⁶³ the Court rejected the company's argument, and recognized that the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.⁶⁴ The Court concluded that the Indians'

⁵⁷ See *Tulee*, 315 U.S. at 681; see also *Puyallup Tribe v. Department of Game* (Puyallup I), 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe* (Puyallup II), 414 U.S. 392 (1968).

⁵⁸ See *Winans*, 198 U.S. at 371.

⁵⁹ A fish wheel is a large wheel like the stern wheel of a steamboat, with paddle blades. The wheel is fixed in the river when the salmon are running and is turned by the current of the river. The salmon are scooped up by the net-like paddles and dropped into a chute in the middle of the wheel, which leads to a receiving fishbox. Brutally efficient, one wheel in the Columbia was known to take eighty-four tons a day. See <http://www.sensato.com/1921/07salmon.htm> (last visited Feb. 27, 2001).

⁶⁰ Celilo Falls was one of the greatest Indian fisheries on the Columbia river. It was drowned behind the Dalles Dam in the 1950s and the United States Army Corps of Engineers paid almost \$27 million to compensate the tribes for their lost fishing sites. See *Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl. 1961), cert. denied, 369 U.S. 818 (1962). The dam flooded the falls in 1956, and the Indian commercial catch on the Columbia fell from over 2 million pounds, in 1955, to 58,000 pounds just two years later. See *Wilkinson & Connor, supra* note 53, at 41 n.133 (citing, *inter alia*, Fish Comm'n of Oregon & Washington Dep't of Fisheries, *Status Report, Columbia River Fish Runs and Commercial Fisheries*, 1938-70, at 62 (1971)).

⁶¹ See *Winans*, 198 U.S. at 378-79.

⁶² The treaty language in dispute was the words "the right of taking fish at all usual and accustomed places in common with the citizens of the Territory." See *id.* at 378.

⁶³ See *id.* at 380.

⁶⁴ See *id.*

fishing right was a property right, an easement across, or "servitude" on private lands, indefeasible by subsequent acts of either the state or federal government.⁶⁵ *Winans'* chief legacy, and a cornerstone of American Indian law, was the Court's recognition of the servitude as a property right restricting "every piece of land as though described therein," giving the tribes the right to occupy and make use of their "usual and accustomed places"⁶⁶ despite "the contingency of future ownership" or changed conditions.⁶⁷

The *Winans* case, though a major victory for the tribes, had unfortunate long-term effects on the tribes' ability to enforce their treaty fishing rights: the *Winans'* Court noted, in dicta, that states could regulate Indian fisheries.⁶⁸ However, the nature and scope of the states' regulatory powers remained unclear and, as a result, state regulations replaced private denial of access to fishery resources as the chief impediment to tribal fishing. This became the basis of nearly seventy-five years of war between the states and tribes. These wars were waged in the court room and on the states' many rivers.⁶⁹

2. *Seufert Bros. Co.* and the Expansion of Tribal Property Rights

Thirteen years after *Winans*, in *Seufert Bros. Co. v. United States*, the Supreme Court expanded its application of the treaty servitude to unceded lands, that is, lands outside of the tribes' reservations.⁷⁰ In *Seufert Bros.*, a salmon packing company had excluded Yakima Indians from Celilo Falls and claimed that *Winans* was inapplicable because the tribal fishing rights servitude, as an exception to a general land grant, could not extend to lands beyond those ceded by the Yakimas to the federal government.⁷¹ The Supreme Court rejected the company's argument and relied on the canons of Indian treaty construction to find that

⁶⁵ See *Winans*, 198 U.S. at 381.

⁶⁶ See Stevens Treaties, *supra* note 3.

⁶⁷ See *Winans*, 198 U.S. at 381.

⁶⁸ Justice McKenna, writing for the Court, stated in dicta, "[n]or does [treaty right] restrain the State unreasonably, if at all, in the regulation of the right." *Id.* at 384.

⁶⁹ See Blumm, *supra* note 42, at 444; see also Peter C. Monson, Casenote: *United States v. Washington (Phase II): The Indian Fishing Conflict Moves Upstream*, 12 ENVTL. L. 469, 477 (1982). See generally Alex Tizon, *25 Years after the Boldt Decision—the Fish Tale that Changed History*, SEATTLE TIMES, Feb. 7, 1999, at A1 (interview with Billy Frank Jr., tribal activist, discussing confrontations between tribal members and state government) (hereinafter *Fish Tale*).

⁷⁰ See *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919).

⁷¹ See *id.* at 194.

the Yakimas understood that the treaty would protect their fishing rights on the disputed, though unceded land.⁷² *Seufert Bros. Co.* was significant because it essentially enlarged the scope of the servitude—or, in other words, extended tribal access rights to all customary fishing stations, regardless of whether the tribes had ever ceded that land to the government in their treaties.⁷³

3. *Sohappy*: The “Fair Share” Doctrine

The most controversial treaty fishing cases arose in the context of state regulation that dealt with resource allocation and conservation. Oregon and Washington interpreted the treaty fishing right to give the tribe only the same rights as other citizens.⁷⁴ In the late 1960s, the Yakima Indian Nation, joined by the federal government, challenged Oregon conservation regulations which limited Columbia River harvests above the Dalles Dam to hook-and-line fisheries, closing the river to traditional Indian net fishing.⁷⁵ The regulations essentially placed the entire conservation burden on the tribes, while allowing non-Indian fishing to continue unhindered.⁷⁶ In *Sohappy v. Smith*, Judge Robert Belloni found that Oregon conservation measures were, among other things, designed to allocate salmon resources among competing harvesters.⁷⁷ Consequently, Belloni held that tribal fishers were entitled to a “fair share” of the harvests and ordered Oregon to consider salmon conservation for the native fishery on a coequal basis with conservation for other users.⁷⁸

Judge Belloni’s decision “revolutionized salmon management on the Columbia River,”⁷⁹ however disputes eventually arose as to what

⁷² See *id.* at 198-199.

⁷³ See Blumm, *supra* note 42, at 447.

⁷⁴ See *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969); see also *Department of Game v. Puyallup Tribe, Inc.*, 422 P.2d 754, 757 (Wash. 1967). In *Puyallup Tribe*, the State of Washington argued that the treaties gave the tribes no special rights. See *Puyallup Tribe*, 422 P.2d at 757. The case was ultimately reversed by the United States Supreme Court in *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 392 (1968).

⁷⁵ See *Sohappy*, 302 F. Supp. at 899.

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See Blumm, *supra* note 42, at 454 (reporting that Judge Belloni later established detailed procedural and substantive standards that the state had to follow in achieving ‘coequal’ status with the native fishery. These standards included ‘meaningful’ tribal participation in the development of harvest regulations, and the ‘least restrictive

constituted a "fair share" of the harvest. Numerous tribal members in Washington were arrested for violating state harvest regulations.⁸⁰ Consequently, in order to enforce the principles of *Sohappy*, the federal government filed suit on behalf of seven Washington State tribes.⁸¹ The case, *United States v. Washington*, was litigated in two parts: Phase I determined the nature and scope of the treaty rights as they affected non-Indian fisherman.⁸² Phase II decided the allocation of hatchery fish and whether a habitat protection right existed.⁸³

4. Fish Wars: *United States v. Washington*—Phase I

Writing the opinion in Phase I, Judge George Boldt invalidated Washington's regulatory scheme as systematically discriminatory against tribal fishing.⁸⁴ He found that state regulation closed many historic tribal fishing sites to net fishing while commercial net fishers were permitting to harvest salmon elsewhere on the same fish run.⁸⁵ Judge Boldt further found that an allocation between native and non-native salmon harvesters was required because the state-wide salmon harvest was insufficient to meet all demands.⁸⁶ Interpreting the treaty language ". . . in common with . . .," Judge Boldt ordered the state to restrict the non-native harvest to fifty percent of the total fish harvest,⁸⁷ essentially guaranteeing the tribes up to half of the harvest.

regulations which can be imposed [on the tribes] consistent with assuring the necessary escapement of fish for conservation purposes.'

Citing *Sohappy v. Smith*, No. 68-409, slip op. at 2-3 (D. Or. Oct. 10, 1969) (unpublished judgment)).

⁸⁰ See generally COHEN, *supra* note 9, at 3-17.

⁸¹ See *United States v. Washington* (Phase I), 384 F. Supp. 312 (W.D. Wash. 1974). The seven tribes were the Hoh, Makah, Muckleshoot, Nisqually, Puyallup, Quileute, and Skokomish.

⁸² The tribes contended they were entitled to one-half the salmon harvests destined for their traditional fishing grounds. See *Phase I*, 384 F. Supp. at 312.

⁸³ See *United States v. Washington* (Phase II), 506 F. Supp. 187 (W.D. Wash. 1980).

⁸⁴ See *Phase I*, 384 F. Supp. at 403-404.

⁸⁵ See *id.* at 393.

⁸⁶ See *id.* at 386.

⁸⁷ Harvestable fish are those not needed for spawning, but does not include fish caught for subsistence or ceremonial purposes. See *id.* at 342. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, the Supreme Court adjusted downward to include subsistence and ceremonial catches, and fish caught on the tribes' reservations. See *Passenger Fishing Vessel*, 443 U.S. 658 (1979).

The Ninth Circuit affirmed the Boldt decision and the Supreme Court denied review.⁸⁸ In the meantime, the state of Washington and its citizens protested and resisted the decision.⁸⁹ In two subsequent suits challenging the decision, the Washington State Supreme Court held Judge Boldt's allocation unconstitutional, finding that the decision discriminated in favor of Indian and against non-Indian fishermen.⁹⁰ This decision created a conflict between state and federal decisions and forced the Supreme Court to consider the Boldt decision.

In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,⁹¹ Justice Stevens, writing for the Supreme Court, affirmed Judge Boldt's equal sharing formula.⁹² In addition, the Court adopted a needs-based "moderate-living" standard defining the scope of the treaty fishing right,⁹³ stating that "Indian treaty rights to a natural resource . . . secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."⁹⁴ Under Justice Stevens' "moderate living" standard, the tribes' share of salmon could be reduced below fifty percent if a tribe dwindled to only a few members or found other sources of support to replace its fisheries.⁹⁵ In the twenty years after the Court's decision, neither of these two conditions has arisen.⁹⁶

⁸⁸ See *Phase I*, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

⁸⁹ See generally *Fish Tale*, supra note 69, at A1.

⁹⁰ See, e.g., *Purse Seine Vessel Owners Ass'n v. Tollefson*, 571 P.2d 1373 (Wash. 1977), vacated by, 443 U.S. 658 (1979); *Puget Sound Gillnetters Ass'n v. Moos*, 565 P.2d 1151 (Wash. 1977), vacated by, 443 U.S. 658 (1979).

⁹¹ See *Passenger Fishing Vessel*, 443 U.S. at 658 (upholding J. Boldt's decision).

⁹² See *id.* at 682.

⁹³ See *id.* at 686.

⁹⁴ *Id.*

⁹⁵ See *id.* at 687.

⁹⁶ Besides establishing the "moderate living" standard, the Court also reduced the tribes' share, albeit modestly, by including on-reservation harvests as well as ceremonial and subsistence harvests in the tribes' share. See *id.* at 687-88. The Court also designated the non-native harvest as only including fish caught by Washington fishermen in either state or federal waters. See *id.* This designation contributed to an international stalemate with Canada over salmon harvest allocation, because it exempted harvests in Alaskan waters from the equal sharing formula. See *id.* The stalemate was broken for a while after the United States and Canada agreed to the Pacific Salmon Treaty in 1985. See Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, Jan. 28, 1985, Treaty Doc. No. 99-2; see generally Thomas C. Jensen, *The United States-Canada Pacific Salmon Interception Treaty: An Historical and Legal Overview*, 16 ENVTL. L. 363 (1986).

5. The Saga Continues: *United States v. Washington*—Phase II

In Phase II, Judge William Orrick, replacing retired Judge Boldt, addressed whether artificially propagated hatchery fish were included in the Phase I allocation, and whether the Indians' right to a share of fish included the right to have treaty fish habitat protected from environmental degradation.⁹⁷ Judge Orrick concluded that hatchery fish should be included in the tribe's allocation, because, in part, under the *Winans* doctrine,⁹⁸ Indian treaty rights survive changed conditions—even the changed make-up of runs to include wild and artificial fish.⁹⁹ The more monumental aspect of Judge Orrick's decision, however, dealt with the tribes' treaty right to habitat protection.

Judge Orrick's decision on the habitat protection issue could not have been made more clear: "At the outset, the Court holds that implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation."¹⁰⁰ The Court's rationale behind recognition of the habitat protection right was based on the notion that a "fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken,"¹⁰¹ and the observation that, were the trend of habitat destruction to continue, "the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty."¹⁰² The significance of Judge Orrick's decision was not only that he re-affirmed the general rule that neither party could act in a manner that destroys the fishery,¹⁰³ but that the general rule applied to the particular situation of impairment by environmental degradation, not merely by physical device,¹⁰⁴ burdened access,¹⁰⁵ or discriminatory regulations.¹⁰⁶

⁹⁷ See *Phase II*, 506 F. Supp. at 200.

⁹⁸ See *United States v. Winans*, 198 U.S. 371 (1905).

⁹⁹ See *Phase II*, 506 F. Supp. at 200. Judge Orrick reached his conclusion that the fish allocation included hatchery bred fish based on the *Winans* proposition that Indian treaty rights survive changed conditions, and *Phase I* allocation of a fair share of fish to the tribes. See *id.* Judge Orrick also rejected the state assertion of ownership over the hatchery fish because the state could not own fish or wildlife freely swimming with natural fish in state waters and because hatchery fish production was funded in part by federal and local governments. See *id.* at 202.

¹⁰⁰ *Id.* at 203.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *id.* at 204 (citing *United States v. Washington (Phase I)*, 384 F. Supp. 312 (W.D. Wash. 1974)).

¹⁰⁴ See *United States v. Winans*, 198 U.S. 371 (1905) (concerning a Columbia River fish wheel).

