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INDIAN TREATY FISHING RIGHTS AND THE ENVIRONMENT: AFFIRMING THE RIGHT TO HABITAT PROTECTION AND RESTORATION

Michael C. Blumm*

Abstract: In 1970, several tribes in the Pacific Northwest, along with their federal trustee, sued the state of Washington claiming that numerous state actions violated their treaty rights, which assured them "the right of taking fish in common with" white settlers. The tribes and their federal trustee maintained that the treaties of the 1850s guaranteed the tribes: (1) a share of fish harvests for subsistence, cultural, and commercial purposes; (2) inclusion of hatchery fish in that harvest share; and (3) protection of the habitat necessary for the salmon that were the basis of the treaty bargain and the peaceful white settlement of the Pacific Northwest. By 1985, the tribes and the trustee persuaded the courts of the merits of the first two propositions, but the Ninth Circuit deferred on the third issue, declining to declare that the treaties supplied habitat protection in the absence of a specific factual dispute.

Some two decades later, in 2007, the tribes and the federal government convinced United States District Court Judge Ricardo Martinez that the state's construction and maintenance of road culverts blocking salmon access to their spawning grounds violated the 1850s treaties. In 2013, after settlement talks failed, the district court issued an injunction that required most of the offending barrier culverts to be remedied within seventeen years, or by 2030. Claiming exaggerated costs of compliance, the state appealed, and in 2016 a unanimous panel of the Ninth Circuit affirmed, rejecting the state's allegations wholesale.

This Article examines the reasoning of both the district court and the Ninth Circuit and the path ahead, which may implicate road culverts owned by other governments and other habitat-damaging activities like dams, water diversions, and land management actions affecting water quality and quantity. Moreover, the Ninth Circuit's reliance on foundational rules of treaty construction to interpret the scope of the treaty right of taking fish could influence other Indian treaty cases beyond the issue of off-reservation fishing rights. Even if confined to treaties with off-reservation rights, the case represents the most significant interpretation of treaty fishing rights in nearly four decades.

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INTRODUCTION

One hundred sixty years ago, during treaty negotiations that led Indian tribes to cede some 64 million acres to the federal government and ensure the largely peaceful settlement of the Pacific Northwest, the principal federal negotiator, Governor Isaac Ingalls Stevens, stated, "I want that you shall not have simply food and drink now but that you may have them forever."[1] Later, he announced, "This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . This paper secures your fish. Does not a father give food to his children?"[2] The full meaning of those promises has been the subject of almost continuous litigation for over 130 years[3] as courts have grappled with the treaty

1. *See* United States v. Washington, 827 F.3d 836, 851 (9th Cir. 2016) (citing negotiations during the Point Elliot Treaty).

2. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 n.11 (1979) (citing negotiations during the Point-No-Point Treaty).

3. The first reported case was *Spedis v. Simpson* (Klickitat Cty. Ct., July 22, 1884) (on file in Klickitat County, Wash. Archives, File KLK-126); *see also* Michael C. Blumm & James Brunberg, *"Not Much Less Necessary . . . Than the Atmosphere They Breathed": Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of* United States v. Winans *and Its Enduring Significance*, 46 NAT. RESOURCES J. 489, 506 n.89 (2006) [hereinafter *Winans Centennial*] (citing

language reserving to tribes "[t]he right of taking fish, at all usual and accustomed grounds and stations . . . in common with [the incoming white settlers]."[4]

The latest round of litigation began in 2001, when the federal government and twenty-one tribes sued the State of Washington over its construction and maintenance of road culverts,[5] which migrating fish like salmon use to pass highways and other roads. In 2007, United States District Court Judge Ricardo Martinez ruled that the state's culverts violated the treaty right by "affirmatively diminish[ing] the number of fish available for harvest," even though the tribes could not give exact figures on the number of fish lost.[6] In reaching his decision, Judge Martinez relied on well-established rules of treaty interpretation favoring the tribes,[7] mindful of the fact that the consideration for the immense amount of land the tribes ceded in the treaties was largely the "right of taking fish," coupled with assurances from federal negotiators that the United States would protect that right.[8]

The 2007 Martinez Decision prompted several years of negotiation between the tribes and the state over how fast the state would rehabilitate passage-blocking culverts (barrier culverts),[9] but with no agreement.

BRAD ASHER, BEYOND THE RESERVATION: INDIANS, SETTLERS, AND THE LAW IN WASHINGTON TERRITORY, 1853–1889, at 150–53 (1999)).

4. For the full language, see *infra* note 20.

5. The case grew out of litigation that began in 1970. *See infra* notes 12, 14, 62 and accompanying text. Road culverts—often a cheap substitute for bridges—are pipes or arches made of metal or concrete that allow water flow under roads or railroads crossing waterways, preventing flooding and erosion. Design or maintenance flaws can cause culverts to block fish migration. *See* Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RESOURCES J. 653, 677–78 (2009) [hereinafter *Resounding Reaffirmation*].

6. United States v. Washington, No. CV 9213RSM, 2007 WL 2437166, at *3 (W.D. Wash. Aug. 22, 2007) [hereinafter Martinez Decision].

7. *See infra* notes 35–37, 45, 72, 117, 119–20, 128 and accompanying text.

8. Martinez Decision, 2007 WL 2437166, at *7–8 (citing Washington v. Commercial Passenger Fishing Ass'n, 443 U.S. 658, 677 (1979)). The Supreme Court stated that the small amount of monetary compensation for the land cessions in the treaties would not amount to fair compensation if the treaties assured the tribes only the right to fish on an equal basis with white settlers:

> [I]t is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish. That each individual Indian would share an 'equal opportunity' with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations. Such a 'right,' along with the $207,500 paid the Indians, would hardly have been sufficient to compensate them for the millions of acres they ceded to the Territory.

Id. *See also infra* notes 73, 81, 137 and accompanying text.

9. The real issue was how quickly the state would repair its culverts, since it committed do so under state law, but its pace was extremely slow with no deadlines for finishing. *See infra* notes 196–98 and accompanying text.

Consequently, the case went to trial in 2009 and 2010. In 2013, the judge issued an injunction establishing schedules for the state to fix the culverts.[10] The state appealed, claiming that the judge's injunction would cost the state some $2.4 billion.[11]

In 2016—nine years after Judge Martinez's initial decision and forty-six years after the tribes filed suit seeking habitat protection[12]—the Ninth Circuit affirmed. Judge William Fletcher, writing for a unanimous panel, relied heavily on foundational Indian law interpretative principles and upheld the lower court's injunction in all respects.[13] The result represented a thorough victory for the tribes and their federal trustee and a considerable setback for the state, which was unable even to win so much as a modification of Judge Martinez's injunction. Assuming the decision is not overturned on appeal, the result vindicated the tribes' efforts of nearly a half-century of litigation to obtain judicial recognition that their treaties entitled them to: (1) a share of fish harvests, especially salmon; (2) inclusion of hatchery fish in that harvest share; and (3) protection for the environment necessary to preserve the fish.[14] All of these claims have now succeeded, albeit only after long and tortuous litigation.

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10. United States v. Washington, No. CV 70-9213, 2013 WL 1334391 (W.D. Wash. March 29, 2013) [hereinafter Martinez Injunction]. The court's injunction gave the state until October 2016 to correct specified culverts, seventeen years to correct other priority culverts, and the remainder at the end of the natural life of the culvert or in connection with independent projects. *See* United States v. Washington, 827 F.3d 836, 848 (9th Cir. 2016) (discussing the trial court's injunction); *infra* notes 103–13 and accompanying text.

11. The state was quoted in the press as claiming the cost of the injunction would be $2.4 billion over fifteen years. Lynda V. Mapes, *Federal Appeals Court Hears Fish-Blocking-Culvert Case*, SEATTLE TIMES (Oct. 16, 2015), http://www.seattletimes.com/seattle-news/environment/federal-appeals-court-hears-fish-blocking-culvert-case/ [https://perma.cc/BA4K-U9KS]. The Ninth Circuit ultimately concluded that the costs would be far less. *See infra* notes 148–52 and accompanying text.

12. On the fact that the claim filed in the so-called Boldt Decision included the three causes of action that the tribes and their federal trustee filed in 1970, see MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 80–82 (2002) [hereinafter SACRIFICING SALMON].

13. *Washington*, 827 F.3d at 850 (relying on foundational principles of treaty interpretation such as "[t]he language used in treaties with the Indians should never be construed to their prejudice") (quoting Worcester v. Georgia, 31 U.S. 515, 582 (1832)); *id.* at 865 (affirming the district court's decision to enjoin Washington to correct barrier culverts in accordance with the treaties). *See also infra* note 35 and accompanying text.

14. *See id.* at 845–46 (discussing the initial case, filed in 1970, and agreeing that the treaties entitled the tribes to a share of fish harvest); *id.* at 846 (discussing earlier proceedings affirming that hatchery fish must be included in determining the share of salmon for the tribes): *id.* at 853 (agreeing with the district court that Washington has a duty to protect the environment in order to guarantee the tribes' share of fish under the treaties).

This Article explains the Ninth Circuit's culverts decision and its implications for the future. Part I sets the stage by briefly describing the context in which the nearly half-century old case began, including the State of Washington's long and shameful efforts to preempt tribal fisheries and the Supreme Court's many interpretations of the Stevens Treaty language. Part II turns to the litigation that led up to the Martinez Decision, the so-called Boldt Decision[15] and its affirmance by the Supreme Court. Part III considers the case law following the Boldt Decision, which confirmed that hatchery fish were included in the tribal allocation but inconclusively resolved the habitat issue when the Ninth Circuit declared in 1985 that the question was too vague to decide in the abstract.

Part IV then turns to the Martinez Decision in both its declaratory and injunctive relief phases. Part V examines the Ninth Circuit's resounding affirmance of Judge Martinez's decision, based in large measure on foundational canons of treaty interpretation. Part VI looks beyond the Ninth Circuit's decision, to assess its implications outside the State of Washington's road culverts, including consideration of federal and local road culverts as well as other habitat-damaging activities like timber harvesting, dam operations, and land use practices. The Article concludes that the case reflects the federal trust relationship with Indian tribes at its best, as the tribes and the federal trustee worked together since 1970 to procure meaningful treaty fishing rights. Moreover, while eliminating barrier culverts will significantly improve the fish habitat in the Puget Sound basin, the decision's implications beyond Washington and beyond state-owned road culverts portend significant future changes in land and water-use management in the Northwest. The culverts case could, for example, cause both the states and the federal government to consult with tribes concerning development projects potentially affecting treaty rights. Such consultation could avoid litigation over other habitat-damaging proposals in the future.