After deciding that the tribes' treaty rights included the right to fish habitat protection, Judge Orrick had to determine the scope of the duties owed by the state, the federal government, and third parties to protect that right.¹⁰⁷ The tribes argued for a "no significant deterioration" standard that could have, theoretically, prohibited any development that affected fishery habitat.¹⁰⁸ The court rejected that standard, noting that the tribes' supporting cases, interpreting goals set by Congress in various environmental statutes, did not support such a "no significant deterioration" standard, and because the "impliedly-reserved right may not be broader than the minimal need which gives rise to the implied right."¹⁰⁹ In other words, the scope of the habitat protection right could be no broader than necessary to ensure the tribes' "moderate living" needs,¹¹⁰ the standard established in *Passenger Fishing Vessel*.¹¹¹

Specifically, the treaties reserve to the tribes a sufficient quantity of fish to satisfy their "moderate living" needs, subject to a ceiling of fifty percent of the harvestable run.¹¹² While the maximum possible allocation is set at fifty percent, the minimum may be modified in response to changing circumstances, for instance, if the number of tribal members dwindles or the tribe gives up fishing.¹¹³ The correlative duty imposed upon the federal and state governments, as well as private parties, then, is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their "moderate living" needs.¹¹⁴ Essentially, Judge Orrick created a presumption that if the tribes' allocation is set at less than fifty percent, its "moderate living" needs are not being fully satisfied under the treaties.¹¹⁵ Essentially, if tribes prove that a defendant's actions will harm

¹⁰⁵ See *Tulee v. Washington*, 315 U.S. 681 (1942) (concerning state fishing license fees).

¹⁰⁶ See *Washington Game Department v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973) (concerning ban on all Indian net fishing in favor of all non-Indian hook-and-line fishing).

¹⁰⁷ See *Phase II*, 506 F. Supp. at 206.

¹⁰⁸ See *id.* at 207.

¹⁰⁹ *Id.* at 208. The Court was also influenced by fear that a "no significant deterioration" standard would have a profound effect on development and industries that harm fish—e.g. timber, hydropower. See *id.* at 207.

¹¹⁰ See *id.*

¹¹¹ See *Passenger Fishing Vessel*, 443 U.S. 658 (1979).

¹¹² See *Phase II*, 506 F. Supp. at 200 (citing *Phase I*, 384 F. Supp. 312 (W.D. Wash. 1974)).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *Blumm & Swift, supra* note 42.

their fishery, and if the tribes' allocation is set at fifty percent, the defendant will be impairing the tribes' "moderate living" needs.

Importantly, Judge Orrick also established burdens of proof. The initial burden is on the tribes, as plaintiffs, to show that the challenged actions "will proximately cause the fish habitat to be degraded such that the rearing or production potential of the fish will be impaired or the size or quality of the run will be diminished."¹¹⁶ The burden then shifts to the state or third party to show that the tribes' needs may be satisfied by a lesser allocation, and that any environmental degradation of the fish habitat will not impair the tribes' "moderate living" needs.

On appeal, a three judge panel of Ninth Circuit judges affirmed Judge Orrick's habitat protection right, but held that, instead of a "moderate living" standard, the state and tribes were each required to take "reasonable steps commensurate with the resources and abilities of each to preserve and enhance the fishery."¹¹⁷ Less than two years later, the Ninth Circuit, sitting en banc, vacated its own "reasonable steps" standard and Judge Orrick's habitat decision on abuse of discretion grounds.¹¹⁸ In reviewing the propriety of declaratory relief in the fishing dispute, the court held that the legal standards governing the state's precise treaty obligations and duties, with respect to actions that may affect treaty habitat, "will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case."¹¹⁹ In several subsequent cases that presented such "concrete facts," the courts, although not explicitly recognizing a right to habitat protection, invariably provided

¹¹⁶ *Phase II*, 506 F. Supp. at 208.

¹¹⁷ *United States v. Washington (Phase II)*, 694 F.2d 1374, 1386 (9th Cir. 1983).

¹¹⁸ The Ninth Circuit, sitting en banc, vacated Judge Orrick's habitat decision, but affirmed the hatchery fish decision based on equitable factors. See *United States v. Washington (Phase II)*, 759 F.2d 1353, 1357 (1985) ("We choose to rest our decision in this case on the proposition that issuance of the declaratory judgment on the environmental issue is contrary to the exercise of sound judicial discretion.").

¹¹⁹ *Id.* at 1357. The court went on to state:

Legal rules of general applicability are announced when their consequences are known and understood in the case before the court, not when the subject parties and the court giving judgment are left to guess at their meaning. It serves neither the needs of the parties, nor the jurisprudence of the court, nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension. Precise resolution, not general admonition, is the function of declaratory relief. These necessary predicates for a declaratory judgment have not been met with respect to the environmental issue in this case.

Id. at 1357.

the tribes with injunctive relief: requiring altered dam operations,¹²⁰ enjoining dam construction,¹²¹ delaying marina and oil port construction,¹²² preventing construction of a pen "fish farm,"¹²³ and awarding water rights to protect treaty fisheries.¹²⁴

After years of litigation, state fishery agencies and tribes began cooperative fisheries management efforts. Tribes began to concentrate on legislative and regulatory processes that promised to restore salmon runs, rather than on litigation.¹²⁵ By the mid-1990s, however, the promise of cooperative efforts proved to be illusory and restoration efforts failed to bring the salmon back.¹²⁶ The Ninth Circuit indefinitely postponed disposition of the habitat protection issue, and even though subsequent courts appear to imply a right to habitat protection, uncertainty still lingers over whether the treaties provide a cause of action for tribes when environmental degradation threatens or damages their fisheries.

III. WHY A DEFINITIVE RULING ON THE HABITAT ISSUE IS NECESSARY

A. *Current Protection Efforts Fail to Protect Tribal Interests*

The value of tribal treaty harvest rights diminishes as government restoration attempts show no signs of recovering endangered and threatened salmon species. In the 1990s, the Northwest states implemented a promising restoration program under the terms of the Northwest Power Act.¹²⁷ However, on the eve of the ESA listing of

¹²⁰ See *Confederated Tribes of the Umatilla Indian Reservation v. Callaway*, No. 74-991, slip. op. at 5 (D. Or. Feb. 13, 1976) (requiring changed dam operations).

¹²¹ See *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (enjoining dam construction).

¹²² See *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988) (granting tribes' request for preliminary injunction of marina construction); *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981) (ordering trial on issue of fish habitat degradation stemming from construction of oil port).

¹²³ See *Northwest Sea Farms v. United States Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996) (upholding denial of permit for pen "fish farm").

¹²⁴ See *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 752 F.2d 1456 (9th Cir. 1985) (awarding tribes water rights to protect treaty fishery).

¹²⁵ See *Blumm & Swift*, *supra* note 42, at 461.

¹²⁶ See *id.* at 502 n.5.

¹²⁷ 16 U.S.C. § 839 (1994). See *Northwest Power Planning Council, Amendments to the Columbia River Basin Fish and Wildlife Program (Phase Two)* 1-2 (1991) (explaining that prior to 1991 the Northwest had a history of considering salmon issues through various forums, including the Salmon Summit convened in 1990 by the region's

several species of Snake River salmon, despite the expenditure of tremendous amounts of money,¹²⁸ the chairman of the council implementing the act recognized that the council's 1991 amendments were "not enough."¹²⁹ Interestingly, despite the ESA listing of the Snake River sockeye as endangered and the Snake River spring/summer chinook and fall chinook as threatened¹³⁰ the National Marine Fisheries Service (NMFS) "authorized dam-related salmon mortality of up to eighty-six percent of juvenile sockeye and spring/summer chinook and up to ninety-nine percent of juvenile fall chinook,"¹³¹ essentially eliminating the opportunity for any significant tribal harvest above the dams. A program of barging and trucking continues to be the centerpiece of federal agencies' interim salmon restoration efforts, but the salmon-saving potential of this technique is dubious.¹³²

Today, despite these protection efforts, less than one million salmon now return to the Columbia River Basin—a fraction of what returns once were.¹³³ The total commercial catch of Columbia River

governors and Senator Mark Hatfield, that eventually led to the Northwest Power Planning Council's regional salmon plan).

¹²⁸ An estimated \$3 billion has been spent by regional rate payers and federal taxpayers on Columbia River salmon recovery over the past twenty years. See Jim Yuskavitch, *Breaching, Drawdowns, and the Art of Salmon Recovery*, TROUT, Summer 1998, at 12, 18; see also Michael C. Blumm et al., *Beyond the Parity of Promise: Struggling to Save Columbia Basin Salmon in the Mid-1990s*, 27 ENVTL. L. 21, 103-04 (1997).

¹²⁹ See Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667, 694 (1992).

¹³⁰ See 56 Fed. Reg. at 58,619 (Nov. 20, 1991) (codified at 50 C.F.R. pt. 222 (1994)) (listing Snake River sockeye as endangered); 57 Fed. Reg. at 14,653 619 (Apr. 22, 1992) (codified at 50 C.F.R. 17.11 (1994)) (listing Snake River spring/summer chinook and fall chinook as threatened).

¹³¹ See Michael C. Blumm et al., *Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows*, 28 ENVTL. L. 997, 1002 (1998) (citing National Marine Fisheries Serv., U.S. Dep't of Commerce, *Endangered Species Act—Section 7 Consultation, Biological Opinion, Reinitiation of Consultation on 1994-1998 Operation of the Federal Columbia River Power System and Juvenile Transportation Program in 1995 and Future Years* (1995)).

¹³² See *id.* at 1017. (citing THE INDEPENDENT SCIENTIFIC GROUP, RETURN TO THE RIVER: RESTORATION OF SALMONID FISHES IN THE COLUMBIA RIVER ECOSYSTEM 90, 328 (1996); PHILLIP R. MUNDY ET AL., TRANSPORTATION OF JUVENILE SALMONIDS FROM HYDROELECTRIC PROJECTS IN THE COLUMBIA RIVER BASIN: AN INDEPENDENT PEER REVIEW, FINAL REPORT (1994) (questioning the transportation program's efficacy and indicating that it may be doing more harm than good).

¹³³ See Roels, *supra* note 30, at 381 (citing Laura Berg, *Tribes Release Salmon Restoration Plan*, WANA CHINOOK TYMOO, Issues 2 and 3 1995, at 14.).

Chinook in 1883 was nearly forty-three million pounds. Just over fifty years later, in 1935 it had been reduced to eighteen million pounds,¹³⁴ and in 1979 it was only 3.2 million pounds.¹³⁵ Salmon runs have dwindled from their historic numbers, estimated at between twelve million and sixteen million fish, to now less than 900,000 fish returning to spawn in the entire Columbia River Basin.¹³⁶ Of returning fish, the great majority are hatchery, rather than wild fish.¹³⁷ A recent study reported that Snake River sockeye will be extinct by 2017.¹³⁸ Definitive judicial recognition of a tribal right to habitat protection would require government and private parties to undertake the “major overhaul”¹³⁹ necessary to guarantee the salmon’s survival and to avoid the enormous financial liability that would result if salmon were simply allowed to disappear. Recognition of a habitat protection right would also sharpen government and private efforts to save salmon by giving direction and instruction on how to include tribal interests in regulatory and business decisions.

B. Provide State, Private Parties, and Tribes with Direction

Definitive judicial recognition of the habitat protection right would provide states, private parties, and tribes with a sense of their respective responsibilities in the fight to save salmon. Historically, government agencies took a “we can manage risk to salmon as we go” stance to river resource development decisions.¹⁴⁰ Today, the task of government agencies has switched from river exploitation to salmon preservation. However, the same agencies now delay decision making in an effort to

¹³⁴ See Monson, *supra* note 69, at 474 (citing S. Doc. No. 87, 75th Cong., 1st Sess. 20 (1937)).

¹³⁵ See *id.* (citing OR. DEP’T OF FISH & WILDLIFE, WASH. DEP’T OF FISHERIES, STATUS REPORT: COLUMBIA RIVER FISH RUNS AND FISHERIES, 1957-1979 54 (May 1981)).

¹³⁶ See Roels, *supra* note 30, at 381 (citing Pacific Northwest Regional Commission, *Columbia Basin Salmon and Steelhead Analysis* 12 (1976)).

¹³⁷ See *id.* at n.47. See also Monson, *supra* note 69, at 474.

¹³⁸ See Trout Unlimited, *Press Release: TU Study Shows Snake River Spring Chinook Will Be Extinct in 18 Years* (Jan. 4, 2000), http://www.tu.org/article_list.html.

¹³⁹ One judge wrote: “[T]he process [relating to hydroelectric power and fish survival] is seriously . . . flawed because it is too heavily geared towards a status quo that has allowed all forms of river activity to proceed in a deficit situation—that is, relatively small steps, minor improvements and adjustments—when the situation literally cries out for a major overhaul.” *Northwest Resource Info. Ctr. v. Northwest Power Planning Council*, 35 F. 3d 1371, 1391 (9th Cir. 1994).

¹⁴⁰ See *Tribal Circumstances*, *supra* note 22, at 75.

"avoid uncertainty" associated with restoration actions.¹⁴¹ Recognition of the habitat protection right would instill a sense of urgency within government restoration efforts. Also, private parties would be educated about the need to account for their treaty-habitat protection obligations when making development decisions. Finally, tribes would have increased clout in opposing projects that would harm the fish habitat, and ultimately, have recourse if the treaty fishery was degraded or destroyed.

C. Avoid Costly Litigation

If the habitat protection issue is left undecided for many more years, and salmon runs are further degraded or become extinct, states and private parties in the Pacific Northwest could be subject to severe financial claims from the treaty tribes. One Northwest tribe, the Nez Perce of Idaho, has settled suits against privately held power companies to recover monetary damages for degraded treaty-fish habitat.¹⁴² After several years of litigation, the tribe eventually settled both cases, for \$16.5 million against an Idaho power company, and for \$40 million against a power company in Washington.¹⁴³ An increasing number of Northwest tribes have become frustrated by the ineffectiveness of government action to save salmon,¹⁴⁴ and appear to be preparing evidence for litigation.¹⁴⁵ In a 226-page document that "reads more like a legal brief in a lawsuit . . . than a salmon recovery plan,"¹⁴⁶ the Nez Perce, Yakima, Umatilla, Warm Springs and Shoshone-Bannock tribes outline losses of salmon in the Snake River system.¹⁴⁷ Each tribe lists specific damages inflicted on its members because of the loss of salmon since the treaties were signed, almost 150 years ago.¹⁴⁸ Presumably, this figure could reach into the billions of dollars.¹⁴⁹ Recognition of the habitat protection right would

¹⁴¹ See *id.*

¹⁴² See *Nez Perce v. Idaho Power Co.*, CV-91-0517-S-HLR (D. Idaho Mar. 21, 1997); *Nez Perce v. Washington Water Power*, 847 F. Supp 791 (D. Idaho 1994).