I. THE STATE OF WASHINGTON'S HISTORIC PREEMPTION OF TRIBAL FISHING AND THE JUDICIAL INTERPRETATION OF THE TREATY "RIGHT OF TAKING FISH"

Soon after the treaties of the 1850s, the white settlers in the Pacific Northwest began to physically preempt tribal fishers by securing locational advantages on rivers, estuaries, and in Puget Sound and the

15. United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd in part, vacated in part*, 443 U.S. 658 (1979) [hereinafter Boldt Decision].

ocean.[16] This physical preemption was soon followed by legal measures that sanctioned this preemption.[17] The federal courts, however, soon weighed in with path-breaking interpretations of the treaties as recognizing tribal property rights—interpretations ratified by the United States Supreme Court—that foreclosed complete preemption of tribal fisheries.[18] This Part discusses these developments.

A. *The Salmon Fishery and State Preemption*

The negotiations that led to what are now known as the Stevens Treaties made clear that both the tribes and the federal representatives intended to protect and preserve the tribes' ability to fish in order to sustain themselves and their way of life.[19] All the treaties contained similar language, recognizing the tribal "right of taking fish, at all usual and accustomed grounds . . . in common with" white settlers.[20] Although the treaties did not expressly mention salmonids, they were the central focus of the negotiations, as salmon were essential to tribal economic and cultural practices which the tribes bargained to retain.[21] Salmon are easy to harvest, given their homing instinct; the Supreme Court even analogized salmon harvests to agricultural crops.[22] Thus, achieving a locational advantage along the migratory route of salmon runs is critical when competition among harvesters becomes intense.

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16. *See Winans Centennial, supra* note 3, at 507–09 (describing commercial fishing at the mouth of the Columbia River and the use of fish wheels preempting upriver tribal harvests).

17. *See id.* at 509–10 (discussing state designations of "salmon preserves," restrictions on net sizes, and seasonal closures that disadvantaged tribal fishing); *infra* note 24.

18. On the property rights recognized by the Stevens' Treaties, see Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 435–45 (1998) [hereinafter *Piscary Profit*].

19. *See* SACRIFICING SALMON, *supra* note 12, at 56–63. Federal treaty negotiators saw the tribes' continued commercial and subsistence fishing to be a means of tribal livelihoods that would avoid federal subsidies or rations. *See infra* notes 21, 73, 81 and accompanying text.

20. The fishing clause of the Stevens Treaty generally provided:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens.

United States v. Washington, 827 F.3d 836, 849 (9th Cir. 2016) (emphasis omitted).

21. According to the Ninth Circuit, "salmon were a central concern" of the treaty negotiations. *Id.* at 851 (citing historian Richard White of Stanford). The government intended that tribal fishers would supply the settlers with food as a result of their salmon harvests, and thus become an integral part of the pioneer economy. *See* SACRIFICING SALMON, *supra* note 12, at 5, 61–63.

22. Washington v. Commercial Fishing Vessel Ass'n, 443 U.S. 658, 663 (1979) (analogizing the salmon runs to agricultural crops due to the relative predictability of harvests).

During the late nineteenth century, non-tribal fishers secured locational advantages in the Columbia River and Puget Sound basins by shifting fishing efforts downriver and into the bays, estuaries, and ocean. They thus could harvest salmon before the salmon reached a tribe's upriver usual and accustomed fishing grounds, thereby physically preempting treaty-recognized fisheries. These efforts were aided by technological innovations such as gasoline-powered ocean troll boats and refrigerated railroad cars that delivered fresh salmon to distant markets like San Francisco, New York, and even Japan.[23] Moreover, the state intervened to aid non-tribal fisheries by outlawing net fishing where the only net fishing was by tribal members.[24]

Washington courts were quite complicit in this effort to legally preempt tribal fisheries, as they repeatedly affirmed the state's authority to regulate the fishery by disadvantaging tribal fishers.[25] And they did so in overtly racist language. Consider the following statement from the Washington State Supreme Court's 1916 decision of *State v. Towessnute*[26] in which the court, after declaring a Stevens Treaty to be a "dubious document" and expressly rejecting the "premise of Indian sovereignty," asserted that "the aborigines" had only the rights of "mere occupants."[27] This physical and legal preemption took place despite a considerable body of federal case law that began in the territorial courts and suggested that this preemption was illegal.

B. The Early Cases

The first recorded treaty fishing rights case occurred in 1884, when Frank Taylor purchased a homestead adjacent to Celilo Falls, and then leased the land to an Indian, William Spedis, who proceeded to deny

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23. *See* SACRIFICING SALMON, *supra* note 12, at 63–64.

24. *See id.* at 64 (discussing so-called "salmon preserves" that displaced tribal fishers); *Washington*, 827 F.3d at 843 (citing a 1907 statute forbidding off-reservation tribal fishing except by hook-and-line and a 1934 initiative banning fixed gear to harvest salmonids, which outlawed tribal net fishing off-reservation).

25. *See, e.g.*, State v. Tulee, 7 Wash. 2d 124, 109 P.2d 280 (Wash. 1941), *rev'd*, 315 U.S. 681, 685 (1942) (discussed *infra* note 50 and accompanying text); State v. Towessnute, 89 Wash. 478, 154 P. 805 (1916); SACRIFICING SALMON, *supra* note 12, at 74–77 (discussing these cases and other efforts of the state of Washington to legally preempt tribal fisheries).

26. 89 Wash. 478, 154 P. 805 (1916).

27. *Towessnute*, 89 Wash. at 480–81, 154 P. at 806–07 (quoted in *Washington*, 827 F.3d at 843). The *Towessnute* court also stated, "The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left so long as civilization did not demand his region." *Id.* at 482, 154 P. at 807.

Yakama tribal members access to their ancient Tumwater fishery.[28] Yakama fishers then forcibly removed Spedis to the Yakama Reservation; after his release, he successfully sued for damages, although he had trouble collecting.[29] The Indian agent for the Yakama's thought that Taylor's lease reflected "white manipulation" of tribal fishers,[30] a sentiment that appeared to be justified by the next case.

Frank Taylor, instigator of the *Spedis* controversy, sold his 160-acre tract to O.D. Taylor (apparently unrelated), a Baptist minister, who evicted tribal fishermen in favor of whites to whom he leased fishing rights.[31] Taylor proceeded to fence out the Indians, burned some of their temporary fishing structures, and dynamited the shore to create space for four large fish wheels.[32] Yakama Indian agent Robert H. Milroy, along with several tribal members, sought an injunction against Taylor declaring a violation of treaty rights, which the federal district court refused to grant.[33] But the Supreme Court of the Territory of Washington reversed in a prescient decision that anticipated the next century of federal treaty rights decisions.

Justice John P. Hoyt thought that the basic question in the case was the intention of the Indians in reserving the fishing right in the treaties.[34] Hoyt invoked what would become known as the canons of treaty construction,[35] reasoning that the treaty language had to be "liberally

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28. *See Winans Centennial*, *supra* note 3, at 512.

29. *See id.* at 512 n.135 ("The $500 jury award remained uncollected until a forced sale of one of the defendant's belongings three years later brought $156.76.").

30. *See id.* at 513.

31. *See id.* at 516–17.

32. *See id.* Fish wheels were water-powered devices used for catching salmon that were so effective in harvesting fish that they were banned on the Columbia River in the early twentieth century. They were revolving wheels with baskets and paddles attached to their rims that use the river current to turn the wheel and lift migrating salmon out of the river. When the wheel floated on the river, the river current turned the wheel, causing the baskets to scoop down upon the salmon traveling upstream and lift them out of the water. Fish wheels are still allowed in Alaska on the Copper and Yukon Rivers. *See* Kaushik, *Catching Salmons with Fish Wheels*, AMUSING PLANET (May 28, 2015), http://www.amusingplanet.com/2015/05/catching-salmons-with-fish-wheels.html [https://perma.cc/5UWR-XRXZ].

33. *See Winans Centennial*, *supra* note 3, at 517.

34. United States v. Taylor, 3 Wash. Terr. 88, 96, 13 P. 333, 335 (1887).

35. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN TREATISE]; MATHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 5.4 (2016). The canons are basically four in number: (1) treaties are construed as the Indians would understand; (2) treaties and treaty substitutes (like statutes and executive orders) are liberally construed in favor of the Indians; (3) ambiguities are resolved in favor of the Indians; and (4) tribal sovereignty and property rights are preserved unless Congress clearly and unambiguously provides otherwise. For a recent treatment of the canons, see Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1 (2013).

construed in favor of the Indians."[36] Articulating an early version of the reserved rights doctrine, Judge Hoyt stated that "the Indians, in making the treaty . . . more likely . . . grant[ed] only such rights as they were to part with, rather than . . . conveyed all . . . ."[37] He thus concluded that the tribe possessed a servitude, a property right impressed upon Frank Taylor's homestead title.[38] Consequently, the Court enjoined Taylor and his successors from interfering with Indian "ancient" fishing practices that had been used "for generations" and recognized in the treaty language.[39] The United States Supreme Court would invoke the principles used by Judge Hoyt over the next century.

C. The Supreme Court's Decisions

During the twentieth century, conflicts between tribal and white fishermen caused the United States Supreme Court to interpret the treaty "right of taking fish" seven times.[40] The Court employed the canons of treaty interpretation[41] and, almost invariably, broadly interpreted the nature of the rights the tribes reserved in the 1850s treaties. In *United States v. Winans*,[42] which involved access to the same Celilo Falls fishery at issue in the *Taylor* dispute, the Court reversed a lower court decision that dissolved a temporary injunction prohibiting the Winans Brothers Packing Company from excluding tribal fishers.[43] In memorable words, Justice Joseph McKenna's opinion for the Court described the treaty negotiations in almost poetic language[44] and emphatically endorsed the canons of treaty interpretation:

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36. *Taylor*, 3 Wash. Terr. at 96, 13 P. at 334–35.

37. *Id.* at 335.

38. *Id.* at 336. The court rejected Taylor's argument that his land patent issued under the federal Homestead Act abrogated the treaty fishing right, stating that the statute "only authorize[d] the extinguishment of the title which the government holds at the time of the appropriation; and, if the land selected by the settler has a such time any servitude or easement impressed upon it, he takes subject thereto." *Id.*

39. *Id.* at 335–36.