¹⁴³ Telephone interview with Doug Nash, former counsel, Nez Perce Tribe, (Oct. 15, 1999).

¹⁴⁴ See discussion *infra*, section IV. D.

¹⁴⁵ See *Tribal Circumstances*, *supra* note 22, at 75.

¹⁴⁶ See Pauley, *supra* note 32.

¹⁴⁷ See *Tribal Circumstances*, *supra* note 22, at 172.

¹⁴⁸ See generally *id.*

¹⁴⁹ The tribes estimate that they have lost billions of dollars in revenues from commercial fisheries. See Roels, *supra* note 30, at 378 (citing Laura Berg, *Tribes Release Salmon Restoration Plan*, WANA CHINOOK TYMOO, Issues 2 and 3 1995 at 14). In *Nez Perce v. Idaho Power Co.*, the tribe sought \$150 million in damages. *Nez Perce v. Washington*

encourage government and private parties to take measures to prevent such costly litigation.

IV. THE SCOPE OF A HABITAT PROTECTION RIGHT: WHAT DOES "PROTECT" REALLY MEAN?

If the courts were to definitively recognize a treaty right to habitat protection, what responsibilities would fall on the shoulders of the federal and state governments, as well as private parties, to honor this right? Over the last quarter century, the courts have articulated three standards that help define the scope of a habitat protection right: the "moderate living" standard, the "no significant deterioration" standard, and the "reasonable steps" standard.

A. The "Moderate Living" Standard

The "moderate living" standard finds its underpinnings in *Phase I*,¹⁵⁰ and was further articulated in *Passenger Fishing Vessel*.¹⁵¹ Essentially the "moderate living" standard is an allocation device because it divides the harvestable fish into equal native and non-native shares¹⁵² that may be reduced if tribal needs could be satisfied by a lesser amount of fish.¹⁵³ Importantly, the "moderate living" standard establishes an implied habitat protection right,¹⁵⁴ however, the standard fails to explain the scope

Water Power, 847 F. Supp. 791 (D. Idaho 1994). Commentators viewed the figure as overinflated. See Michael Mirande, *Sustainable Natural Resource Development, Legal Dispute, and Indigenous Peoples: Problem-Solving across Cultures*, 11 TUL. ENVTL. L.J. 33, 44 (1997). However, the figure was, arguably, an under-representation of the true value of the lost fish when inflation is considered. Some commentators have suggested that if the state governments simply let the salmon runs die out, the states could be subject to severe financial claims from the tribes: "If there are no more fish runs, then the state of Idaho will be directly responsible to make monetary compensation to those tribes[;] . . . my sense is . . . that amount will be horrendous." Associated Press Pol. Serv., *Congressional Challenger Richard Stallings . . .*, available in 1998 WL 7451636.

¹⁵⁰ See *United States v. Washington (Phase I)*, 384 F. Supp. 312 (W.D. Wash. 1974)

¹⁵¹ See *Passenger Fishing Vessel*, 443 U.S. 658 (1979).

¹⁵² See *Phase I*, 384 F. Supp. at 312.

¹⁵³ See *Passenger Fishing Vessel*, 443 U.S. at 658.

¹⁵⁴ In *Phase II*, Judge Orrick found an implied treaty right to habitat protection, reasoning that the treaty right to harvest fish was meaningless if there were no fish to be caught. See *United States v. Washington (Phase II)*, 506 F. Supp. 187 (W.D. Wash. 1980). Judge Orrick's decision, however, was later vacated for want of "concrete facts" and thus the federal and state governments', and private parties' duty to refrain from degrading the

of that right,¹⁵⁵ that is, what is required of government and private parties to honor the habitat right.

The "moderate living" standard is promising because it would require government and private parties to refrain from activities which interfere with the tribes' ability to harvest sufficient fish to satisfy their "moderate living" needs. Unfortunately, this definition suffers from several shortcomings. Initially, state government attacked the meaning of "moderate living" and argued that a tribal right of habitat protection based on "moderate living" was unworkable because the tribal allocation would have to be readjusted annually to account for varying individual incomes and market fluctuations.¹⁵⁶ The argument failed because, as the Supreme Court in *Passenger Fishing Vessel* held,¹⁵⁷ the "moderate living" standard is only adjusted when tribal conditions change substantially, and the state has the burden of proof in showing changed circumstances.¹⁵⁸

A second, more fatal weakness of the "moderate living" standard is not that it fails to define what constitutes a "moderate living," but rather that it fails to provide a definitive measure of the governments' and private parties' obligation to refrain from degrading fish habitat. What exactly must the government and individuals do to prevent habitat destruction? Illustratively, the *Phase II* court allocated burdens of proof for future litigation, but it did not clarify the respective responsibilities of the treaty parties to avoid that litigation,¹⁵⁹ nor did it establish tribal remedies if their "moderate living" needs are deprived.

B. *The "No Significant Deterioration" Standard*

The tribes originally argued for the "no significant deterioration" standard employed by courts in other areas of environmental regulation,¹⁶⁰ which would preclude the state from degrading the environmental quality of the fish habitat. The "no significant deterioration" standard was

fish habitat remains unclear. See *United States v. Washington (Phase II)*, 759 F.2d 1353, 1357 (1985).

¹⁵⁵ See *Phase II*, 506 F. Supp. at 187.

¹⁵⁶ See Brief for Appellant at 58-60, *United States v. Washington (Phase II)*, 694 F.2d 1374 (9th Cir. 1982).

¹⁵⁷ *Passenger Fishing Vessel*, 443 U.S. at 658.

¹⁵⁸ See *Phase II*, 506 F. Supp. at 208.

¹⁵⁹ See Judith W. Constans, *The Environmental Right to Habitat Protection: A Sohappy Solution—United States v. Washington*, 759 F.2d 1353 (9th Cir.), *Cert. Denied*, 106 S.Ct. 407 (1985), 61 WASH. L. REV. 731, 755 (1986).

¹⁶⁰ See *id.* at 753; *Phase II*, 506 F. Supp. at 208.

articulated by courts and adopted by Congress for the purpose of carrying out the goals of certain environmental statutes.¹⁶¹ The *Phase II* district court found that the scope of the state's environmental duty was defined by the treaty fishing right rather than by unrelated Congressional environmental standards.¹⁶² The court concluded that the scope of the fishing right was measured by the tribes' "moderate living" needs.¹⁶³

On its face, the "no significant deterioration" standard appears unrealistic, especially in light of the realities of modern development.¹⁶⁴ Query, however, whether the "no significant deterioration" standard should be so readily dismissed. Application of the standard would mean, simply, that any activity that significantly affects the habitat of fish, which pass through usual and accustomed fishing grounds, or through reservations, infringes on the tribes' treaty rights as interpreted in *Phase II*. If an activity results in habitat degradation, causing fewer fish to be caught by the tribes, private individuals, as well as state or federal agencies, may be liable for the lost fish. This liability adds a new cost to habitat-degrading development.¹⁶⁵ Critics might claim that a "no significant deterioration" would be difficult to implement,¹⁶⁶ but essentially such a regime has already been installed. With the listing of several Pacific salmon species as "threatened" or "endangered,"¹⁶⁷ the

¹⁶¹ See *Phase II*, 506 F. Supp. at 208 (citing *Sierra Club v. Ruckleshaus*, 344 F. Supp. 253 (D.D.C. 1972)). See, e.g., U.S.C. §§ 7470-7491 (1982) (Clean Air Act, U.S.C. § 7401); *United States Steel Corp. v. Train*, F.2d 822 (7th Cir. 1977); 33 U.S.C. § 1313(c)(2) (1982) (Federal Water Pollution Control Act, 33 U.S.C. § 1251); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); 49 U.S.C. § 1653(f) (1982) (Department of Transportation Act, 33 U.S.C. § 1651); 43 U.S.C. § 1782(c) (1982) (Federal Land Policy and Management Act, 43 U.S.C. § 1701).

¹⁶² See *United States v. Washington (Phase II)*, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

¹⁶³ See *id.* at 203.

¹⁶⁴ See Constans, *supra* note 159, at 753.

¹⁶⁵ See Monson, *supra* note 69, at 469, 498.

¹⁶⁶ Foreseeably, a "no significant deterioration" standard would create proof problems, clog the courts, prevent projects and development, thus creating great public resentment and opposition, perhaps even lawlessness.

¹⁶⁷ See 64 Fed. Reg. at 14,308 (Mar. 24, 1999) (to be codified at 50 C.F.R. pts. 223.102(a)(16), 223.102(a)(17), 223.102(a)(18), and 224.101(a) (listing three Chinook Evolutionary Significant Units (ESUs) in Washington and Oregon as threatened and one Chinook Salmon ESU in Washington as endangered); 60 Fed. Reg. at 19,342 (Apr. 17, 1995) (codified at 50 C.F.R. pt. 227.4(f)-(g) (1998)) (listing Snake River spring/summer Chinook and Snake River fall Chinook as threatened); 57 Fed. Reg. at 14,653 (Apr. 22, 1992) (codified at 50 C.F.R. pt. 227 (1996)) (listing Snake River spring/summer Chinook and fall Chinook as threatened); 64 Fed. Reg. 14,508 (Mar. 25, 1999) (to be codified at 50 C.F.R. pts. 223.102(a)(12) and 223.102(a)(13)) (listing two ESUs of Chum salmon in

federal and state governments have an obligation to prevent the salmon's extinction. Considering that any further deterioration may in fact result in extinction and require great compensation to tribes for their loss, federal and state governments are required to prohibit any "significant deterioration."

C. The "Reasonable Steps" Standard

Before Judge Orrick's habitat protection ruling was vacated by the Ninth Circuit's en banc decision, the three-judge Ninth Circuit panel created an alternative "reasonable steps" standard.¹⁶⁸ Under the "reasonable steps" standard, both the states and tribes must take "reasonable steps commensurate with the resources and abilities of each to preserve and enhance the fishery."¹⁶⁹ The panel rejected the "moderate living" standard, relying on an equal protection analogy and reasoning that persons similarly situated should be treated alike under the law: because the Indians, as citizens, share in the benefits of state economic development, fairness required that they occasionally bear "a portion of the costs of non-discriminatory development."¹⁷⁰

The "reasonable steps" standard is flawed for several reasons. The treaty fishing right is a contract right, not a question of equal protection.¹⁷¹ The tribes did not grant the government their homelands in exchange for equal treatment, instead they granted the land after reserving their historic fishing rights.¹⁷² As such, the tribes "did not bargain for the benefits and burdens of economic development."¹⁷³ Furthermore, the "reasonable steps" standard is overly ambiguous in that it fails to articulate standards to direct either party's behavior—for instance, what would the tribes'

Washington and Oregon as threatened); 63 Fed. Reg. 42,587 (Aug. 10, 1998) (codified at 50 C.F.R. pt. 227.4(o) (1998)) (listing Oregon Coast ESU of Coho salmon as threatened); 64 Fed. Reg. 14,528 (Mar. 25, 1999) (to be codified at 50 C.F.R. pt. 223.102(a)(19)) (listing Ozette Lake Sockeye in Washington as threatened); 56 Fed. Reg. at 58,619 (Nov. 20, 1991) (codified at 50 C.F.R. pt. 222.23(a) (1998)) (listing Snake River sockeye as endangered); 63 Fed. Reg. 13,347 (Mar. 19, 1998) (codified at 50 C.F.R. pts. 227.4(m)-(n) (1998)) (listing two ESUs of Steelhead in Washington, Oregon, and California as threatened). The NMFS' final 4(d) rule prohibiting "take" went into effect on January 8, 2001. 65 Fed. Reg. 42,422 (July 10, 2000) (to be codified at 50 C.F.R. pt. 223.202).

¹⁶⁸ See *United States v. Washington (Phase II)*, 759 F.2d 1353, 1357 (9th Cir. 1985).

¹⁶⁹ *United States v. Washington (Phase II)*, 694 F.2d 1374, 1389 (9th Cir. 1983).

¹⁷⁰ *Id.* at 1387.

¹⁷¹ See Constans, *supra* note 160, at 756.

¹⁷² See *id.*

¹⁷³ *Id.*

remedy be if state protection efforts were unreasonable? Finally, advocates of the "reasonable steps" standard point to its promise in fostering cooperative stewardship,¹⁷⁴ but such promises are uninspiring as past efforts at cooperative state and tribal fishery management have produced lackluster results.¹⁷⁵

D. *Alternative Proposal*

Any proposed habitat protection standard should be based on the Supreme Court's "moderate living" standard. Courts construing the treaties have time and again reaffirmed this definition of the tribes' treaty harvest rights.¹⁷⁶ The "moderate living" standard is more helpful, however, when viewed solely as an allocation measure, rather than as a proclamation of conservation-effort obligations to be imposed upon states, private parties, and the tribes. Comparatively, the "no significant deterioration" and "reasonable steps" standards are more helpful in defining the underlying habitat protection obligations of the "moderate living" allocation.¹⁷⁷ The key question then becomes, which of the two standards should be imposed upon government and private parties?

The listing of several Pacific salmonids as "endangered" or "threatened," has seemingly answered this question, essentially designating "no significant deterioration" as the definition of the treaty-

¹⁷⁴ *Id.*

¹⁷⁵ Cooperative fishery management efforts between the state and tribes have proved unsuccessful. See Blumm, *supra* note 42, at 460-61, 461 n.260.