40. *See infra* notes 42–54, 71–76 and accompanying text.

41. *See* COHEN TREATISE, *supra* note 35, at § 2.02[1]; FLETCHER, *supra* note 35, at § 5.4.

42. 198 U.S. 371 (1905).

43. For a detailed account of the conflict, see *Winans Centennial*, *supra* note 3, at 523–36. *See also id.* at 536–44 (explaining the significance of the *Winans* decision as (1) ratifying the rule that treaties would be construed as the tribes would understand; (2) establishing the reserved rights doctrine; (3) considering treaty rights to establish property rights; and (4) rejecting the state's "equal footing" argument).

44. "The right to resort to the fishing places in controversy was part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not

> [W]e have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.'[45]

Like the *Taylor* court, the Supreme Court interpreted the treaty fishing right to impress an easement on private lands, enabling tribal fisherman to access their reserved fishing grounds.[46] But while reading the treaty language to provide tribal fishers a property right to access historic fishing grounds, the Court also announced that the state was not restrained, "if at all," from regulating the fishery.[47] This dictum emboldened the state to use its police power during the first three-quarters of the twentieth century to consistently disadvantage tribal fishers.[48]

Soon after its historic 1905 decision, the Court expanded the nature of the tribal reserved right to extend to lands not expressly ceded by the treaties, ruling that Yakama fishers' treaty rights extended to the Oregon side of the Columbia River.[49] Later, in 1942, the Court declared that the treaties protected tribal members fishing at historic sites from state licensing fees.[50] Thus, the Court added fiscal preemption to the proscribed physical preemption of its earlier decisions.

In a series of decisions concerning the state's regulation of salmon fishing on the Puyallup River, the Court first decided that the treaties allowed the state to regulate tribal fishing in the interest of conservation of the fish, so long as the regulation was non-discriminatory and met

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much less necessary to the existence of the Indians than the atmosphere they breathed." *Winans*, 198 U.S. at 381.

45. *Id.* at 380–81 (citing Choctaw Nation v. United States, 119 U.S. 1, 30 (1886); Jones v. Meehan, 175 U.S. 1, 44 (1899)).

46. *Id.* at 381–82 (referring to the treaty fishing right as impressing "a servitude upon every piece of land as though described therein . . . intended to be continuing against the United States and its grantees as well as against the state and its grantees").

47. *Id.* at 384 ("Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.").

48. *See, e.g.*, *supra* notes 24–25 and accompanying text; United States v. Washington, 827 F.3d 836, 842–45 (9th Cir. 2016) (retracing the history of government disadvantaging tribal fishers).

49. Seufort Bros. Co. v. United States, 249 U.S. 194, 197–98 (1919).

50. Tulee v. Washington, 315 U.S. 681, 685 (1942). An unintended consequence of this decision was to make states not invested in tribal fisheries because they could not charge tribal members license fees. Since only non-tribal fishers funded the budgets of state fishery agencies, state fishery managers consequently did not think of the tribes as their constituents.

"appropriate standards."[51] But when the state decided to employ this "conservation necessity" authority to ban all net fishing on the river, the Court quickly was forced to clarify that such a ban—which affected only tribal fishers—was proscribed because it was discriminatory in effect, even though it was not facially discriminatory.[52] The state's definition of conservation was overbroad, as it sought to "conserve" salmon for non-tribal fishers.[53] Perhaps recognizing the state's persistent regulatory bias, the Court called for "fairly apportioned" harvests between tribal and non-tribal fishers.[54] Lower courts were already grappling with devising such an allocation to safeguard the treaty fishing right.

II. THE BOLDT DECISION AND ITS AFTERMATH

In the 1960s, Oregon and Washington routinely arrested tribal members for fishing in violation of state conservation regulations.[55] In one such case, Judge Robert Belloni of the United States District Court for the District of Oregon rejected the State of Oregon's argument that the treaties gave the tribes only an equal opportunity to fish with others,

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51. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398, 401–03 (1968) [hereinafter *Puyallup I*] (without identifying which standards were "appropriate").

52. Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 48–49 (1973) [hereinafter *Puyallup II*]. Justice William Douglas wrote *Puyallup I* and *II*. David Getches considered Douglas foremost an environmentalist when treaty rights and the environment (in this case "the last living steelhead") clashed. David H. Getches, *Conquering the Culture Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1632 n.284 (1996).

53. Professor Johnson presciently warned of the trouble that the Court's loose interpretation of conservation would cause in a critique of the *Puyallup I* decision. Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 208–09 (1972).

54. *Puyallup II,* 414 U.S. at 48–49. The Supreme Court was unable to extricate itself from the *Puyallup* controversy without issuing a third opinion, after the Ninth Circuit ruled that the tribal fishing at issue was actually on-reservation, not—as the Supreme Court had assumed—off-reservation, because the appeals court ruled that the Puyallup reservation had not been extinguished. Fearing that an exclusive on-reservation right would allow tribal fishermen to "interdict completely the migrating fish run and 'pursue the last living [Puyallup River] steelhead,'" the Court affirmed a state court's allocation of forty-five percent of steelhead harvests to the tribe. Dep't of Game v. Puyallup Tribe, 433 U.S. 165, 176–77 (1977) [hereinafter *Puyallup III*].

55. For example, David Sohappy was arrested for fishing with a net in violation of state regulations. Like Sampson Tulee before him, Sohappy was jailed, and the case was a criminal offense. One tribal leader, Billy Frank, Jr., later awarded the Martin Luther King, Jr. Distinguished Service Award for Humanitarian Achievement, was arrested over fifty times. *See* THE LIFE AND LEGACY OF BILLY FRANK, JR., http://billyfrankjr.org/ [https://perma.cc/7YYF-UNUA]; *see generally* CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 4 (2000) (explaining that Billy Frank, Jr. was arrested more than fifty times by state law enforcement officials in the 1950s and 1960s for fishing in violation of state regulations).

subject to state regulation.[56] This regulation limited fishing on the Columbia River above Bonneville Dam to hook-and-line fishing, effectively eliminating traditional tribal net fishing.[57] Striking down the state regulation in memorable words,[58] Belloni ruled that the tribes were entitled to a "fair share" of the harvests,[59] although he did not define what precisely those terms meant.[60] In a similar case, involving Puget Sound fisheries, Judge George Boldt would soon do so.

Following the Belloni Decision, tribal members continued to be arrested for off-reservation fishing, especially in Puget Sound.[61] The tribes and the federal government filed suit in 1970, claiming that the treaty fishing promise assured them: (1) a fair allocation of harvests; (2) inclusion of hatchery fish in that allocation; and (3) protection of the environment and habitat necessary to provide meaningful subsistence and commercial harvests.[62] Judge Boldt heard evidence for some three years on the first issue, while deferring consideration of the latter two issues.

Invoking the canons of treaty interpretation, Boldt decided that the state's regulatory scheme systematically discriminated against the tribal fishing right by closing historic fishing sites to net fishing to the extent that at the time of trial the tribes were harvesting only about two percent

56. Sohappy v. Smith, 302 F. Supp. 899, 910–11 (D. Or. 1969).

57. *See* SACRIFICING SALMON, *supra* note 12, at 79.

58. *Sohappy*, 302 F. Supp. at 905 (responding to the state's equal opportunity argument, the court stated, "Such a reading would not seem unreasonable if all history, anthropology, biology, prior case law and the intention of the parties to the treaties were to be ignored.").

59. *Id.* at 911.

60. Judge Belloni did order the state to adopt an objective of treating the tribal fishery "co-equal with the conservation of fish runs for other users." *Id.* He later established detailed standards and procedures for the state to follow in producing this co-equal status, including: (1) enabling the tribes to "participate meaningfully" in the development of harvest regulations, and (2) requiring such regulations to be "the least restrictive which can be imposed [on the tribes] consistent with assuring the necessary escapement of fish for conservation." *Id.* at 907, 912; Sohappy v. Oregon, No. 68-409, 68-513 slip op. at 5, 8 (D. Or. July 8, 1969). *See also* Timothy Weaver, *Litigation and Negotiation: The History of Salmon in the Columbia Basin*, 24 ECOLOGY L.Q. 677, 680–81 n.12 (1997) (reprinting a portion of Judge Belloni's unreported decision). Belloni gave a video interview concerning the case to the Columbia River Inter-Tribal Fish Commission: *Empty Promises, Empty Nets: Chinook Trilogy, vol. 2*, YOUTUBE (Feb. 19, 2013), https://www.youtube.com/watch?v=URkgvvNNQVQ.

61. *See* ROBERTA ULRICH, EMPTY NETS: INDIANS, DAMS, AND THE COLUMBIA RIVER 133 (1999). A fish-in during the summer of 1970, staged to protest the arrests, led to a raid by federal agents only weeks before the filing of the suit that later became known as the Boldt Decision. *See* WILKINSON, *supra* note 55, at 5 (illustrating the fish-in that led to sixty-two people being arrested).

62. *See* Boldt Decision, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd in part, vacated in part*, 443 U.S. 658 (1979).

of the salmon.[63] Consequently, echoing Judge Belloni, Judge Boldt determined that the treaty "right of taking fish" required a fair allocation of harvests; however, he proceeded to define the treaty language "in common with" to mean a property right to half of the harvests.[64] He therefore directed the state to limit non-treaty fishing to meet this treaty obligation.[65]

Although Judge Boldt's decision was a judicial landmark, implementing the court's decree became problematic, as the decision generated widespread public outrage and state resistance.[66] This recalcitrance prompted the Ninth Circuit, in affirming the decision, to remark that "[e]xcept for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century."[67] The state exacerbated the situation by claiming that it lacked authority to implement the injunction, and the Washington State Supreme Court agreed.[68] The upshot was that Judge Boldt had to issue numerous orders managing the fish harvests for several years.[69] Perhaps influenced by the state's intransigence in implementing a federal court decree that had been twice affirmed by the Ninth Circuit,[70] the United States Supreme Court agreed to interpret the meaning of the "right of taking" once again, for the fourth time in eleven years.

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63. *Id.* at 393 (noting that the state had closed many historic tribal fishing sites to net fishing while "permitting commercial [non-Indian] net fishing for salmon elsewhere on the same runs of fish"). *See also* Washington v. Commercial Fishing Vessel Ass'n, 443 U.S. 658, 676–77 n.22 (1979) (two percent of harvests).

64. Boldt Decision, 384 F. Supp. at 343 (construing "in common with" to mean "[b]y dictionary definition and as intended and used in the . . . treaties[,] . . . *sharing equally* the opportunity to take fish").

65. *Id.*

66. *See, e.g.*, WILKINSON, *supra* note 55, at 58 (noting that Judge Boldt was hung in effigy by those protesting his decision).

67. Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123, 1126 (9th Cir. 1978) (citations omitted).

68. Wash. State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (Wash. 1977) (en banc), *vacated*, 443 U.S. 658 (1979); Puget Sound Gillnetters Ass'n v. Moos, 88 Wash. 2d 677, 565 P.2d 1151 (Wash. 1977) (en banc), *vacated*, 443 U.S. 658 (1979) (state court found that under state statutes and the state constitution the state lacked authority to recognize "special rights" for tribal fishers).

69. In fact, Judge Boldt's orders managing the salmon fishery during 1977–79 were so numerous that it took West Publishing Company two volumes to collect them. UNITED STATES V. STATE OF WASHINGTON, U.S. DIST. COURT, WESTERN DIST. OF WASHINGTON, 1974–1985 (VOL. I) & 1985–2013 (VOL. 2) (Thomson Reuters 2015).

70. Puget Sound Gillnetters Ass'n, 573 F.2d 1123 (9th Cir. 1978) (upholding Judge Boldt's management of the fisheries); Unites States v. Washington, 520 F.2d 676 (9th Cir. 1975).

In 1979, the Court largely affirmed Judge Boldt in a 6-3 decision.[71] Justice Stevens, writing for the majority, applied the canons of treaty interpretation[72] and construed the treaty fishing right language to preserve for the tribes a *supply* of fish—not merely an *opportunity* to fish. He cited Governor Stevens' specific promise that the salmon would provide a continuous "source of food and commerce."[73] According to the Court, the treaties prevented the state from "crowd[ing] the Indians out" of the tribal fishery and guaranteed the tribes a fishing livelihood, up to fifty percent of the harvests.[74] The Court's affirmation of Judge Boldt on the harvest share issue[75] did not, however, resolve the other two issues before the district court: (1) whether hatchery fish were included within the tribes' allocated share; and (2) whether the treaties protected the fish against habitat-damaging activities. Those issues would occupy the attention of Judge Boldt's successors.[76]

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71. Washington v. Commercial Fishing Vessel Ass'n, 443 U.S. 658, 696–97 (1979). Justice Powell wrote a dissent in which Justices Stewart and Rehnquist joined. *Id.* at 696 (claiming that the treaty language should not be interpreted to guarantee a specific harvest share).

72. *Id.* at 676 ("[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.") (citing Jones v. Meehan, 175 U.S. 1, 11 (1899)).

73. *Id.*

74. *See id.* at 676, 686 ("[T]he central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood—that is, to say, a moderate living."); *id.* at 687 n.27 ("The logic of the 50% ceiling is manifest. For an equal division—especially between parties who presumptively treated with each other as equals—is suggested, if not necessarily dictated, by the word 'common' as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset . . . ."). The Court opined that the "moderate living" standard would allow a judicial reduction below 50% if a tribe: (1) dwindled to just a few members; or (2) abandoned its fisheries. *Id.* at 687. No evidence of either condition has appeared since the Court's 1979 opinion. On the significance of the insertion of the moderate living language by Justice Stevens, see *Resounding Reaffirmation*, *supra* note 5, at 672 n.100 (explaining that Justice Marshall's papers suggested that Justice Stevens thought the language was necessary to preserve the six-member majority).

75. The Supreme Court made two modifications to Judge Boldt's decision: (1) including on-reservation harvests as well as off-reservations harvests in the tribal share; and (2) excluding harvests outside the state of Washington (in Alaskan and Canadian waters) in the non-tribal share. *Fishing Vessel*, 443 U.S. at 687–89. The latter exclusion would require an international agreement reducing salmon interceptions in the North Pacific. The Treaty Between the Government of the United States of America and the Government of Canada Concerning Pacific Salmon, March 18, 1985, T.I.A.S No. 11,091. *See also* SACRIFICING SALMON, *supra* note 12, at 161–72.

76. Judge Boldt, who was appointed to the federal bench by President Dwight D. Eisenhower in 1953, had retired from the case by the time of the Supreme Court's opinion in 1979. He suffered from Alzheimer's disease in his later years and died in 1984 at the age of 80. *See* Wolfgang Saxon, *Judge George H. Boldt Dies: Ruling Set Off Fishing Battle*, N.Y. TIMES (March 21, 1984), http://www.nytimes.com/1984/03/21/obituaries/judge-george-h-boldt-dies-ruling-set-off-fishing-battle.html [https://perma.cc/LJA6-8A5D].

III. BEYOND THE BOLDT DECISION: THE HATCHERY AND HABITAT ISSUES

The courts resolved the hatchery fish issue rather quickly. The district judge who succeeded Judge Boldt, Judge William Orrick,[77] ruled that the hatchery fish were included within the tribes' allocation because the tribes reserved not merely a share of treaty-time harvests but also a share of future fish runs. Judge Orrick also stated that hatchery fish had become the overwhelming mitigation choice for spawning fish damaged by development activities like dam construction and operation.[78] A panel of the Ninth Circuit agreed,[79] as did an en banc panel.[80]

But the habitat question proved more vexing. Judge Orrick ruled that the treaties protected fish habitat because the "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[81] He reasoned that if the state could degrade fish habitat without limitation, the tribes' ability to pursue the Supreme Court-sanctioned "moderate living" would be jeopardized, threatening the

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77. Judge William Orrick of the Northern District of California was appointed by the Ninth Circuit as Judge Boldt's successor, as apparently no member of the Western District of Washington wanted to succeed Judge Boldt in such a controversial case. Judge Orrick was appointed to the federal bench by President Nixon in 1974, presided over San Francisco's long-running school desegregation case and a civil rights suit challenging jail conditions, and he sentenced Patti Hearst to seven years for a bank robbery. He died in 2003 at the age of 87. *See* Reynolds Holding, *William Orrick—U.S. District Judge (obituary)*, S.F. GATE (Aug. 16, 2003), http://www.sfgate.com/bayarea/article/William-Orrick-U-S-district-judge-2595886.php [https://perma.cc/3BC2-DYXL].

78. United States v. Washington, 506 F. Supp. 187, 198–99 (W.D. Wash. 1980) [hereinafter Orrick Decision]. Judge Orrick also observed that hatchery fish were difficult to distinguish from spawning fish until harvested; hatchery fish were planted not merely by the state but also by the federal government; and under wild animals law the state had no claim to ownership of the fish once released to the wild. *Id.* at 196, 201 ("the Supreme Court has flatly rejected the notion that a state owns fish swimming within its waters"); *id.* at 202 ("[a]lthough the State provides considerable funding for its hatchery program, it is undisputed that federal and local governments as well as private parties also contribute to the construction and operation of State-run hatcheries."). A three-judge concurrence in *Puyallup II* had encouraged the state to argue that the "Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 49–50 (1973) (*Puyallup II*) (White, J., concurring).

79. United States v. Washington, 694 F.2d 1374, 1379–85 (9th Cir. 1982).

80. United States v. Washington, 759 F.2d 1353, 1358–60 (9th Cir. 1985) (en banc).

81. Orrick Decision, 506 F. Supp. at 203. Judge Orrick noted that the Supreme Court in affirming Judge Boldt found that the primary purpose of the treaty fishing right was to preserve the tribes' economic and cultural way of life, and that federal negotiators "specifically assured the tribes that they could continue to fish notwithstanding the changes that the impending western expansion would certainly entail." *Id.* at 204.

tribes with empty-net fishing, which the Court had also proscribed.[82] Therefore, Orrick established what appeared to be a rigorous formula for determining whether an activity violated the treaty right.[83] The state appealed, and a divided Ninth Circuit panel affirmed but suggested that all the treaties required from the state were "reasonable steps" in light of its resources to preserve and enhance the fishery.[84]

The tribes and the federal government sought and obtained en banc review, and a divided Ninth Circuit[85] decided that it was judicially imprudent to determine the habitat issue via a declaratory judgment without concrete facts. Therefore, the Ninth Circuit vacated the lower court's decision on this issue,[86] although it largely affirmed on the

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82. *Id.* at 208 (citing Washington v. Commercial Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979)) (specifying that the tribes' fifty percent share was a ceiling, not a floor, and that the treaties guaranteed the tribes "so much as but no more than is necessary to provide the Indians with a livelihood—that is to say, a moderate living."). *See supra* note 74 on the moderate living language.

83. Judge Orrick's formula presumed that until the tribes' share of the harvests was reduced to less than fifty percent, their "moderate living" needs were unmet. Until they were met, the state bore the burden of showing that

> any environmental degradation of the fish habitat proximately caused by the State's actions (including the authorization of third parties' activities) will not impair the tribes' ability to satisfy their moderate living needs. Naturally, the plaintiffs must shoulder the initial burden of proving that the challenged action(s) 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.

Id. at 208.

84. United States v. Washington, 694 F.2d 1347, 1381 (9th Cir. 1982) [hereinafter *1982 Washington*], rejected Judge Orrick's formula, *supra* note 83, fearing it would amount to an "environmental servitude with open-ended and unforeseeable consequences." *Id.* The panel decision, written by Judge Joseph Sneed, also decided, without explanation, that the treaty obligations did not burden private parties. *Id.* at 1381 n.15. This result was completely inconsistent with the Supreme Court's *Winans* decision. *See supra* note 46 and accompanying text. Judge Stephen Reinhart wrote separately to suggest that there was little practical difference between the Orrick formula and the new "reasonableness" test, emphasizing that the treaty right did in fact protect the salmon supply against severe habitat degradation. *Id.* at 1390 (Reinhart, J., concurring).

85. United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (en banc) [hereinafter *1985 Washington*]. The case engendered six different opinions, including four different concurrences (two of which included partial dissents), and a dissent. For a discussion of the various opinions in the case, see *Resounding Reaffirmation*, *supra* note 5, at 675–76 & n.129.