¹⁷⁶ *Passenger Fishing Vessel*, 443 U.S. at 658.

¹⁷⁷ See Blumm, *supra* note 42, at 492-496. Blumm discusses three sources that help define the scope of the habitat protection right. First is Judge Belloni's decision in *Sohappy*, holding that the tribes are entitled to a "fair share" of the harvest. See *id.* at 493. (citing *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969)). Second is Judge Reinhardt's concurrence in the *United States v. Washington (Phase II)* panel decision, which lays out a series of procedural and substantive protections to ensure "due consideration" of treaty rights in the regulatory process and "full participation" of the tribes in making decisions that affect the treaty right. See *id.* at 493-494. (citing *United States v. Washington (Phase II)*, 694 F.2d 1389 (9th Cir. 1983)). Finally, Blumm cites a 1997 order issued by the Secretaries of the Interior and Commerce on tribal rights, federal trust responsibilities, and the Endangered Species Act. See *id.* at 494-496 (citing *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*, U.S. Dept's Interior and Commerce, Sec. Order No. 3206 and Appendix (June 5, 1997)). The order reiterates many of the judicially created standards to protect the treaty fishing right, including the requirement that any restrictions on treaty fishing be "reasonable and necessary." See *id.*

habitat protection obligation under the "moderate living" standard.¹⁷⁸ A "no significant deterioration" definition of the habitat protection obligation may very well be the only effective way to inject tribal interests into current salmon preservation efforts and ensure that the tribes' "moderate living" needs are met.¹⁷⁹ However, if the treaty-habitat protection right is to be viewed in the context of *profit à prendre* law, the "reasonable steps" standard makes a better fit.¹⁸⁰ It seems, given the status of several stocks

¹⁷⁸ When a species is listed as endangered, it becomes unlawful to "take any such species." 16 U.S.C. § 1538(a)(1)(B). Arguably, "no significant deterioration" is co-equal with the definition of a "taking" that includes any activity that harms or harasses a species, not limited to killing or capturing. See 16 U.S.C. § 1532(19) (defining "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."). Thus, under both "no significant deterioration" and a "taking" under the ESA, the very habitat of an endangered species is to remain undisturbed.

By contrast, when a species is listed as threatened, as many of the Pacific salmonids have been, "takings" are not completely prohibited. See 16 U.S.C. § 1533(d). Instead, the Secretary promulgates regulations concerning what form and amount of taking will be allowed. See 16 U.S.C. § 1533(d). The Eighth Circuit has held that regulations issued by the Secretary must provide for the conservation of threatened species. Furthermore, the statutory definition of conservation authorizes takings only "in the extraordinary case where population pressures within an ecosystem cannot be otherwise relieved." *Sierra Club v. Clark*, 577 F. Supp. 783, 787 (D. Minn. 1984), *aff'd in part, rev'd in part*, 755 F.2d 608, 613 (8th Cir. 1985). The ESA listing, on its face, appears favorable to the tribes because it essentially creates a "no significant deterioration" regime; on the other hand, however, serious questions arise as to whether the listing diminishes or even abrogates tribal treaty fishing rights. The effect of ESA listings on tribal treaty fishing rights is a vast topic, well beyond the scope of this note, but it is important to recognize that judicial determination of the scope of a treaty-habitat protection obligation will have to account for the fact that the tribal fishery habitat under scrutiny may have already been designated "critical habitat" under the ESA. See 16 U.S.C. § 1532(5)(A) (defining "critical habitat"). See also Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543 (1991) (discussing potential effects of ESA listing of salmon on tribal treaty fisheries).

¹⁷⁹ Comparatively, the effects that the ESA listings will have on identified salmon-habitat-destroying activities in the Pacific Northwest are now just matters of speculation. See Lynda V. Mapes, *Puget Sound Salmon on the Brink*, SEATTLE TIMES, Mar. 14, 1999, at A13. Arguably, as government officials and interested private party-stakeholders gather to generate salmon-saving solutions, tribal interests will continue to be overlooked in favor of more influential stakeholders, such as the hydroelectric power and forestry industries, so long as the obligation to honor tribal rights to fish-habitat protection is defined any less than "no significant deterioration." See Miller, *supra* note 178, for implications of ESA listing in context of tribal treaty fishing rights.

¹⁸⁰ Under *profit à prendre* law, the owner of the servient estate may not unreasonably interfere with the beneficiary's enjoyment of the profit. See RESTATEMENT (THIRD) OF

of Pacific salmonids as “threatened” or “endangered,” that “reasonable steps” means, in fact, no less than “no significant deterioration.”¹⁸¹ Any less-stringent definition of the treaty protection obligation may doom the salmon to extinction. Viewed in this way, the habitat-protection right may be explained by *profit à prendre* law and extend the fullest protection to the tribes’ treaty habitat.

Unfortunately, the courts have eschewed the “no significant deterioration” standard out of fear of imposing a “wilderness servitude” on development.¹⁸² Imposition of a such a standard does not mean that salmon habitat must be restored to nineteenth century conditions or that development must halt in the name of “King” Salmon,¹⁸³ but creation of a “no significant deterioration” regime will taste like bad medicine: The standard is just what the doctor ordered, in a sense, because any further degradation may mean the salmon’s extinction, but imposing the standard will “taste bad” to the Northwest economy.¹⁸⁴ The “no significant deterioration” standard simply means that the Northwest’s most creative and cooperative problem solvers, representing stakeholders from government, business and industry, sport fishers, and tribes must come together to develop a plan of action that fosters reasonable growth in a

PROPERTY: SERVITUDES §4.9 (1998). In this way, profit law’s prohibition of “unreasonable interference” is co-equal with the Ninth Circuit panel’s “reasonable steps” definition of the habitat protection obligation under the “moderate living” allocation standard. See Blumm, *supra* note 42, at 491-92.

¹⁸¹ Arguably, servient tenants’ obligation to refrain from “unreasonable interference” of profit holders’ ability to exercise their rights, in the context of nearly extinct salmon, means that the government and private parties cannot engage in activity that “significantly deteriorates” treaty-habitat. Any significant deterioration, actively imposed or allowed to occur, would be “unreasonable.” See Blumm, *supra* note 42, at 491-92.

¹⁸² See, e.g., *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 813 (D. Idaho 1994).

¹⁸³ The courts have repeatedly stated that the tribes are not entitled to fisheries restored to treaty-time conditions, but rather conditions which ensure the tribes’ “moderate living” needs are met. See *Passenger Fishing Vessel*, 443 U.S. 658 (1979); *United States v. Washington (Phase II)*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc); *United States v. Washington (Phase II)*, 694 F.2d 1374 (9th Cir. 1983); *United States v. Washington (Phase II)*, 506 F. Supp. 187 (W.D. Wash. 1980).

¹⁸⁴ Comparitively, the ESA listing of several Pacific salmonids as “endangered” or “threatened” could have a substantial impact on many of the major economic bases of the Northwest including logging, agriculture, power generation, and fishing to an extent that dwarfs the impacts that the listing of the spotted owl had on the economy of the Northwest. See Larry J. Bradfish, *Recent Development in Listing Decisions under the Endangered Species Act and Their Impact on Salmonoids in the Northwest*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 77 (1995).

way that incorporates habitat restoration and ensures tribal "moderate living" needs.¹⁸⁵

About now, the skeptics are asking what, in fact, should be the scope of a treaty-habitat protection right, and how would such a standard be implemented and enforced. To highlight, the tribes' treaty-habitat protection right should, and must be based on the "moderate living" allocation standard,¹⁸⁶ and defined in scope by a "no significant deterioration" standard. Implementation of any standard begins when states, as they currently are required to, take treaty rights into consideration when making regulatory decisions.¹⁸⁷ If the state failed to adequately consider tribal interests in making regulatory decisions that negatively impacted tribal fisheries, or allowed private development that intentionally or negligently destroys treaty fish, the tribes should have the ability to sue for money damages in federal district court.¹⁸⁸

¹⁸⁵ Of note, any proposed definition of the treaty-habitat protection obligation will also have to confront the management complexities compounded by the migration of salmon between Canadian and United States waters. "Interception by Canadian fishers of salmon spawning in United States waters but migrating beyond United States jurisdiction into Canadian waters, and vice versa, has been a major problem for United States and Canadian officials during most of this century." John V. Byrne, *Salmon Is King—Or Is It?*, 16 ENVTL. L. 343, 350 (1986). For background on U.S.-Canada relations in the fishing arena, see generally Thomas C. Jensen, *The United States-Canada Pacific Salmon Interception Treaty: An Historical and Legal Overview*, 16 ENVTL. L. 363 (1986).

¹⁸⁶ See *Passenger Fishing Vessel*, 443 U.S. at 658.

¹⁸⁷ See *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969).

¹⁸⁸ Federal District courts have original jurisdiction in "all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362 (2001). See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (holding that 28 U.S.C. § 1362 creates federal jurisdiction when an Indian tribe brings a tort action alleging damage to an interest created by treaty or other federal law); *Pueblo Isleta ex rel. Lucero v. Universal Constructors Inc.*, 570 F.2d 300, 302 (10th Cir. 1978) (holding district court has jurisdiction over action to recover damages for injury to tribal property); *Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336 (10th Cir. 1974) (citing *Oneida* and applying it against private defendants); *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1997) (recognizing jurisdiction to hear action alleging damages to treaty fishing rights). *But see Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989) (denying jurisdiction in action for possession of carved wooden posts and rain screen unprotected by federal law).

Even if a federal district court has subject matter jurisdiction over a tribe's claim against a private party, the claim may exceed the statute of limitations for such claims. In 1982, the Indian Claims Limitation Act extended the statute of limitations for pre-1966 Indian damage claims against private parties for monetary damages, which was to expire on December 31, 1982. 28 U.S.C. § 2145. Under the Act, tribes were allowed to submit potential pre-1966 claims to the Bureau of Indian Affairs (BIA) until December 20, 1992.

V. THE REMEDY IF HABITAT PROTECTION RIGHTS ARE INFRINGED: MONEY DAMAGES

A. *Why Money Damages?*

1. Injunctive Relief Is an Inadequate Remedy

The tribes have successfully obtained injunctive relief to prevent salmon habitat destruction in a number of cases. These cases have enabled tribes to alter dam operations,¹⁸⁹ enjoin dam construction,¹⁹⁰ acquire water rights to protect treaty fisheries,¹⁹¹ delay marina and oil port construction,¹⁹² and prevent construction of a pen "fish farm."¹⁹³ Despite the tribes' successes, injunctive relief is an inadequate remedy when dam building, logging, farming, mining, industry, and residential development have forever destroyed treaty-fish, habitat, and traditional fishing grounds.¹⁹⁴ Money damages, unlike injunctive relief, would provide compensation for lost fishery resources and provide stronger incentive for states and private parties to minimize damage to treaty fish.

2. Provide Tribes with Funds to Restore Depleted Fisheries

The ability to bring claims for money damages is really just a means to an end: "[t]ribal people want the fish and ecosystem restored,

The BIA would then determine which claims the Department of Justice should pursue. Ostensibly, Northwest tribes could still bring claims for money damages against private parties who degrade treaty fish habitat, however they could not seek money damages for pre-1966 claims.

¹⁸⁹ See *Confederated Tribes of the Umatilla Indian Reservation v. Callaway*, Civ. No. 72-211, slip. op. at 5 (D. Or. Aug. 17, 1973) (requiring changed dam operations).

¹⁹⁰ See *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553, 556 (D. Or. 1977) (enjoining dam construction).

¹⁹¹ See *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, No. 80-35-5, slip. op. at 5 (9th Cir. Sept. 10, 1982) (awarding tribes water rights to protect treaty fishery).

¹⁹² See *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988) (granting tribes' request for preliminary injunction of marina construction). See also *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981) (ordering trial on issue of fish habitat degradation stemming from construction of oil port).

¹⁹³ *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1518 (W.D. Wash. 1996) (upholding denial of permit for pen "fish farm").

¹⁹⁴ See COHEN, *supra* note 9, at xi-xii. See also CHILDROSE & TRIM, *supra* note 10, at 49-76 for a detailed explanation of environmental threats to the anadromous fishery.

not simply dollars.”¹⁹⁵ Monetary compensation works like a double-edged sword: compensation would increase tribal wealth and has the potential for salmon habitat restoration, but if awarded in an unstructured fashion, the money has the potential to be squandered and do nothing to secure the future of the salmon, or the tribes’ ability to continue harvesting fish. The tribes should not be expected to endure years of litigation to recover money to “buy a can of salmon off the shelf at Albertsons.”¹⁹⁶ Treaty tribes should be entitled to monetary compensation when their fishing rights have been deprived by habitat destruction, but payments should be structured in a way to ensure that funds go toward restoring depleted fisheries.

Unstructured, cash-in-hand payment of compensation to tribes on a per-capita basis creates great risks. Large cash payments would be a windfall to tribal members who are often terribly poor. The risk of squandering is great, especially for those tribal members very inexperienced in the handling of cash.¹⁹⁷ Cash-in-hand payments to tribal members might provide a temporary boost to the tribal economy, but in the long run, little or no money goes toward salmon habitat restoration or to programs to rebuild tribal culture.¹⁹⁸ Alternatively, monetary compensation, structured within long-term, trust-based payment schemes, or specifically designated for salmon habitat restoration or tribal culture building projects would be much more constructive. Illustratively, the Nez Perce tribe’s settlement with Idaho Power Company dedicated a certain percentage of money to fisheries restoration efforts designed to address the impacts the Hell’s Canyon dams have had upon the fisheries.¹⁹⁹ Money damages would not only promise to assist tribal efforts to restore salmon habitat, but might also encourage efforts to prevent salmon habitat destruction from occurring at all.

¹⁹⁵ See Roels, *supra* note 30, at 405 (quoting Ted Strong, Executive Director of the Columbia River Inter-Tribal Fish Commission).

¹⁹⁶ Representative Helen Chenoweth (R-Idaho) is quoted as saying “How can I [take salmon’s endangered status seriously] when you can buy a can of salmon off the shelf at Albertsons?” See Robert L. Peters, DEFENDERS, Winter 1995/96, at 24 (satirizing Representative Chenoweth’s comments in an editorial cartoon).