86. The court's per curiam decision suggested that Judge Orrick should not have ruled on the habitat issue without concrete facts as a matter of judicial prudence, stating, "The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case." *1985 Washington*, 759 F.2d at 1357. But the en banc court also vacated the three-judge panel "reasonableness" test for judging state compliance with the treaty right, although a concurrence would have affirmed the panel decision. *Id.* at 1360 (Sneed, J. and Anderson, J., concurring).

hatchery question.[87] Thus, in 1985, the tribes stood in roughly the same position on the habitat issue as they did when they filed the case fifteen years before: with no clear indication whether the treaties protected the fish that were the essential bargain for the largely peaceful white settlement that followed their signing in the 1850s.

IV. THE CULVERTS CASE IN THE DISTRICT COURT

The tribes spent much of the ensuing decade-and-a-half pursuing other means of fish restoration, particularly efforts to rebuild salmon runs, such as through the Northwest Power and the Endangered Species Acts.[88] Some lower-court case law involving particular dams, pipelines, marinas, fish farms, and water rights suggested that the treaty right could restrain habitat-destructive actions, particularly those that blocked access to historic fishing sites.[89] But by the turn of the century, there was no definitive ruling on whether the treaties protected fish from environmental degradation of their habitat.

Between 1985 and 2001, the tribes searched for factual settings that would satisfy the Ninth Circuit's demand for concrete evidence on the habitat issue. They eventually arrived at road culverts constructed and maintained by the state, which was an auspicious choice because the effect of poorly constructed or operated culverts is often quite dramatic: salmon migrating and spawning below the barrier culverts, but not at all above.[90] As a result, the tribes and the federal government filed a new

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87. *Id.* at 1357–60 (finding the hatchery issue to be sufficiently particularized to be subject to judicial resolution, but determining that Judge Orrick improperly concluded that the tribal harvest share was a minimum share when in fact it was a maximum).

88. *See* SACRIFICING SALMON, *supra* note 12, at 129–60, 173–217.

89. For example, in 1981, Judge Belloni ordered a trial on the effects on treaty fishing rights of the proposed Northern Tier Pipeline that would have crossed Puget Sound to serve an oil terminal at Port Angeles, but the pipeline was soon abandoned. No Oilport! v. Carter, 520 F. Supp. 334, 372–73 (W.D. Wash. 1981). In 1988, the Muckleshoot and Suquamish Tribes obtained a preliminary injunction temporarily stopping construction of a residential development in Elliot Bay that would have blocked tribal access to an historic fishing site without congressional approval, reinforcing an access component to the treaty fishing right. Muckleshoot v. Hall, 698 F. Supp. 1504, 1505–06, 1518–22 (W.D. Wash. 1988). And in 1996, the district court upheld the U.S. Army Corps of Engineers denial of a federal permit for a proposed "net pen" for a fish farm in Rosaria Straight because of adverse effects on the Lummi Tribe's fishing rights, which the court ruled that the Corps had no right to diminish, because "only Congress has such power." Nw. Sea Farms v. U.S. Army Corps of Engineers, 931 F. Supp. 1515, 1519–23 (W.D. Wash. 1996). For discussion of these and similar cases, see Robert T. Anderson, *Federal Treaty and Trust Obligations, and Ocean Acidification*, 6 WASH. J. ENVTL. L. & POL'Y 474, 488–90 (2016); SACRIFICING SALMON, *supra* note 12, at 256–71; *Piscary Profit*, *supra* note 18, at 462–89.

90. A recent academic paper claimed that it would be "difficult to overstate the threat which culverts pose to salmonid species throughout the Pacific Northwest," pointing out that there are

subproceeding in the original *United States v. Washington* case in 2001; Judge Ricardo Martinez was assigned the case.[91]

A. The 2007 Decision

Six years later, after extensive briefing,[92] Judge Martinez handed down a decision granting the tribes' request for declaratory relief but deferring a determination on injunctive relief.[93] The Martinez Decision emphasized that the treaty fishing right was an essential part of the bargain that led to one of the largest peaceful real estate transactions in

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more than 10,000 culverts on fish-bearing streams on federal lands in Washington and Oregon alone. Christine Miller, If You Teach a Man to Fish: Barrier Culvert Removal in Washington State 14 (Apr. 29, 2016) (unpublished paper written for University of Idaho Law Professor Barbara Cosens' seminar on Law, Science and the Environment, on file with the author) (citing David Price, Timothy Quinn & Robert J. Barnard, *Fish Passage Effectiveness of Recently Constructed Road Crossing Culverts in the Puget Sound Region of Washington State*, 30:1 N. AM. J. FISHERIES MGMT. 1100, 1100). Of the 3,000 culverts managed by the Washington State Department of Transportation, sixty percent are barriers to fish. According to one commentator:

> The problem of fish barrier culverts is more widespread than simply limiting the ability of adult salmon to return to spawning grounds. Movement is essential for thesuccessful life-cycle completion and persistence of populations of all animal species.Movement can be broken down into four categories: station keeping, ranging, migration,and accidental displacement, all of which Western salmonids express. Station keepingoccurs within an animal's home range and includes foraging, commuting and territorial behavior. Ranging occurs when animals leave their home range for a short time in orderto explore new habitat. Migrations occur when animals make regular, predictable longdistance movement. Accidental displacments are caused by unpredictable environmentaland human-caused events such as fire, flood, hurricane or habitat alteration and destructionby humans. The ability to move is crucial to every part of the salmonid cycle.
>
> Salmonids require a multitude of habitats for their life-cycles. They utlize different habitats for spawning, rearing and refuge, and each of these habitats must be connected. The problem is complicated by the fact that different salmonid specieshave different movement patterns and habitat requirements. However, regardlessof the type of salmonide population, they must be able to move in order for populations to persist. Salmonids require spawning habitats which have cool,clear water and stable gravel beds. Juvenial salmonids require a diverse and connected habitat which utlilizes practically every segment with the stream environment. Salmonids require a diverse connected habitat which culvertscan adversely affect in a variety of ways.

Id. at 15–16 (citing R. Hoffman & J. Dunman, *Fish-Movement Ecology in High-Gradient Streams: Its Relevance to Fish-Passage Restoration Through Steam Culvert Barriers* U.S. Geological Survey Rep. 2007-1140 (2007)) (pointing out that loss of mobility due to culverts can create genetic bottle-necks, loss of genetic diversity and a reduction in population sizes, and that "[e]ven after culvert removal the effects of genetic bottlenecking in affected populations will persist for generations." Miller, *supra*, at 17).

91. Judge Martinez was appointed to the federal bench by President George W. Bush in 2003 and confirmed in 2004. He became chief judge of the Western District of Washington in 2016.

92. *See, e.g.*, *Resounding Reaffirmation*, *supra* note 5, at 683–87 (discussing some of the briefs).

93. Martinez Decision, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007).

history,[94] concluding that the treaties required the state to refrain from building or operating road culverts that hinder fish passage.[95]

Judge Martinez first determined that road culverts were responsible for "some portion of the diminishment" of the tribes' harvestable fish, even if the tribes could not provide an exact figure of the amount of fish taken by culverts.[96] Second, he denied that recognizing such a right imposed a broad environmental servitude or imposed an affirmative duty on the state to take all possible measures to protect tribal fisheries.[97] Third, he rejected the state's argument that the Supreme Court's "moderate living" standard was unenforceable and instead ruled the standard could be applied to barrier culverts with the aid of the treaty rules of construction.[98] For all of these reasons, Judge Martinez ruled that the treaties' reservation of the tribes' "right of taking fish" was more than merely an opportunity to fish.[99]

Quoting extensively from the Supreme Court's affirmance of Judge Boldt's decision,[100] the court decided that the assurances by the United States' treaty negotiators that the tribes could continue their historical fishing practices "would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource."[101] Thus, he determined that the treaty "right of taking fish" included a right of habitat protection which the state had violated through its construction and operation of road culverts blocking fish passage.[102]

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94. *Id.* at *10.

95. *Id.*

96. *Id.* at *3. A 1997 state study estimated that barrier culverts under control of the Washington Department of Transportation blocked some 249 linear miles of stream consisting of over 1.6 million miles of salmon habitat sufficient to produce some 200,000 salmon per year. *See* United States v. Washington, 827 F.3d 836, 857 (9th Cir. 2016). But the Ninth Circuit determined that the evidence before Judge Martinez indicated that "the total habitat blocked by state-owned barrier culverts in the Case Area is capable of producing several times the 200,000 mature salmon specified in the 1997 report." *Id.* at 859 (finding that barrier culverts blocked almost 1,000 linear miles of streams, amounting to almost 5 million square miles of salmon habitat).

97. Martinez Decision, No. CV 9213RSM, 2007 WL 2437166 at *5 ("A narrowly-crafted declaratory judgment such as the one requested here does not raise the specter of a broad 'environmental servitude' so feared by the State.").

98. *Id.* at *5–6 (concluding that "'[m]oderate living' . . . is neither a 'missing term' in the contract, nor a meaningless provision; it is a measure created by the Court. To the extent that it needs definition, it would be for the Court, not the Tribes, to define it.").

99. *Id.* at *7–8.

100. *Id.* at *5–7.

101. *Id.* at *10.

102. *Id.*

B. The 2013 Injunction

After a bench trial, and fruitless negotiations attempting to settle the case, Judge Martinez issued a decision on injunctive relief in 2013.[103] The court directed the state to identify, in consultation with the tribes and the federal government, all barrier culverts under state-owned roads using a prescribed methodology.[104] The court then ordered the state by October 2016 to fix 180 barrier culverts within the case area owned or managed by the state fish and wildlife, natural resources, and parks agencies,[105] which the state claimed it had planned to do anyway. For the more than 800 barrier culverts under the jurisdiction of the state transportation agency that blocked at least 200 meters of linear habitat, Judge Martinez gave the state seventeen years—or until 2030—to fix them.[106] But he also provided an exemption for up to ten percent of the transportation agency's culverts under certain conditions that included consultation with the tribes and the federal government and a physical survey of the habitat blocked by each culvert.[107] The state must also fix all remaining barrier culverts at the end of the culvert's usual life or in connection with a new highway project, whichever comes first.[108]

The injunction also authorized the state to deviate from prescribed passage standards "in rare circumstances" on emergency grounds and under extraordinary conditions,[109] and established monitoring conditions to ensure that fixed barrier culverts continue to supply requisite fish passage.[110] The state must provide notice to the tribes of any changes in its culverts inventory, including the identification of previously unidentified barrier culverts, so the tribes can monitor state implementation of the injunction.[111] Finally, and importantly, the court retained continuing jurisdiction "for a sufficient period" to oversee state

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103. Martinez Injunction, No. CV 70-9213, 2013 WL 1334391 (W.D. Wash. March 29, 2013).

104. *Id.* at *2 n.2 (citing the Fish Passage Barrier and Surface Water Diversion Screening Assessment and Prioritization Manual); *see also* United States v. Washington, 827 F.3d 836, 848 (9th Cir. 2016) (discussing the trial court's injunction).

105. Martinez Injunction, No. CV 70-9213, 2013 WL 1334391 at *3 n.5. All new culverts had to meet prescribed fish passage standards. *Id.* at *3 n.4 (new culverts), *4 n.9 (existing culverts).

106. *Id.* at *3 n.6; *see* United States v. Washington, 827 F.3d at 856–57.

107. Martinez Injunction, No. CV 70-9213, 2013 WL 1334391 at *3–4 n.8; *see* United States v. Washington, 827 F.3d at 857.

108. Martinez Injunction, No. CV 70-9213, 2013 WL 1334391*3 n.7.

109. *Id.* at *4–5 n.10.

110. *Id.* at *5 n.12.

111. *Id.* at *5 n.13.

compliance.[112] The state appealed, claiming that the treaties provided no habitat protection injunction and maintaining that the Martinez Injunction was overbroad, expensive, and would often produce little practical gain.[113]

V. THE NINTH CIRCUIT'S AFFIRMATION OF THE MARTINEZ DECISION

In 2016, nine years after Judge Martinez declared that the state's road culverts violated the treaty fishing right, and three years after he issued his injunction, a unanimous Ninth Circuit panel affirmed without modification.[114]

A. Affirming the Treaty Right to Habitat Protection

At the outset, Judge William Fletcher, who had incredulously questioned the state's suggestion at oral argument that it could destroy all the salmon runs,[115] dismissed the state's argument that the Stevens Treaties promised the tribes only half of the available harvest, not that "any fish will, in fact, be available."[116] The court specifically rejected the state's contention that the main purpose of the treaties was to open the region to white settlement, explaining that the state failed to interpret the treaties as the tribes would understand, and the Indian understanding was that treaties would provide a means of supporting themselves through continued salmon harvests.[117] Salmon were—in the words of the 1905 Supreme Court—"not much less necessary to the existence of the [tribes] than the atmosphere they breathed."[118] Judge Fletcher emphasized that the tribes did not understand the treaties to allow the government "to diminish or destroy the fish runs"; interpreting the

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112. *Id.* at *5 n.14.

113. *See* Mapes, *supra* note 11.

114. United States v. Washington, 827 F.3d 836 (9th Cir. 2016); *see also infra* note 156 and accompanying text.

115. *Washington*, 827 F.3d at 850 (quoting from the state's concession at oral argument that the treaties would not prohibit the state from damming every salmon stream in the Puget Sound basin).

116. *Id.* at 849.

117. *Id.* at 851 ("Washington has a remarkably one-sided view of the Treaties . . . . Opening up the Northwest for white settlement was indeed the principle purpose of the United States. But it was most certainly not the principal purpose of the Indians. Their principal purpose was to secure a means of supporting themselves once the Treaties took effect."). Construing treaties as the tribes would understand is one of the canons of treaty interpretation. *See supra* note 35.

118. *Id.* (quoting United States v. Winans, 198 U.S. 371, 381 (1905)). On the *Winans* decision, see *Winans Centennial*, *supra* note 3.

treaties in "such a cynical and disingenuous" fashion would be wholly inconsistent with Governor Stevens' assurances that the treaties would supply them "food and drink . . . forever."[119]

Even had Stevens not expressly promised the tribes that salmon would remain abundant, the rules of treaty interpretation would have led the Ninth Circuit to infer such a promise.[120] The court relied on two landmark cases that found implied tribal rights: *Winters v. United States*[121] and *United States v. Adair*.[122] The former applied reserved rights to water, because a tribal land reservation's purpose—to make the tribes "pastoral and civilized"[123]—could not be achieved without an implied right of water for irrigation.[124] The latter inferred a water right for the Klamath Tribe's reservation to sustain treaty-reserved hunting and fishing rights in Klamath Marsh.[125] Relying on the Supreme Court's decision affirming Judge Boldt, the Ninth Circuit stated that "even in the absence of explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes."[126]

The court also used the rules of treaty interpretation to reject the state's allegation that the federal government's actions and inactions over the years led the state to believe the government had waived its

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119. *Id.* The Ninth Circuit's use of the canons of treaty interpretation was fully consistent with recent Supreme Court case law like *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (using the canons to construe an 1837 treaty ceding lands to the federal government but retaining the right to hunt, fish, and gather to survive a subsequent treaty, executive order, and statute), where all nine members of the Court endorsed the canons; *see id.* at 196, 200 (majority); *id.* at 218 (dissent) ("[U]sing our canons of construction that ambiguities in treaties are often resolved in favor of the Indians . . . ."); United States v. Brown, 777 F.3d 1025, 1031 (8th Cir. 2015) (using the canons to interpret the same 1837 treaty to bar federal prosecution of tribal members fishing on-reservation in violation of a tribal code).

120. *Washington,* 827 F.3d at 852 ("Even if Governor Stevens had not explicitly promised that 'this paper secures your fish,' and that there would be food 'forever,' we would infer such a promise.").

121. Winters v. United States, 207 U.S. 564 (1908) (concluding that the federal government implicitly reserved water rights for an Indian irrigation project when it set aside land for the Fort Belknap reservation).

122. United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) (implying "time immemorial" water rights to fulfill the Klamath Reservation's fishing and hunting purposes) (authored by the late judge, Betty Fletcher, William Fletcher's mother).

123. *Winters*, 207 U.S. at 576.

124. *Washington*, 827 F.3d at 852.

125. *See id.*

126. *Id.* at 852–53 (citing Washington v. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979), to the effect that "[s]almon now available for harvest are not sufficient to provide a 'moderate living' to the Tribes."). On the Supreme Court's moderate living language, see *supra* note 74.

right to enforce the treaties. The state cited a number of federal actions and inactions implementing the Endangered Species and Clean Water Acts and federal funding of highways with culverts designed according to federal standards.[127] But the court ruled that such a treaty abrogation required "an Act of Congress that 'clearly express[es an] intent to do so.'"[128] And not only was there no statute terminating rights reserved by the Stevens Treaties, the federal government, as trustee, joined the tribes in asserting those rights in the case.[129]

The state's effort to invoke the Supreme Court's *City of Sherrill v. Oneida Indian Nation*[130] as support for its claim that the equitable doctrines of laches or estoppel prevented the federal government from asserting the treaty right also proved unavailing. Judge Fletcher distinguished *Sherrill* on the ground that the Oneida tribe had abandoned its land and let its aboriginal rights claim fall dormant; the Stevens' Treaty tribes had done neither—in fact, they had been contesting in court state actions affecting their fishing rights for over a century.[131] Moreover, the court reaffirmed its rule that neither laches, nor estoppel, nor waiver may defeat Indian treaty rights.[132]

The state also failed to convince the court that the federal government had an obligation to fix its own road culverts before suing the state. The state argued that the district court's injunction requiring it to fix offending barrier culverts was unfair and imposed a disproportionate burden on the state.[133] But the Ninth Circuit affirmed the district court on both sovereign immunity and standing grounds. On the former, the court ruled that sovereign immunity protected the federal government from affirmative relief in the absence of its consent.[134] On the latter, in the

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127. *See Washington*, 827 F.3d at 854.

128. *Id.* (citing Minnesota v. Mille Lacs, 526 U.S. 172, 202 (1999)).

129. *Id.* ("The United States, as trustee for the Tribes, may bring suit on their behalf to enforce the Tribes' rights, but the rights belong to the Tribes.").

130. City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005) (ruling that tribal purchase of land with aboriginal rights did not revive the tribal sovereignty over the land because of a roughly 200-year period of time in which the tribe allegedly had not sought to regain title).

131. *Washington*, 827 F.3d at 855 ("The Tribes have not abandoned their reservations . . . . Washington and the Tribes have been in a more or less continuous state of conflict over treaty-based fishing fights for over one hundred years.").

132. *Id.* at 854 (citing Cramer v. United States, 261 U.S. 219, 234 (1923)); United States v. Washington, 157 F.3d 630, 649 (9th Cir. 1998). Concerning the waiver claim, the court decided that "[b]ecause the treaty rights belong to the Tribes rather than the United States, it is not the prerogative of the United States to waive them." *Washington*, 827 F.3d at 854.

133. *See Washington*, 827 F.3d at 855.

134. *Id.*

process of rejecting the state's standing, the court clarified that the federal government's culverts did in fact violate the treaties, no less than the state's culverts did.[135] The court concluded, however, that the state lacked standing to enforce the treaty right of the tribes which, Judge Fletcher noted, had "not sought redress against the United States in the proceeding now before us."[136]

If there were no right to protect the environment necessary to preserve fish habitat, the Ninth Circuit thought that the state could impermissibly "crowd the Indians out of any *meaningful use* of their accustomed places to fish," something the Supreme Court had proscribed.[137] In effect, the tribes' "in common" treaty right was a tribal property right that protected them from being "crowded out" of their historic fisheries and preempted contrary state action.[138]

B. Affirming the Martinez Injunction

The state's best chance to change the Martinez Decision was probably to challenge the scope of the injunction the court ordered: (1) requiring the state to fix barrier culverts that it had already committed to fix; (2) prescribing a seventeen-year period for fixing the majority of barrier culverts; but (3) also providing an exemption for ten percent of the priority culverts; and (4) not requiring the state to fix non-priority culverts until the end of their life, or when there was a new roadway project.[139] But because the state thought the injunction was unjustified, it

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135. *Id.* at 856 ("Our holding that Washington has violated the Treaties in building and maintaining its barrier culverts violated the Treaties necessarily means that the United States has also violated the Treaties in building and maintaining its own barrier culverts.").

136. *Id.*

137. *Id.* at 852 (emphasis in original) (quoting Washington v. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676–77 (1979)) ("Governor Stevens and his associates were well aware of the 'sense' in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would *protect that source of food and commerce* were crucial in obtaining the Indians' assent. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter should be excluded from their ancient fisheries, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any *meaningful use* of their accustomed places to fish.") (emphasis in original).