¹⁹⁷ See Mirande, *supra* note 149, 57.

¹⁹⁸ See *id.* at 57 (equating cash settlements with traditional money-for-tribal heritage exchanges).

¹⁹⁹ See *id.* at 51-52.

3. Encourage Preventative Measures

In the 1990s, as salmon stocks became threatened and endangered, salmon recovery projects became a focus for feasibility analysis.²⁰⁰ Conservation managers asserted the need to be highly certain of salmon results before taking action; in other words, decision-making officials were much more risk averse with respect to uncertainty when the issue was saving salmon, than when the issue was developing rivers for other uses.²⁰¹ If Pacific salmon become extinct, however, state governments could be liable to the tribes for a tremendous amount of money.²⁰² Faced with the risk of incurring such horrendous monetary liability, state politicians and private parties would have incentive to take preventative rather than delayed prescriptive action.²⁰³ Other salmon-saving solutions, such as dam removal, habitat restoration, and stricter zoning ordinances could be much cheaper in comparison.²⁰⁴

B. *Are Tribes Entitled to Money Damages for Treaty-Fish Habitat Destruction?*

Although the nature and scope of treaty rights are not to be limited by Anglo-American common law regarding property,²⁰⁵ courts have found common law property concepts instructive and have employed them to protect tribal fishing rights.²⁰⁶ The key to recognizing the tribes' right to bring claims for money damages for treaty-fish habitat destruction is to

²⁰⁰ See *Tribal Circumstances*, *supra* note 22, at 75.

²⁰¹ See *id.*

²⁰² When the U.S. Supreme Court upheld *Phase I* in *Passenger Fishing Vessel*, making tribal pursuit of the *Phase II* habitat protection right sure to follow, Washington State Governor Dixie Lee Ray expressed the fear that "were all the claims now identified by various Indian tribes to be granted, it would totally break the bank so far as the economy of the state and nation is concerned." See Cohen, *supra* note 9, at 139 (citing Paul Andrews, *Environmental Impacts: Larger Dispute on Fish-Run Impacts ahead as Phase II of Boldt Ruling*, SEATTLE TIMES, July 4, 1979, at A14).

²⁰³ See *Congressional Challenger Richard Stallings*, *supra* note 149.

²⁰⁴ See Blumm, *supra* note 131, at 1053 (advocating dam removal on Snake River and warning that tribal damages claims could be quite large).

²⁰⁵ See *Passenger Fishing Vessel*, 443 U.S. at 684; *Grand Traverse Band of Chippewa Indians v. Director, Michigan Dep't of Nat'l Resources*, 971 F. Supp. 282, 289 (W.D. Mich. 1995). See also Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?*, 17 PUB. LAND & RESOURCES L. REV. 153, 156 (1996).

²⁰⁶ See *United States v. Taylor*, 13 P. 333 (Wash. Terr. 1887); *United States v. Winans*, 198 U.S. 371 (1905).

understand that the treaties reserve enforceable property rights.²⁰⁷ The tribes hold property rights to their “usual and accustomed places,” for which they are entitled compensation if these rights “in land” are destroyed;²⁰⁸ however, the more complicated issue involves their treaty-reserved property rights to fish—not the opportunity to try and catch fish, but the right to take a share of the harvestable fish that would be available absent human interference.²⁰⁹ In this sense, the tribes’ right to harvest fish imposes a “servitude” on land,²¹⁰ otherwise known as a “*profit à prendre*,” or profit, that requires compensation whenever the right to harvest fish is interfered with by habitat destruction.

1. The Treaty Right as a Servitude—the *Profit à Prendre*

It is a basic legal tenet that “wild animals such as fish are the property of no one until reduced to possession”,²¹¹ and that “the res is the property right consisting of the opportunity to take the fish.”²¹² Accordingly, tribal treaty fishing rights are a property right to harvest fish, a right that many courts have construed as a “servitude” or “right in land.”²¹³ The tribes’ treaty right to harvest fish is fairly characterized as a form of a servitude known as a “*profit à prendre*” (“profit”) in that the treaty right, similar to an easement,²¹⁴ confers the right to enter and use the

²⁰⁷ See *Passenger Fishing Vessel*, 443 U.S. at 673 n.20.

²⁰⁸ See Blumm, *supra* note 42, at 409, 488.

²⁰⁹ See *Passenger Fishing Vessel*, 443 U.S. at 678.

²¹⁰ See *Winans*, 198 U.S. at 381-382.

²¹¹ See Roels, *supra* note 30, at 385 n.69.

²¹² See *id.*

²¹³ The Restatement (Third) of Property states that servitudes now refers to all “*profit à prendre*” simply as “profit.” See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.2 (1998). The right to hunt and fish upon another’s land has commonly been recognized as a “profit.” See *Figliuzzi v. Carcajou Shooting Club*, 516 N.W.2d 410 (Wis. 1994); *Reeves v. Alabama* 514 So. 2d 917 (Ala. 1987) (holding right to hunt on land of another is a *profit à prendre*); *Nelson v. State*, 883 S.W.2d 839 (Ark. 1994) (holding right to hunt and fish is a *profit à prendre*); *Hagan v. Delaware Anglers’*, 655 A.2d 292 (Del. Ch. 1994) (holding reservation of fishing rights created a profit in gross); *Merriam v. First Nat’l Bank*, 587 So. 2d 584 (Fla. Dist. Ct. App. 1991) (characterizing the right to hunt or fish as a *profit à prendre*); *State v. Davids*, 534 N.W.2d 70 (Wis. 1995) (holding tribal right to hunt and fish is considered a *profit à prendre* and an interest in real property); *Van Camp v. Menominee Enterprises*, 228 N.W.2d 664 (Wis. 1975) (holding a right to hunt and fish is a *profit à prendre*, an interest in real property).

²¹⁴ The RESTATEMENT THIRD OF PROPERTY: SERVITUDES § 1.2 defines an easement as a “nonpossessory right to enter and use land in the possession of another [that] obligates the possessor not to interfere with the uses authorized by the easement.”

land in possession of another for the purpose of removing, among other things, fish from the water.²¹⁵

Tribal treaties meet all the formal requirements for creation of an appurtenant servitude—a *profit à prendre*.²¹⁶ Tribal treaties comply with the formalities required for creation of a servitude because the parties expressed their intent to reserve tribal fisheries in written and signed instruments.²¹⁷ Furthermore, the treaty fishing right to take resources from another's land inherently touches and concerns the retained land, or servient tenement, and benefits the tribes' reservations, or dominant tenement, by achieving the reservations' purpose—to enable the tribes to “maintain an economically and culturally viable lifestyle.”²¹⁸ The tribes' appurtenant servitude operates to allow tribal use and restrain the servient estate holder, federal and state governments, as well as private parties, from using the servient estate as would a holder of property in fee simple, even if the servient estate is not adjacent to the dominant estate.²¹⁹

The courts have consistently recognized the right to hunt and fish upon another's land as a *profit à prendre*.²²⁰ In one seminal case, *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*,²²¹ the Wisconsin Supreme Court examined whether the Club's hunting rights on land owned by the Figliuzzis constituted an easement. The court noted that

²¹⁵ See *Figliuzzi v. Carcajou Shooting Club*, 516 N.W.2d 410 (Wis. 1994) (“We can find no distinction between easements and profits relevant to recording the property interest . . . numerous courts have blurred the distinction between the two.”).

²¹⁶ See Gerry D. Meyers, *United States v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 OR. L. REV. 771, 783-84, 787 (1988) (equating profits à prendre with easements).

²¹⁷ See *id.* at 787.

²¹⁸ See *id.*

²¹⁹ See *id.* at 786.

²²⁰ See *Kennedy v. Becker*, 241 U.S. 556, 562 (1916) (“We assume that [the Seneca] retained an easement [to hunt and fish,] or a *profit à prendre*, to the extent defined [in the treaty of the Big Tree of 1797]”); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983) (describing treaty fishing rights as “similar to a *profit à prendre*”); *United States v. Finch*, 548 F.2d 822, 833 (9th Cir. 1976) (Judge (now Justice) Kennedy recognizing that the treaty fishing right could be characterized as a *profit à prendre*); *Van Camp v. Menonimee Enterprises, Inc.*, 228 N.W.2d 664, 669-70 (Wis. 1975) (Supreme Court of Wisconsin recognizing a right to hunt and fish derived from a treaty as a *profit à prendre* and citing 1 THOMPSON, REAL PROPERTY (1964 Replacement) 513, sec. 135. and 3 TIFFANY, REAL PROPERTY (3d ed.), pp. 427, 428, sec. 839.); *Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan Dep't of Natural Resources*, 971 F. Supp. 282, 288 (W.D. Mich. 1995) (discussing that treaty rights to fish are profits à prendre, constitutionally protected property rights).

²²¹ See *Figliuzzi v. Carcajou Shooting Club*, 516 N.W.2d 410 (Wis. 1994).

hunting rights on another's land are regarded as a *profit à prendre*, which courts do not generally distinguish from easements.²²² The Figliuzzi's proposed development of their land would have destroyed the Club's easement, so the Court prohibited the development.²²³ Treaty fishing rights do not significantly differ from the non-treaty hunting rights at stake in *Figliuzzi*. Like non-treaty hunters, treaty fishers have the right to remove a product from property, namely a river, that does not belong to them. Therefore, treaty fishing rights, under the doctrine of *profit à prendre*, could be considered the same as an easement.

2. The Remedy for Damages to Profits: Monetary Relief

Historically, one stick in the proverbial bundle of property rights is the right not to have the property itself degraded or destroyed.²²⁴ Under servitude law, when the owner of the servient estate unreasonably interferes with the beneficiary's enjoyment of the profit,²²⁵ the beneficiary is entitled to compensation.²²⁶ When federal and state governments and private parties degrade fish habitat, they are "unreasonably interfer[ing]"

²²² See *id.* at 417.

²²³ See *id.* at 417-418.

²²⁴ See generally Roels, *supra* note 30, at 393-95.

²²⁵ See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.9 (1998); 8 THOMPSON ON REAL PROPERTY § 65 (David A. Thompson ed., 1994).

²²⁶ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 8.2 (1998). Traditional remedies appropriate for enforcement of profits include injunctions and damages. See § 8.3 cmt. b. Injunctions are normally available to redress violations of easements and restrictive covenants without proof of irreparable injury or a showing that a judgment for damages would be inadequate. See *id.* Damages, on the other hand, are available to remedy excessive use or unauthorized use of an easement—generally a trespass—for which damages or injunctive relief are normally granted; damages are also available for obstruction of the easement; damages and injunctions requiring removal of the obstruction, restoration of the easement, and prohibiting future obstruction are normally appropriate. See *id.* A judgment for money damages ordinarily provides an adequate remedy for a claim for maintenance, repair, or replacement expenses. See *id.* Damages commonly accompany injunctions in easement cases. This is significant in that tribes could win both money damages and require state and private parties to restore the salmon runs.

In determining the appropriate remedy, courts should take account of the purpose of the servitude arrangement and its continued utility as well as the relative equities of the parties. A servitude may have utility beyond its benefit to the immediate parties, suggesting that it should be enforced with a coercive remedy. If an injunction will create significant externalities, monetary relief alone may be more appropriate.

Id.

with the tribes' ability to harvest a sufficient number of fish to satisfy their "moderate living" needs.²²⁷ Foreseeably, application of the no "unreasonable interference" to the "moderate living" standard would limit or prohibit development activities which threaten or destroy a treaty-reserved fish run.²²⁸ Essentially, the tribes' treaty-reserved right to harvest fish is a property right that cannot be destroyed by either the government or private parties without compensation.²²⁹ The exercise of the treaty fishing right requires fish for the catching and the destruction of the fish prevents the tribes from using and enjoying its property rights.

There is great judicial concern that recognition of a tribal right to bring claims for money damages if treaty-fish habitat is destroyed would establish a wilderness servitude and prevent development.²³⁰ Pacific Northwest fish do not benefit from 1855 conditions, and the tribes do not argue for habitat restoration to those conditions.²³¹ In reality, current conditions threaten several salmon runs with extinction.²³² The common law scope of protection afforded *profits à prendre* of "no unreasonable interference" would not prevent all development, only activities that substantially impaired the treaty tribes ability to harvest fish sufficient to satisfy their "moderate living" needs.²³³ Accordingly, when state and federal governments contribute to and cause fish declines,²³⁴ as guarantors of the tribes' treaty right to fish, they may be liable to compensate the

²²⁷ See Blumm, *supra* note 42, at 492.

²²⁸ Under profit law, these habitat-degrading developments would be deemed to "unreasonably interfere" with the tribes' ability to harvest fish sufficient to meet their "moderate living" needs. See *id.* at 492 n.431 (citing several fish allocation cases in which both native and non-native fisheries were regulated to ensure fish preservation for the proposition that development projects which damage fish habitat should be treated no differently). See, e.g., Puyallup Tribe v. Department of Game, 433 U.S. 165, 175-177 (1977) (Puyallup III) (discussing that tribal fishing subject to conservation regulations); United States v. Oregon, 657 F.2d 1009 (9th Cir. 1982) (upholding an injunction against a tribal fishery in the interest of conservation); Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683 (W.D. Wash. 1981); Confederated Tribes v. Kreps, Civ. No. 79-541 (D. Or. Sept. 10, 1979) (finding ocean harvest subject to conservation regulations).

²²⁹ See Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1512 (D. Or. 1988).

²³⁰ See United States v. Adair, 723 F.2d 1394, 1411 (9th Cir. 1983).

²³¹ See Blumm, *supra* note 42, at 490-1.

²³² See Bradfish, *supra* note 184, at 86-90.

²³³ See generally RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.9 (1998).

²³⁴ See Roels, *supra* note 30, at 378 (describing how federal and state governments have caused and/or contributed to fish declines).

tribes under the Fifth Amendment takings clause.²³⁵ Furthermore, because the treaties' obligations apply not only to the United States, but also to its grantees,²³⁶ private parties may also be liable for money damages if they degrade tribal treaty fisheries.

a. Government Liability

i. Fifth Amendment Takings Claim

As property rights, treaty-reserved harvest rights are protected by the Fifth Amendment to the United States Constitution.²³⁷ The exercise of the tribes' fishing right requires fish to harvest, and so the elimination of the fish through degradation of habitat denies the tribes the ability to use their property rights and enjoy ownership benefits.²³⁸ Accordingly, loss of the tribes' ability to exercise treaty fishing rights, through fish habitat degradation, could give rise to a claim for compensation under the Fifth Amendment.²³⁹

Treaty rights were first construed as property rights in *Menominee Tribe v. United States*.²⁴⁰ In *Menominee*, the tribe sued the federal government for damages for lost reservation-based treaty hunting and fishing rights.²⁴¹ In recognizing the tribe's hunting and fishing rights as a treaty-secured property right, the Court held that only Congress has the power to abrogate treaty rights, and that abrogation requires compensation.²⁴² Ultimately, the Court found that Congress, in passing

²³⁵ U.S. CONST. amend. V.; see generally Roels, *supra* note 30 (arguing treaty rights to engage in fishing, rather than in fish themselves, are a compensable Fifth Amendment property right).

²³⁶ See *United States v. Winans*, 198 U.S. 371, 381-82 (1905).

²³⁷ See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968); see also *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1510, 1512 (W.D. Wash. 1988) (citing *Menominee* for construing treaty rights as Fifth Amendment property rights). The Fifth Amendment provides, in part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

²³⁸ See Roels, *supra* note 30, at 383.

²³⁹ See *id.*

²⁴⁰ See *Menominee Tribe of Indians*, 391 U.S. 404 (1968).

²⁴¹ See *id.* at 412.

²⁴² See *id.* (holding that a treaty right cannot be abrogated—in whole or part—without express and specific congressional action).

the Menominee Termination Act of 1954,²⁴³ had not abrogated tribal treaty rights and that the tribe was entitled to compensation.²⁴⁴

In the Pacific Northwest, Congress has not expressly or specifically abrogated tribal treaty fishing rights,²⁴⁵ but governmental action has substantially interfered with the tribes' ability to exercise their treaty fishing rights at a level to satisfy their "moderate living" needs.²⁴⁶ One commentator suggests that a tribal takings claim could be made alleging either a direct taking, analogizing government interference with the tribes' beneficial ownership of the right to harvest fish with government takings of land, or alternatively, a regulatory taking, occurring when government action or inaction under statutes and regulations impact fish population and habitat, and thus tribal fishing.²⁴⁷ If a tribe were to successfully bring either form of takings claim, the United States would owe compensation, potentially an enormous amount of money, to treaty tribes.²⁴⁸

One difficulty with seeking compensation for damaged treaty fisheries under a Fifth Amendment takings claim is that compensation might actually abrogate treaty-fishing rights. In *United States v. Sioux Nation of Indians* the United States Supreme Court held that a taking had occurred and ordered the federal government to compensate the tribe.²⁴⁹ The compensation payment was deemed to extinguish the tribe's claim to the Black Hills.²⁵⁰ Today, one tribe refuses to accept the compensation payment, claiming that it wanted the land restored rather than a damage award; as a result, the tribe now has neither land nor money.²⁵¹ If the Northwest tribes were to bring a takings claim against the government, to

²⁴³ See Menominee Indian Termination Act of 1954, 25 U.S.C. §§ 891—902 (1994).

²⁴⁴ See *id.*

²⁴⁵ See Roels, *supra* note 30, at 380.

²⁴⁶ See Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1492-93 (citing a multitude of federal agencies responsible for the present salmon crisis in the Columbia River Basin); see also Roels, *supra* note 30, at 380-382, 390 (discussing environmental degradation caused by government dam licensing, construction, and operation and inability of the tribes to satisfy their needs through fishing).

²⁴⁷ See Roels, *supra* note 30, at 389-403.

²⁴⁸ See *id.* at 407.

²⁴⁹ See *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); see Roels, *supra* note 30, at 406.

²⁵⁰ See generally *Sioux Nation of Indians*, 448 U.S. 371.

²⁵¹ See *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981) (finding that the federal court lacked jurisdiction to hear a Fifth Amendment takings suit filed by the Oglala Sioux because the Tribe's sole remedy had been established as monetary damages through the Indian Claims Commission).

avoid a Black Hills result, they would have to ensure that any compensation payment was structured in a way that does not extinguish treaty rights.²⁵²

ii. Claims Under Federal Trust Responsibility

Another important consideration in analyzing government liability for degradation of tribal treaty-habitat is the Indian trust doctrine. The Indian trust doctrine imposes a strict fiduciary obligation on the federal government in its dealings with the tribes,²⁵³ requires the government to assist in the protection of tribal property and resources, and provides a basis for compensation or equitable relief when the government has breached its duty and wronged tribal people.²⁵⁴ Nearly all tribal reservation lands are held in trust by the United States, with a particular tribe as the beneficiary,²⁵⁵ but as seen with the Northwest tribes' treaty-reserved fishing rights, treaty resources may be subject to off-reservation harm and require federal intervention.²⁵⁶ Curiously, however, the federal government is responsible for many of the worst threats to tribal salmon through its own activities.²⁵⁷

Historically, the trust doctrine has been invoked by Congress and federal agencies as a source of plenary power to control activities on tribal lands in a "guardian-ward" sense,²⁵⁸ rather than as a doctrine of

²⁵² See Roels, *supra* note 30, at 406 (suggesting ways in which a tribal takings claim could be made and compensation structured without abrogating treaty rights).

²⁵³ A leading Indian trust case is *Seminole Nation v. United States*, where the United States Supreme Court stated: "Under a humane and self-imposed policy . . . [the federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). Trust responsibility may arise between a tribe and the federal government in a number of ways: treaties and agreements; the United States Constitution; judicial decisions; federal statutes; international law. See GILBERT L. HALL, *DUTY OF PROTECTION: THE FEDERAL-INDIAN TRUST RELATIONSHIP* 3 (1979). Many Northwest tribes enjoy their trust relationship with the federal government through the Stevens Treaties.

²⁵⁴ See Hall, *supra* note 253, at 3.

²⁵⁵ See Wood, *supra* note 246, at 1478, 1495 (citing Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3, 65).

²⁵⁶ See *id.* at 1489.

²⁵⁷ See *id.* at 1492-93 (citing a multitude of federal agencies responsible for the present salmon crisis in the Columbia River Basin).

²⁵⁸ The notion of the trust doctrine as a "guardian-ward" model derives from *United States v. Kagama*, 118 U.S. 375, 383-384 (1886)

governmental restraint to protect tribal natural resources.²⁵⁹ Columbia River Basin tribes have urged federal agencies to fulfill their trust responsibility by restoring salmon populations, controlling water pollution, and conserving water in streams.²⁶⁰ The courts' use of the trust doctrine to restrain Congress in the area of Indian affairs has been virtually nonexistent,²⁶¹ but various tribes have relied upon the trust responsibility to successfully secure equitable relief and enjoin federal agency action that threatens the use of Indian land and corollary treaty resources, such as treaty fishing rights.²⁶²

(These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . [f]rom their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.)

²⁵⁹ See Wood, *supra* note 246, at 1506-08.

²⁶⁰ See *id.* at 1506 (citing *Water Spreading Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Natural Resources*, 103d Cong., 2d Sess. 60, 62-63 (1994) (statement of Antone Minthorn, Confederated Tribes of the Umatilla Indian Reservation); *Hearings Before the House Subcomm. on Dep'ts of Commerce, Justice, and State, the Judiciary and Related Agencies of the House Comm. on Appropriations*, 103d Cong., 2d Sess., pt. 7, at 373 (1994) (statement of Ted Strong, Executive Director, Columbia River Inter-Tribal Fish Commission); Jay Minthorn, Columbia River Inter-Tribal Fish Commission, *Testimony Before the Environmental Protection Agency Regarding the Scientific Reassessment of 2, 3, 7,8-TCDD (Dioxin) 2-4* (April 28, 1992); Harry Smiskin, *Testimony Before the Environmental Protection Agency Regarding the Columbia River Dixon TMDL at the PUD Community Room 2-4* (July 17, 1990)).

²⁶¹ See Wood, *supra* note 246, at 1508.

²⁶² See *id.* at 1528-1532 (citing *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 3065 (D. Mont. May 28, 1985) (mem.), *remedy modified*, No. 82-116-BLG (D. Mont. Oct. 8, 1985) (mem.), *modified remedy rev'd*, 851 F.2d 1152 (9th Cir. 1988) (holding that the Department of Interior violated its fiduciary duty owed to the Cheyenne Tribe by failing to consider the tribe's interests in issuing coal leases on tracts of public land surrounding the reservation, enjoining further leasing of tracts near the reservation, and ordering rescission of all prior leases); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C.) (mem.), *modified on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), *rev'd in part on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) (finding that Secretary of Interior was obligated, pursuant to his fiduciary duty owed to the tribe, to assert his authority to preserve water for the tribe); *Nance v. Environmental Protection Agency*, 645 F.2d 701 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981) (finding that the EPA owed a fiduciary duty to the tribe, but that the duty was fulfilled); *United States v. Washington (Phase II)*, 506 F. Supp. 187 (W.D. Wash. 1980), *aff'd, vacated in part*, 759 F.2d 1353 (9th Cir. 1985) (per curiam) (en banc), *cert. denied*, 474 U.S. 994 (1985) (implying a treaty right to habitat protection and corresponding duty on the federal government and states to ensure environmental protection of treaty fish)). For a discussion of the federal government's trust responsibility concerning off-reservation treaty resources see Adele

In contrast, the trust doctrine has fared less favorably in the monetary-claim landscape, despite the fact that the Supreme Court has observed that a damages remedy is essential to deter federal officials from mismanaging tribal resources.²⁶³ When monetary claims are involved, lower courts are required to assess fiduciary obligations through an intense, fact-specific inquiry.²⁶⁴ This makes the trust doctrine a less effective vehicle, compared to common law causes of action, for tribal efforts to obtain compensation when government degrades treaty-fish habitat. Despite the hurdles the trust doctrine presents in claims for money damages,²⁶⁵ with the tribes' fishing resources on the verge of irrevocable deterioration, renewed attention to the trust doctrine may be necessary if other avenues fail to adequately protect treaty-fish habitat or compensate tribes for their losses.

b. Private Party Liability

Treaty obligations run not merely to the federal and state governments, but to private parties as well.²⁶⁶ Private parties have no more authority than governments to exclude the tribes from their fishing grounds, to deprive them of their fair share of the fish runs, or to destroy treaty fish,²⁶⁷ even if a tribe cedes its occupancy right to land on which the fishing right runs.²⁶⁸ Accordingly, private parties who degrade treaty-fish habitat will, like the government, be required to compensate the tribes for their losses.

Third-party liability is based on the notion that the right to harvest fish is a property right that cannot be divested, or abrogated, by changed

Fine, *Comment, Off-Reservation Enforcement of the Federal-Indian Trust Responsibility*, 7 PUB. LAND L. REV. 117 (1986).

²⁶³ In *United States v. Mitchell* (Mitchell II), the Supreme Court held: "Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties." *United States v. Mitchell* (Mitchell II), 463 U.S. 206, 226 (1983).

²⁶⁴ See Wood, *supra* note 246, at 1534 (1994) (citing *United States v. Mitchell* (Mitchell II), 463 U.S. 206, 226 (1983)).

²⁶⁵ See *id.*

²⁶⁶ See *United States v. Winans*, 198 U.S. 371 (1905).

²⁶⁷ See *United States v. Washington* (Phase II), 506 F. Supp. 187, 204, 208, (W.D. Wash. 1980) ("[n]either party to the treaties, nor their successors in interest, may act in a manner that destroys the fishery. . . . Therefore, the correlative duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their moderate living needs.").

²⁶⁸ See *Winans*, 198 U.S. at 371.

conditions and that treaty right burdens even non-parties to the agreement: "It is . . . inconceivable that either party [to the treaty] deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish."²⁶⁹ The destruction of the tribes' right to harvest fish and the exclusion of the tribes from their ancient fishing places was neither foreseen nor sanctioned by the treaties.²⁷⁰ If private party degradation of the treaty fisheries were allowed as a fact of modern development, the tribes would have only the same rights they "would have without the treaty—an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more."²⁷¹

The case which had the most potential to establish a right to bring claims for money damages to treaty-fish habitat is *Nez Perce Tribe v. Idaho Power Company*.²⁷² In *Idaho Power*, the tribe filed suit against the power company alleging that the construction and operation of its three dam Hell's Canyon Complex violated treaty rights by reducing the number of salmon returning to tribal fishing grounds and by inundating those grounds with water.²⁷³ The Tribe argued that it was entitled to damages under section 10(c) of the Federal Power Act, which made each licensee governed by the Act "liable for all damages" to the "property" of others caused by the construction, maintenance, or operation of its projects.²⁷⁴ Alternatively, the tribe argued that it was entitled to damages under a treaty right to habitat protection.²⁷⁵

Federal Magistrate Boyle rejected Idaho Power's contention that there was no federal court jurisdiction, and concluded that section 10(c) created no new federal cause of action, but only preexisting causes of action, under which the tribe's claims did not fall.²⁷⁶ Magistrate Boyle then considered, and rejected tribal money damages claims based on state tort law or federal treaty rights.²⁷⁷ The basis for both conclusions was the same: the court was persuaded that the tribe did not own the uncaught fish in a salmon run, and thus had no property rights entitling it to

²⁶⁹ *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979).

²⁷⁰ *See id.*

²⁷¹ *See Winans*, 198 U.S. at 380.

²⁷² *See Nez Perce Tribe v. Idaho Power Company*, 847 F. Supp. 791 (D. Idaho 1994).

²⁷³ *See id.*

²⁷⁴ *See* 16 U.S.C. § 803(c) (1994).

²⁷⁵ *See Idaho Power*, 847 F. Supp. at 791.

²⁷⁶ *See id.* at 803.