138. Washington v. Commercial Fishing Vessel Ass'n, 443 U.S. at 676. The proscription against "crowding out" the tribes from the fishery was an antimonopolistic sentiment typical of nineteenth century public land policies. *See generally* Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENVTL. L. REV. 155, 159–84 (2016) (tracing antimonopoly policies in the nineteenth century).

139. *See supra* notes 103–09 and accompanying text.

refused to participate in negotiating its terms.[140] This strategy turned out to be a colossal mistake, as neither the district court nor the Ninth Circuit gave deference to the state's position concerning how to implement the treaty fishing right.[141]

After reviewing the evidence before the lower court,[142] the Ninth Circuit rejected the state's claims that there was no evidence in the record that state-owned culverts had a significant effect on salmon production, citing the state's own studies contradicting this allegation.[143] In fact, the court concluded that the state studies had underestimated the effect of fixing deficient barrier culverts, finding a habitat capability of producing "several times the 200,000 mature salmon" specified in a 1997 state report that referred to barrier culverts as "one of the most recurrent and correctible obstacles" to restoring healthy salmon runs.[144] The court also relied heavily on tribal experts—as well as the state's—concerning the importance of fixing culverts that block salmon migration, and thus rejected the state's claim that the lower court had no evidence to support its injunction.[145]

The Ninth Circuit dismissed the state's contention concerning the overbreadth of the district court's injunction. The court took particular issue with the state's claim that the injunction "indiscriminately orders correction of . . . every . . . barrier culvert" in the case area, because the district court's order in fact had "carefully distinguishe[d] between high- and low-priority culverts based on the amount of upstream habitat culvert correction will open up."[146] The lower court also authorized an exemption for up to ten percent of high-priority culverts to be fixed on the "more lenient" schedule for low-priority culverts.[147]

In addition, the court rejected the state's estimates of the cost of implementing the injunction, finding them to be "not supported by the evidence" and citing studies showing the state-claimed costs to be

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140. *Washington*, 827 F.3d at 858. *See infra* note 202 and accompanying text.

141. On the district court's injunction, see *supra* notes 103–13 and accompanying text.

142. *Washington*, 827 F.3d at 856 (providing an extensive explanation of the district court's injunction).

143. *Id.* at 858–59.

144. *Id.*

145. *Id.* at 859–60 (citing testimony of tribal experts, Mike McHenry and Lawrence Wasserman, and a state expert, Paul Wagner). *See also id.* at 860 (describing the significant adverse effects on salmon migration of barrier culverts).

146. *Id.* at 860.

147. *Id.*

considerable overestimates.[148] Nor did the state account for the fact that federal funding would cover a considerable amount of the cost of correcting offending barrier culverts.[149] Thus, the state's allegation that the injunction would cost "roughly $100 million per year" and result in "deep and painful cuts to subsidized health insurance for low income workers, K-12 schools, higher education, and basic aid for persons unable to work" was, the court thought, "dramatically overstated."[150] The court observed that the state had a separate transportation budget of $9.9 billion during the 2011–13 biennium,[151] meaning that "money will not be taken from education, social services, or other vital State programs to fund culvert repairs."[152]

Finally, the court rejected the state's argument that the district court's injunction violated several of what the state called "federalism principles."[153] The Ninth Circuit thought the Martinez Injunction violated no federalism principles, quoting the Supreme Court's affirmance of Judge Boldt's regulation of the salmon fishery in the wake of state intransigence in the 1970s, in which the Court stated that it was "absurd to argue . . . both that the state agencies may not be ordered to implement the [court] decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision."[154] The court therefore upheld the Martinez Injunction in full.[155]

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148. *See id.* at 862 (suggesting that the cost estimate of $2.3 million per culvert was an overestimate by roughly 30% to 70%) (citing an average of $658,639 per culvert corrected prior to the 2009 trial and $1,827,168 for twenty-four culverts fixed thereafter, although the state had no cost figures on eight other culverts). The court also noted that state's cost estimates did not include the exemption for up to 10% of high-priority culverts and failed to factor in the marginal costs of complying with the court's accelerated schedule of culvert repair already required by federal and state law. *Id.*

149. *Id.* (citing the district court's finding that the federal government would fund $22 million during the years 2011–17 and $15.8 million in the 2013–15 biennium).

150. *Id.* at 863 (quoting from the state's brief).

151. *Id.* at 863–64.

152. *Id.* at 864 (quoting the district court's decision). Even using the state's inflated cost figures, $100 million annually for culvert repairs would amount to roughly just two percent of the state's $9.9 billion transportation budget during the 2013–15 biennium.

153. *Id.* at 864 (claiming that an injunction should: (1) be no broader than necessary to cure a federal law violation; (2) grant deference to a state's institutional competency and subject matter expertise; (3) not substitute a court's budgetary judgment for that of the state's; and (4) be the least intrusive relief in terms of interfering with a state's governmental affairs).

154. *Id.* (quoting Washington v. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979)) (emphasis omitted).

155. The Ninth Circuit did suggest that the district court should "should not hesitate" to modify the injunction should new facts or circumstances warrant. *Id.* at 865. The state appealed the panel

VI. BEYOND THE MARTINEZ DECISION: THE TREATY FISHING RIGHT'S EFFECT ON OTHER HABITAT-DAMAGING ACTIVITIES

In terms of the potential implications of the Ninth Circuit's affirmation of the Martinez Injunction, perhaps the easiest extrapolation concerns other road culverts. In response to the state's argument that the lower court's injunction was unfair because it required the state to fix its faulty culverts before the federal government had to do so, the Ninth Circuit affirmed the district court on both sovereign-immunity and standing grounds.[156] Although the court specifically found that the federal government had also violated the treaty fishing right with its culverts,[157] it rejected the state's claim because "any violation of the Treaties by the United States violates rights held by the Tribes" and they

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decision, seeking a rehearing or a rehearing en banc, claiming that the panel adopt a rule rejected by the en banc Ninth Circuit in 1985, see *supra* note 86 and accompanying text, forcing "Washingtonians to spend billions to correct the federal government's mistakes," and requiring future land and water management changes. State of Washington's Petition for Rehearing/Rehearing En Banc at 1, United States v. Washington, No. CV 70-9213 (Aug. 11, 2016). The state maintained that the panel decision gave "the district court unprecedented power to make policy in Washington," fixing a problem caused by the federal government, which had approved the design of virtually all the culverts at issue. *Id.* at 3–4. The state also alleged that the effect of the panel decision's recognition of a habitat protection right was to impermissibly guarantee to the tribes a minimum quantity of fish. *Id.* at 9. Although the state conceded in its briefing to the panel that "the treaties protect against habitat protection that discriminates against tribal fishing," it claimed that the injunction affirmed by the panel was overbroad, imprecise, uncertain, and inconsistent with the 1985 en banc decision, requesting a rehearing "to articulate the treaty obligation most precisely than the panel did." *Id.* at 10. The state suggested that a more appropriate and workable injunction would target only those culverts that "prevent meaningful use of a usual and accustomed tribal fishing ground that would be otherwise useable," because the injunction the panel upheld "requires the State to replace culverts even when doing so will make no difference," as "roughly 90% of state barrier culverts are upstream or downstream of other barriers." *Id.* at 11, 15–16. In addition, the state attempted to resurrect the 1982 panel decision's litmus of "reasonable steps commensurate with" the state's resources, *id.* at 11, but that standard was vacated by the 1985 en banc panel, *see supra* note 86. Finally, the state contended that panel erroneously rejected its argument that it should be able to recoup some of the costs of replacing culverts from the federal government for culverts that it designed, funded or authorized. *Id.* at 12–13.

Idaho and Montana submitted an amicus brief supporting Washington's rehearing petition, alleging that the panel decision was inconsistent with the case law implying rights in Indian treaties where "absolutely necessary" or where the purposes of a reservation would be "defeated," neither of which obtained in the culverts case. States of Idaho and Montana's Brief Amicus Curiae in Support of Appellant's Petition for Rehearing/Rehearing En Banc at 3–4, United States v. Washington, No. CV 70-9213 (Aug. 22, 2016). The states also objected to the panel's dismissal of equitable principles like "reasonable expectations, belated assertion of rights, and the practical effect of the requested claim relief." *Id.* at 4 (citing City of Sherrill v. Oneida Nation of New York, 544 U.S. 197 (2005)).

156. *Washington*, 827 F.3d at 855.

157. *Id.* at 856. *See also supra* note 135 (quoting the Ninth Circuit).

"have not sought redress against the United States" in the case before us.[158] Thus, the Ninth Circuit seemed to suggest that the tribes could successfully sue the federal government, obtaining similar relief. But there would be significant impediments to proceeding against the federal government.[159] Moreover, rather than filing suit, the tribes may wish to file a rulemaking petition with federal agencies requesting a schedule for fixing the federal culverts, mostly on national forests, in order to maintain relations with its trustee in other cases involving other habitat-damaging activities.[160]

On the other hand, culverts built and maintained by local governments do not seem to be expressly subject to the district court's injunction.[161] Thus, that loophole could prompt a separate suit by the tribes, although there is a strong argument that local governments—as mere "creatures" of the state—are subject to the state's obligations.[162]

158. *Washington*, 827 F.3d at 856.

159. Whether the tribes could successfully sue the federal government for injunctive relief concerning its barrier culverts is not entirely clear. A breach of trust suit is possible, *see* Mary C. Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies,* 39 TULSA L. REV. 355 (2003), but such a suit would succeed only if the federal government violated specific statutory or regulatory duties. COHEN TREATISE, *supra* note 35, § 5.05[3][c]. Money damages would be unlikely. Although the Indian Tucker Act waives sovereign immunity for money damages against the federal government, there is a six-year statute of limitations period, and the Supreme Court has interpreted the liability standard quite narrowly. *See* United States v. Navajo Nation, 556 U.S. 287 (2009) (reversing a decision awarding the tribe money damages under other statutes because they did not establish a specific fiduciary duty that could be interpreted as requiring compensation for damages due to a breach of duty imposed by the governing law); United States v. Navajo Nation, 537 U.S. 488 (2003) (no statutory or regulatory basis for an award of money damages under the Indian Mineral Leasing Act for the Secretary of Interior's approval of a coal lease with a royalty rate of eight percent below what had been negotiated).

160. Presumably, the federal agency would conduct an analysis under the National Environmental Policy Act to decide how best to proceed.