²⁷⁷ *See id.*

compensation.²⁷⁸ The court's opinion is an aberration:²⁷⁹ it failed to recognize Supreme Court precedent establishing tribal treaty fishing rights as property rights²⁸⁰ and extending treaty obligations to third-parties.²⁸¹ Eventually, the Nez Perce settled the Idaho case for \$16.5 million, and a second case against a Washington power company for \$40 million, based on the companies' degradation of treaty fishery resources.²⁸²

Arguably, tribal fishers' rights are as extensive as fishers without treaty or property rights who are entitled to common law causes of action for damages when fish resources are diminished by environmental harm.²⁸³ Historically, wrongful interruption or interference with a person's fishing rights has given rise to conversion or trespass action for damages.²⁸⁴ Furthermore, private individuals and businesses have a duty under the common law to:

provide fish passage, avoid pollution, and use other fish protection measures. Harm to fishers resulting from the

²⁷⁸ See *id.* at 811. Magistrate Boyle commented:

[I]f the Indians had a property interest in the fish, regardless of whether that interest was created by treaty, the Indians would have a recognized cause of action against any private party who intentionally or negligently injured the fish. Therefore, this court bases its decision on the fact that the Indians do not have a property interest in the fish runs, rather on the fact that Idaho Power is a private party.

Id. at 810 n.22.

²⁷⁹ For a blistering criticism of the court's opinion see Blumm, *supra* note 42, at 481-489; see also Sanders, *supra* note 205, at 162.

²⁸⁰ See *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

²⁸¹ See *Winans*, 198 U.S. at 381.

²⁸² Telephone Interview with Doug Nash, former counsel, Nez Perce Tribe (Oct. 15, 1999). See also *Mirande*, *supra* note 149, at 39-47.

²⁸³ See *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974).

²⁸⁴ Animals are tangible property and intentional acts leading to the destruction of chattels give rise to a cause of action in tort for conversion. See *Oppenheimer Indus., Inc. v. Johnson Cattle Co.*, 112 Idaho 423, 426, 732 P.2d 661, 664 (Idaho 1986). A cause of action in negligence is available for one whose chattel is lost or destroyed through the negligence of another. See *id.* In the context of fisheries, see, e.g., *Union Oil Co. v. Oppen*, 501 F.2d 558, 568 (9th Cir. 1974) (action for damages brought by fishermen); *Snug Harbor Packing Co. v. Schmidt*, 394 P.2d 397, 399 (Alaska 1964); *Bales v. City of Tacoma*, 20 P.2d 860, 863 (Wash. 1933). See also *Carr v. United States*, 136 F. Supp. 527, 535 (E.D. Va. 1955); *Beacon Oyster Co. v. United States*, 63 F. Supp. 761, 764 (Ct. Cl. 1946); *Mansfield & Sons Co. v. United States*, 94 Ct. Cl. 397, 421 (1941); *State Dep't of Pollution Control v. International Paper Co.*, 329 So. 2d 5, 7-8 (Fla. 1976); *Jurisich v. Louisiana S. Oil & Gas Co.*, 284 So. 2d 173, 182 (La. App. 1973); *Department of Fisheries v. Gillette*, 621 P.2d 764, 767 (Wash. Ct. App. 1980) (action for damages brought by state).

failure to take these measures is considered reasonably foreseeable and a sufficient basis for [imposing] trespass, negligence, or nuisance [liability.] Damage claims brought by fishermen are one of the 'classic exceptions' [to admiralty law's pure economic loss rule].²⁸⁵

C. *Practical Considerations: How Should Damages Be Calculated?*

The main problem with tribal claims for money damages is determining the amount of compensation due to the tribes. Traditionally, compensation awarded in common law conversion cases involving private parties,²⁸⁶ as well as in takings cases against the government, is the fair market value (FMV) of the lost property.²⁸⁷ Tribal property rights are not in the fish habitat itself, but in the fish which depend on pristine habitat.²⁸⁸ Therefore, tribal efforts seeking compensation for degraded treaty-fish habitat are actually implicit within primary claims for lost revenues in fish destroyed by such degraded habitat.

Commentators suggest that compensation could not be made for lost fish, because the tribes cannot claim ownership in uncaught fish, and also because the approximate number of fish lost, and the value of those fish would be impossible to determine.²⁸⁹ However, "a rose by any other name would smell as sweet."²⁹⁰ In the end, the only way to place a value on the treaty harvest right is to place value on the uncaught fish. The reasoning goes like this: the salmon's return was once so predictable,²⁹¹ and generated such consistent tribal income,²⁹² that the tribes essentially had a secured interest in the fish, despite the fact that the fish were not yet caught in tribal nets. The tribes are now deprived of this income generated from fish sales—fish which are now uncaught as a result of environmental

²⁸⁵ Sanders, *supra* note 205, at 166-167.

²⁸⁶ See ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 206 (2d ed. 1998).

²⁸⁷ See *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987) ("The owner's loss is measured by the extent to which governmental action has deprived him of an interest in property. The value of that interest, in turn, is determined by isolating it as a component of the overall fair market value of the affected property." (citations omitted)); see also *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (explaining that FMV is the compensation in condemnation cases).

²⁸⁸ See CHILDERHOSE & TRIM, *supra* note 9, at 26-27.

²⁸⁹ See Roels, *supra* note 30, at 404-405.

²⁹⁰ WILLIAM SHAKESPEARE, ROMEO AND JULIET, Act 2, Scene 2.

²⁹¹ See LANE, *supra* note 2, at 7.

²⁹² See *id.*

degradation. Specifically, the measure of damages would be the difference between the retail value of the amount of salmon to which the tribes were entitled, had the right not been interfered with by environmental degradation, and the value of the salmon the tribes actually received.²⁹³ In this sense, the measure of damages appears to award money for uncaught fish—but in reality, any awarded money simply compensates the tribes for damages to their treaty harvest rights caused by habitat degradation.

Illustratively, in two cases that the Nez Perce tribe settled with private power companies, damages were measured as the value the fish would have had in a commercial market had the harvest right not been interfered with.²⁹⁴ A significant amount of data was produced that reflected the tribe's historic harvests, the harvests' consistency, and the tribe's ability to capitalize on their harvests.²⁹⁵ Several tribes have now prepared an analysis of damages by estimating losses of 243 to 410 million pounds of salmon after lower Snake River Dam construction. The value of those lost fish, with inflation, could reach into the billions of dollars.²⁹⁶

Lost fish revenues may be inadequate because the measure fails to take into account the collateral cultural effects caused by the salmon's demise. Several Northwest tribes contend that the loss of salmon has caused deterioration in tribal members' health due to improper diet, including increased diabetes and heart disease rates, higher alcoholism rates, illiteracy, juvenile delinquency, the loss of tribal language, and the decline of tribal spiritual and religious practices.²⁹⁷ Any compensation regime, whether based on the market value of lost fish or other, must be expanded to compensate for the tribes' actual losses—including damages to cultural values and to future generations who were to culturally benefit

²⁹³ See *Confederated Tribes of the Colville Reservation v. United States*, 43 Ind. Cl. Comm'n 505 (1978). Compare *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974) (measuring damages to tribal hunting and fishing rights caused by government regulation as the value the game and fish tribal members would take if completely free from regulation, less the value of the limited amounts of game and fish taken by members subject to state regulation).

²⁹⁴ This is the measure that the arbitrator used to calculate damages in *Nez Perce Tribe v. Idaho Power Corp.*, which resulted in a settlement in the amount of \$16.5 million for the tribe. Telephone interview with Doug Nash, former counsel for Nez Perce Tribe (Oct. 15, 1999).

²⁹⁵ See *id.*

²⁹⁶ See Roels, *supra* note 30, at 376 n.10 (citing Laura Berg, *Tribes Release Salmon Restoration Plan*, WANA CHINOOK TYMOO, Issues 2 and 3 1995, at 14).

²⁹⁷ See *Tribal Circumstances*, *supra* note 22.

from the treaty right.²⁹⁸ Critics contend that placing a value on the cultural meaning of fish may be difficult, if not impossible.²⁹⁹ Furthermore, even if a compensation scheme were devised to compensate tribes for lost culture, it would not be effective in takings claims against the government because the Fifth Amendment does not provide for compensation for government "takings" of culture, only property.³⁰⁰

A narrow view would suggest that money damages are inappropriate because it is impossible to calculate the value of lost cultural resources.³⁰¹ The value of lost cultural resources could be measured alternatively, however, as the cost associated with the funding of tribal alcoholic programs, literacy programs in tribal schools, tribal language courses, and juvenile-delinquent diversion programs.³⁰² Furthermore, the Government already provides tremendous financial support to the tribes for social programs.³⁰³ Assuming, *arguendo*, that the government could be held responsible for culture lost as a result of salmon-run degradation, the government could compensate tribes for their losses by increasing the amount of tribal payments, and perhaps by even designating the increased amount for culture restoring programs.

Where compensatory damages provide only money for lost fish, a punitive damages award could enhance a compensatory damages award and account for lost cultural resources and degraded fish habitat. The purpose of punitive damages is to punish fault, reckless disregard for others, or a defendant's conduct that is found to be "willful," or "wanton."³⁰⁴ In the context of degraded treaty-fish habitats, punitive damages may serve other purposes, including camouflaged compensation. A large punitive damages award against parties who destroy treaty fish with impunity would help capture and internalize habitat restoration or cultural resource costs that cannot be recovered in a traditional compensatory damages award.³⁰⁵

²⁹⁸ See Roels, *supra* note 30, at 405.

²⁹⁹ See *id.*

³⁰⁰ See U.S. CONST. Amend. v.

³⁰¹ See Roels, *supra* note 30, at 405.

³⁰² See Mirande, *supra* note 149, at 57 (advising that, instead of cash, long-term trust-oriented payment schemes should be encouraged).

³⁰³ See Roels, *supra* note 30, at 376 n.10 (citing Laura Berg, *Tribes Release Salmon Restoration Plan*, WANA CHINOOK TYMOO, Issues 2 and 3 1995, at 14).

³⁰⁴ PLATER, *supra* note 286, at 208.

³⁰⁵ See *id.*

VI. ALTERNATIVE TO MONEY DAMAGES: STREAM ENHANCEMENT AND RESTORATION

If tribes have money in their pockets for their lost fish, the money compensates them for their loss, but does little in terms of preventing future loss or improving salmon habitat. Five conditions must be present in order for salmon and steelhead trout to survive: "(1) access to and from the sea; (2) an adequate supply of good-quality water; (3) a sufficient amount of suitable gravel for spawning and egg incubation; (4) an ample supply of food; and (5) sufficient shelter."³⁰⁶ An "alteration of even one of these essential, finely-balanced requirements will affect the production potential."³⁰⁷ Historically, courts have reaffirmed the notion that tribal treaties reserve to the tribes rights to a sufficient amount of water instream to fulfill their treaties' fishing purposes.³⁰⁸ Under the rationale of this reserved water rights doctrine, the courts have restricted damaging activities resulting from other parties' exercise of their own water rights,³⁰⁹ thereby implicitly recognizing a right to restoration of tribal fisheries. If a court were to definitively recognize a treaty right to habitat protection, treaty tribes may be able to rely on reserved water rights doctrine to secure a habitat restoration remedy in other contexts. One of the first cases to use the reserved water doctrine to imply a right to fish

³⁰⁶ *United States v. Washington (Phase II)*, 506 F. Supp 187, 203 (W.D. Wash. 1980).

³⁰⁷ *Id.* at 203 (citing *United States Fish and Wildlife Service, Washington Department of Fisheries and Washington Department of Game, Joint Statement Regarding the Biology, Status, Management, and Harvest of Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsular Drainage Area of Western Washington* (1973) (Joint Biology Statement) at 17).

³⁰⁸ See Blumm, *supra* note 42, at 470. See also *United States v. Anderson*, 6 Indian L. Rep. F-129 at F-131 (E.D. Wash. July 23, 1979), 591 F. Supp. 1 (E.D. Wash. 1982), *aff'd*, 736 F.2d 1358 (9th Cir. 1984); *Colville Confederate Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (*Colville II*); *United States v. Adair*, 478 F. Supp. 336, 345 (D. Or. 1979), *aff'd*, 723 F.2d 1394, at 1414-15; see also *Order Re: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places, State Dep't of Ecology v. Acquavella*, No. 77-2-01484-5, (Wash. Sup. Ct. Mar. 1, 1995) (recognizing a limited right of habitat protection "to maintain fish life" in the river for Yakima Basin tributaries with treaty fishing grounds); *Order Re: "Flushing Flows" Acquavella*, No. 77-2-01484-5, (Wash. Sup. Ct. Apr. 13, 1995) (requiring fish flows to flush juvenile salmon downstream and recognizing a duty of the Bureau of Reclamation to provide flows to "maintain all life stages" of salmon).

³⁰⁹ See *id.*

habitat restoration was *United States v. Anderson*,³¹⁰ involving a dispute over water rights to the Chamokane Creek in northeast Washington.³¹¹ The court concluded that a purpose of the Spokane Indian Reservation was to ensure tribal access to fish for food and the maintenance of Chamokane Creek for fishing,³¹² and as such, the tribe was entitled to the amount of reserved water sufficient to preserve their fishing rights.³¹³ The court's holding is striking, because it essentially implies a treaty right of fisheries restoration and maintenance: the defendant was required to release waters to maintain water temperature below sixty-eight degrees Fahrenheit, necessary for native trout propagation, and in no case less than twenty cubic feet per second.³¹⁴

In another tribal water rights case, *Colville Confederate Tribes v. Walton*, the Ninth Circuit also introduced a restorative component to the treaty right to fish.³¹⁵ The court ruled that when the Colville Indian Reservation was created, sufficient appurtenant water was reserved to permit crop irrigation on the reservation and to provide sufficient water for the tribes to develop an on-reservation trout fishery to compensate for historic salmon runs lost as a result of the construction of the Grand Coulee Dam.³¹⁶ The court observed that the tribe had a vested property right in reserved water, and could use the water in any lawful manner, subject only to restrictions on the quantity, rather than the purpose of water use.³¹⁷ Accordingly, the court permitted the tribe to use some of its irrigation water to restore flows in a creek in order to promote trout spawning.³¹⁸ As in the *Anderson* case, by reaffirming the tribe's rights to use water to reestablish their fisheries, the *Walton* court implicitly recognized the right to habitat restoration.

³¹⁰ See *United States v. Anderson*, 6 Indian L. Rep. at F-131 (E.D. Wash. July 23, 1979), *United States v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982), *aff'd*, 736 F.2d 1358 (9th Cir. 1984).

³¹¹ See *id.*

³¹² See *id.* The *Anderson* case did not involve a Stevens treaty; the right to fish was a purpose of the tribe's 1877 reservation, established by Executive Order. See *id.* at F-130.

³¹³ See *id.* ("The Court therefore holds that the Tribe has the reserved right to sufficient water to preserve fishing in the Chamokane Creek.").

³¹⁴ See *id.*

³¹⁵ See *Colville Confederate Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) (*Colville II*)

³¹⁶ See *id.* at 48.

³¹⁷ See *id.*

³¹⁸ See *id.* at 46. The district court had held that the tribe was not entitled to water to promote trout spawning because the federal government was supplying hatchery fish. See *Colville I*, 460 F. Supp. 1320, 1330 (E.D. Wash. 1978), *aff'd in part, rev'd in part Colville II*, 647 F.2d at 48 (1981).

In *United States v. Adair*, the United States, along with the Klamath and Modoc Indians, sued the state of Oregon to settle a dispute of water rights in the Williamson River system.³¹⁹ A panel of the Ninth Circuit concluded that the Klamath tribe had a "time immemorial" right "to as much water on the Reservation lands as they need to protect their hunting and fishing rights."³²⁰ The court characterized the tribal fishing right as a negative right, enabling the tribes "to prevent other appropriators from depleting the streams [sic] waters below a protected level in any area" where the treaty fishing right applied.³²¹ However, the court refused to find that the tribe was entitled to restoration out of the fear of imposing a "wilderness servitude" on the reservation.³²² Instead, the court held that any restoration right must be tied to the "moderate living" standard as established by the Supreme Court in *Passenger Fishing Vessel*.³²³ In other words, tribes are entitled to restoration of fisheries at a level that will supply them with a "moderate living."³²⁴

The courts' use of the reserved-water doctrine to imply a right to habitat restoration could be promising if applied to compel fish habitat restoration in other contexts. However, a restoration remedy would suffer great practical problems, especially when trying to determine the responsible parties. No single activity is solely responsible for the anadromous fisheries' decline, rather many activities have had a cumulative impact.³²⁵ Dams, diversions, and sedimentation caused by forest roads and timber harvesting are the most often cited reasons for the fisheries' decline,³²⁶ but other activities also contribute significantly to fish habitat degradation, such as: "channelization, particularly of spawning streams; agricultural practices, including stream diversion and livestock-caused degradation; urban and industrial development of lowland stream habitat; estuarine construction; and gravel removal from streambeds and banks."³²⁷ Because the reasons for salmon habitat destruction are legion,

³¹⁹ See *United States v. Adair*, 478 F. Supp. 336, 345 (D. Or. 1979), *aff'd*, 723 F.2d at 1414-15.

³²⁰ *Id.*

³²¹ *Adair*, 723 F.2d at 1411.

³²² See *Adair*, 723 F.2d at 1414.

³²³ See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979).

³²⁴ See Blumm, *supra* note 42, at 473 n.326.

³²⁵ See Monson, *supra* note 69, at 469, 473.

³²⁶ See *id.* at 474.

³²⁷ *Id.* (citing Affidavit of Donald Chapman at 2, *United States v. Washington (Phase II)*, 506 F. Supp. 187 (W.D. Wash.1980).

the value of a habitat restoration remedy to the tribes is diminished, but not completely without value.

A treaty habitat protection right that entitles tribes to compel habitat restoration would be most effective against major sources of fish and fish habitat destruction, such as hydroelectric dams. One proposal to restore Northwest salmon advocates dam removal.³²⁸ The government annually spends hundreds of millions of dollars to rectify the effects dams have on salmon,³²⁹ but mitigation efforts have had little success.³³⁰ Dam removal debates are complex, as there is no assurance that dam removal will in fact prevent the salmon's extinction.³³¹ The removal of the Edwards Dam on the Kennebec River in Maine, highlighted by Secretary of the Interior Bruce Babbitt's challenge to dam owners and operators to demonstrate "by hard facts [that] the continued operation of a dam is in the public interest, economically and environmentally,"³³² however, is promising precedent for future dam removals on the Snake River.

A tribal right to compel fish-habitat restoration could not only help tribes secure habitat restoration in areas destroyed by dam building, but also combat the effects of less-significant activities that combine to destroy treaty fish, especially when such a right is viewed as an extension of the Indian trust doctrine. Tribes could invoke the Indian trust doctrine to compel stringent government enforcement of current habitat protection laws or creation of new legislation for fish-habitat protection.³³³ Fortunately, the tribes may not need to rely on a right to compel fish habitat enhancement and restoration, because many local governments in the Northwest have already voluntarily committed themselves to such efforts.³³⁴

³²⁸ See Joseph, *supra* note 16, at 51. For the case supporting dam removal on the Snake River, see generally Blumm, *supra* note 131.

³²⁹ See *id.* at 60.

³³⁰ See *id.* (describing dismal return rates of salmon despite government efforts to mitigate the effects of dams).

³³¹ See *id.*

³³² See *id.* at 61.

³³³ See Wood, *supra* note 246, at 1471 (contending that tribes are entitled to a writ of mandamus to compel government observance of treaty rights).

³³⁴ See Frank Vinluan, *The Sammamish and Salmon Get Some ReLeaf*, (Oct. 5, 1999) (reporting local government sponsored efforts to restore salmon habitat along Sammamish River), available at http://www.seattletimes.com/news/local/html98/fish_19991005.html (last visited Feb. 27, 2001); the state of Washington has enacted a program that pays farmers to protect salmon streams on their property. The program pays rent to farmers for land around streams to create buffer zones along up to 3,000 miles of environmentally sensitive streams. The program requires farmers to fence off

VIII. IS RECOGNITION OF A RIGHT TO MONETARY DAMAGES REALLY NECESSARY IN LIGHT OF OTHER PROTECTIVE LAWS?

Federal statutes may also provide tribes with a cause of action for money damages when essential fish habitat conditions are degraded and treaty fishing rights are affected. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)³³⁵ provides tribes with a source of recovery when parties are liable under CERCLA for "damages for injury to, destruction of, or loss of natural resources."³³⁶ "Natural resources" are defined within CERCLA to include fish and wildlife "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by . . . an Indian tribe."³³⁷ CERCLA's natural resource damage recovery scheme provides that the federal government, state government, or tribal government, as trustee of the natural resources, may seek compensatory damages for the loss of the resource. CERCLA recognizes an Indian tribe's property interest in fish and wildlife and, accordingly, provides for recovery of monetary damages. Treaty tribes have also employed the Federal Power Act³³⁸ and the National Environmental Policy Act³³⁹ to protect their fisheries from hydroelectric power projects or other development that threaten essential fish habitat conditions.³⁴⁰

Most federal statutes have no provisions for recovery of damages. Section 505 of the Clean Water Act allows for natural damages recoveries, but only due to hazardous waste releases.³⁴¹ Section 10(c) of the Federal

streams and plant trees and shrubs to enhance salmon habitat. Agriculture runoff has been blamed as a major factor in pollution of salmon-bearing waters in Washington. *See Enticements to Help Farmers Save Salmon*, TACOMA NEWS TRIBUNE, Oct. 29, 1998, at A12.

Other fish habitat enhancing and restoring activities that the state could require of those responsible for degrading fish habitat are to widen river channels to ease fish passage, reconnect side channels, restore tributaries, create estuary habitat, remove barriers to fish passage, cease water diversion and install fish ladders in places where streams are diverted, plant trees along streams' riparian areas to provide salmon with necessary shade and protection and filter sediment from runoff.

³³⁵ 42 U.S.C. §§ 9601-9675 (1994).

³³⁶ *See* 42 U.S.C. § 9607(a)(4)(C).

³³⁷ *See* 42 U.S.C. § 9601(16).

³³⁸ *See* 16 U.S.C. §§ 791a-828c (1994).

³³⁹ *See* 42 U.S.C. §§ 4321-4370d (1994).

³⁴⁰ *See, e.g.,* Washington Dep't of Fisheries v. Federal Energy Regulatory Comm'n, 801 F.2d 1516, 1517-19 (9th Cir. 1986) (vacating preliminary permits for failure to give adequate consideration to resource protection, including tribal fishery concerns).

³⁴¹ *See* Oil and Hazardous Substance Liability Act, 33 U.S.C.A. § 1321 (1997).

Power Act allows for damage claims versus FERC-licensed dams, although the Nez Perce tribe was unsuccessful in relying on this provision to recover money damages.³⁴² The Endangered Species Act of 1973³⁴³ might provide Northwest tribes with monetary relief; under the ESA, the government assesses damages for unlawful takings of endangered or threatened species.³⁴⁴ Tribal reliance on the ESA would be tenuous, however, because of the uncertain effects that the Act has on tribal treaty fishing rights. In fact, one private interest group has actually used the ESA to file suit, claiming that the government has violated the Act by allowing Indian tribes to exercise their treaty fishing rights in Puget Sound and the Columbia River.³⁴⁵

IX. APPLICATION OF THE RIGHT TO HABITAT PROTECTION AND MONEY DAMAGES OUTSIDE THE PACIFIC NORTHWEST

The significance of a treaty habitat protection right and the corresponding right to bring claims for money damages, if that right is infringed, reaches far beyond the Pacific Northwest and may be asserted by other Indian tribes to protect their reserved hunting and fishing rights. In Minnesota, the Mille Lacs Band of Chippewa Indians has been embroiled with the state over off-reservation fishing and hunting rights. Eventually in *Minnesota v. Mille Lacs Band of Chippewa Indians*, the U.S. Supreme Court, in a 5-4 decision, ruled that the tribe retained its aboriginal inland fishing and hunting rights on thirteen million acres of ceded public land provided for under 1836 and 1855 treaties.³⁴⁶ However, recognition of tribal fishing and hunting rights may be just the beginning of the Chippewa's foray into the judicial realm. If the land upon which the tribe's fishing and hunting rights has been degraded and deer and elk populations have plummeted as a result of state or private action, the right to sue for money damages or habitat protection will then be a very important right to the Mille Lacs Band of Chippewa Indians.

³⁴² See *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994).

³⁴³ 16 U.S.C. §§ 1531-1544 (1994).

³⁴⁴ See *id.* § 1540.

³⁴⁵ See *Feds Sued Over Fishing Permits For Tribes*, WALL STREET JOURNAL-NORTHWEST, Aug. 25, 1999, available in 1999 WL-WSJ 24911239 (reporting that Common Sense Salmon Recovery, a coalition of real-estate and agriculture interests, claim the National Marine Fisheries Service is jeopardizing runs of salmon that are classified as threatened or endangered).

³⁴⁶ See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

The Klamath Tribe in Oregon may also find it necessary to rely on the right to bring claims for money damages or habitat restoration in light of the destruction to their historic hunting grounds.³⁴⁷ Klamath hunting grounds have been subject to timber harvesting practices of the U.S. Forest Service, and as a result mule-deer populations have plummeted.³⁴⁸ Because deer is an essential staple for indigent Klamath tribal members, the tribe is trying to protect the habitat to ensure their hunting rights remain fruitful; however, the number of deer has been reduced from thirteen to fourteen mule deer per mile to about seven per mile.³⁴⁹ The tribe successfully enjoined the habitat-destructive harvesting practices, but the injunction does not compensate the tribe for the degradation of their treaty habitat protection right, nor does the injunction necessarily ensure the future of the mule deer.³⁵⁰ The Klamath Tribe may find it necessary, someday, to rely upon the right to bring claims for money damages to their treaty-reserved habitat protection rights.

In a more general sense, the treaty right to habitat protection, and the corresponding right to damages if the right is degraded, might develop into increased off-reservation habitat management rights for treaty tribes. Tribes have been successful in exercising tribal involvement in other off-reservation contexts where subject matter is of significant importance to tribes. For instance tribes have been successful in gaining jurisdiction of Indian children living off-reservation, authority over graves and funerary objects, treatment as state status under several environmental laws which affect off-reservation activities, and tribal regulatory control over members' off-reservation hunting and fishing.³⁵¹ If a tribal right to habitat protection is definitively recognized, it may encourage tribes to become more involved in habitat management—on and off the reservation. Tribes would then have an incentive to direct resources to habitat restoration and public education of native culture and the importance of treaty reserved rights to hunt and fish.

³⁴⁷ See *Klamath Tribe v. Oregon*, Civ. No. 96-381-HA (D. Or. Oct. 2, 1996).

³⁴⁸ See Jess Brown, *Do Tribal Off-Reservation Hunting and Fishing Rights Include the Right to Habitat Protection?*, LETTER OF THE LAW (Feb. 1999), available at <http://www.lclark.edu/~lotl/volume5issue4/tribal.html> (last visited Feb. 27, 2001).

³⁴⁹ See *id.*

³⁵⁰ See *id.*

³⁵¹ See *id.*

X. CONCLUSION

Recognition of a tribal right to bring claims for money damages when treaty-fish habitat is degraded would compensate tribes for and minimize damage to treaty fisheries. A damages remedy stems from the nature of tribal property rights in Northwest salmon and from treaty rights to habitat protection. Aided by a definitive judicial explanation of the scope of a habitat protection right, tribal damages claims could help ensure the future of the tribes' historic harvest rights—rights which they were led to believe would always be theirs in exchange for vast amounts of land. Making the case for tribal damages claims in the context of treaty fishing rights raises awareness of the losses tribes will suffer if the salmon are allowed to disappear, the losses the tribes have already suffered, and the economic implications salmon extinction will have for the federal and state governments, as well as private parties. Ultimately, money can never replace salmon; recognition of a tribal right to money damages claims is but a vehicle to help government and private parties—who sometimes understand issues only in terms of dollars—heed tribal advice in the effort to save the salmon.