161. *See Washington*, 827 F.3d at 857–58 (describing the lower court's injunction); Martinez Injunction, No. CV 70-9213, 2013 WL 1334391, at *24–25 (W.D. Wash. Mar. 29, 2013) (approving the injunction requested by the tribes and the federal government). In *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005), the court denied a tribe's claim that the City of Tacoma's federally licensed Cushman dam interfered with its treaty fishing rights because its treaty did not support an implied right of action for damages by a third party, a result that engendered withering criticism from a respected commentator. *See* William H. Rodgers, Jr., *Judicial Regrets and the Case of the Cushman Dam*, 35 ENVTL. L. 397 (2005). On the other hand, a federal licensee who flooded reservation land was liable in trespass. United States v. Pend Oreille Pub. Util. Dist. No. 1, 28 F.3d 1544 (9th Cir. 2004). *See generally* COHEN TREATISE, *supra* note 35, § 18.04[g][3].

162. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362 (2009) (explaining that local governments are not sovereign entities, but rather are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions") (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964)); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 476 (1982) ("States traditionally have been accorded the widest latitude in ordering their internal

Moreover, state law quite clearly requires fishways in streams to prevent obstructions like barrier culverts.[163] A judicial injunction could make the state enforce that promise against city-owned and county-owned culverts.

Culverts in other states within the Ninth Circuit, like California, Idaho, and Oregon, also seem vulnerable to the tribes' use of the affirmation of the Martinez Injunction.[164] For example, the Ninth Circuit could have mentioned the Oregon Statehood Act's promise of free-flowing navigable waters.[165] Oregon therefore may be in violation of both the Stevens Treaties and its own statehood statute. Tribal suits against the other states, if the federal government joined,[166] could prompt those states to prepare plans identifying barrier culverts and prioritize them consistent with the Martinez Injunction.

In addition to barrier culverts, dams also impede salmon migration. Many dams provide fish passage but hardly any are operated to maximize salmon survival. Some dams—like the federal dams on the lower Snake River—destroy salmon habitat and hamper migration while providing minimal public benefits compared with their public costs.[167]

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governmental processes . . . and school boards, as creatures of the State, obviously must give effect to policies announced by the state legislature.") (internal citations omitted).

163. *See* Martinez Injunction, 2013 WL 1334381, at *6 ("Washington State law has long required that obstructions across or in its streams be provided with a durable and efficient fishway, maintained in an effective condition and continuously supplied with sufficient water to freely pass fish.").

164. Idaho would be affected by at least the Treaty with the Nez Perce, a Stevens Treaty tribe. Treaty with the Nez Perces, 1855, Jun. 11, 1855, 12 Stat. 957 (ratified 1859). Oregon has other Stevens Treaty tribes, like the Walla Walla, Cayuse, and the Umatilla tribes. Treaty with the WallaWalla, Cayuse, Etc., June 9, 1855, 12 Stat. 945 (ratified 1859). And both Oregon and California would have obligations to the Klamath Tribes, whose 1864 treaty was not a Stevens Treaty, but it did expressly recognize the tribes' fishing, hunting, and gathering rights, albeit only on reservation. Treaty with the Klamath, Etc., Oct. 14, 1864, 16 Stat. 707 (ratified 1866) (interpreted to include water rights to fulfill the fishing and hunting purposes of the 1864 treaty in United States v. Adair, 723 F.2d 1394 (9th Cir. 1983)).

165. *See* Oregon Statehood Act, ch. 33, § 2, 11 Stat. 383 (1859) (navigable waters to be "common highways and forever free").

166. Without the federal government joining the suit, the states would enjoy protection from suit due to sovereign immunity. For example, in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997), the Court held that the Eleventh Amendment barred a suit against the state concerning the ownership of Lake Coeur d'Alene. But when the federal government subsequently joined the suit, the tribe prevailed, since the Eleventh Amendment does not apply to suits by the federal government. Idaho v. United States, 533 U.S. 262 (2001).

167. *See* Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. 3:01-CV-00640-SI, 2016 WL 2353647, at *8 (D. Or. May 4, 2016) (requiring an environmental impact statement to analyze, among other things, the breaching of the four federal lower Snake River dams); 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*

The tribes may choose not to invoke their treaty rights against federal dams, for the reasons stated above.[168] But there are many non-federal dams obstructing fish passage and damaging fish habitat, the operation of which could violate treaty fishing rights.[169]

Diversions that dewater streams can have much the same effects on fish migration as barrier culverts or dams. The dewatering of a tribe's usual and accustomed fishing ground would seem to be no less a treaty right violation as migration blockage by a structure in the stream. The Nez Perce Tribe asserted its Stevens Treaty fishing rights in the Snake River Basin Adjudication,[170] but a state trial court rejected any application of the tribe's rights off-reservation, a result patently inconsistent with applicable case law.[171] The tribe subsequently agreed to a settlement of its claims with the state,[172] so the lower court decision was not appealed. But the issue of dewatering off-reservation treaty usual and accustomed fishing grounds remains a live one.

Less obvious problems for salmon concern water diversions that increase water temperatures and can lead to violations of water quality standards.[173] The effect of diversions on salmon is likely to be exacerbated by warming temperatures and changes in precipitation

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Natural River Flows, 28 ENVTL. L. 997 (1998) (maintaining that the costs of the federal dams on the Lower Snake River are dramatically higher than their benefits).

168. *See supra* notes 159–60 and accompanying text.

169. According to the Congressional Research Service, there are some 300 non-federal hydroelectric dams in the states of Idaho (135), Oregon (79), and Washington (86), far more than the 22 federal dams in the three Northwest states. KELSI BRACMORT ET AL., CONG. RESEARCH SERV., HYDROPOWER: FEDERAL AND NONFEDERAL INVESTMENT 4–5 (July 7, 2015), https://www.fas.org/sgp/crs/misc/R42579.pdf [https://perma.cc/KP8Q-NFWR].

170. *See* Ann Y. Vonde et al., *Understanding the Snake River Basin Adjudication*, 52 IDAHO L. REV. 53, 111, 151 (2016) (an exhaustive article by current or former Idaho Deputy Attorneys General that represented the state in the long-running SRBA).

171. *In re* Snake River Basin Adjudication, No. 39576, Subcase No. 03-10022 (Idaho Dist. Ct. Nov. 10, 1999), *criticized in* Michael C. Blumm, Dale D. Goble, Judith V. Royster & Mary Christina Wood, *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449, 451–52 (2000) (maintaining that the court misunderstood the purpose of the treaty, misconstrued or ignored relevant Supreme Court cases, and erroneously concluded that the tribe's reasoned water rights were limited to reservation lands).

172. *See* Vonde, *supra* note 170, at 170–73; *Mediation of the Stake River Basin Adjudication*, 42 IDAHO L. REV. 547, 547–793 (2006).

173. *See generally* Richard M. Adams & Dannele E. Peck, *Effects of Climate Change on Drought Frequency: Potential Impacts and Mitigation Opportunities, in* MANAGING WATER RESOURCES IN A TIME OF GLOBAL CLIMATE CHANGE: MOUNTAINS, VALLEYS AND FLOOD PLAINS 126 (Alberti Garrido & Ariel Dinar eds., 2009); Craig Johnston, *Salmon and Water Temperature: Taking Endangered Species Seriously in Establishing Water Quality Standards*, 33 ENVTL. L. 151 (2003); Kelly House, *A Creek in Crisis: Oregon Pours Millions into Saving Steelhead but Lacks a Crucial Element: Water*, OREGONIAN, Sept. 2, 2016, at A1.

patterns due to climate change.[174] Similarly, timber harvests, grazing practices, and construction projects can produce sedimentation in salmon streams in violation of water quality standards.[175] Although water quality standards violations might not be as dramatic an interference with salmon migration and habitat as road culverts and dams, they remain significant obstacles to salmon restoration.[176] Moreover, to the extent that any federal land usage triggers evaluations required by the National Environmental Policy Act (NEPA), it would seem that among the reasonable alternatives that a federal agency must consider to comply with NEPA would be one protecting treaty fishing rights.[177] Further, it may be that the agency would have no choice but to select the alternative that protects the right of taking fish, since administrative agencies have no authority to terminate or curtail treaty rights.[178]

Because any of the above-described actions may be subject to treaty-imposed limits does not necessarily mean that all culverts, dams, diversions, and land-use practices will be subject to treaty constraints.[179] Applying treaty rights to particular activities will be a factual decision that, under the Ninth Circuit's reasoning, will first consider whether there is an affirmative action adversely affecting fish subject to the

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174. *See, e.g.*, United States v. Anderson, No. 3643, Mem. Op. & J. (E.D. Wash. Sept. 12, 1979) (establishing tribal reserved water rights in part based on salmon habitat needs) (discussed in Robert T. Anderson, *Water Rights, Water Quality, and Regulatory Jurisdiction in Indian County*, 34 STAN. ENVTL. L. J. 195, 219–23 (2015)).

175. *See, e.g.*, James W. Burns, *Spawning Bed Sedimentation Studies in Northern California Streams*, 56 CAL. DEP'T OF FISH AND GAME 253 (1970); David Wann, *Timber and Tourists: Idaho Confronts Logging Issues*, 13 EPA J. 20, 20 (1987); Mary Ann Madej, *How Suspended Organic Sediment Affects Turbidity and Fish Feeding Behavior,* SOUND WAVES MONTHLY NEWSLETTER: COSTAL AND MARINE RESEARCH NEWS FROM ACROSS THE USGS (Nov. 2004), http://soundwaves.usgs.gov/2004/11/research2.html [https://perma.cc/M32P-BP9P].

176. *See* SACRIFICING SALMON, *supra* note 12, at 222–32; ALBERT H. MIRATI, JR., OR. DEP'T OF FISH AND WILDLIFE, ASSESSMENT OF ROAD CULVERTS FOR FISH PASSAGE PROBLEMS ON STATE- AND COUNTY-OWNED ROADS (1999); David M. Price, Timothy Quinn & Robert J. Barnard, *Fish Passage Effectiveness of Recently Constructed Road Crossing Culverts in the Puget Sound Region of Washington State*, 30 N. AM. J. FISHERIES MGMT. 1110 (2010), http://wdfw.wa.gov/publications/01339/wdfw01339.pdf [https://perma.cc/MGD5-PSTR].

177. The Council on Environmental Quality's NEPA regulations require federal agencies to "rigorously explore and objectively evaluate all reasonable alternatives" to proposed actions. 40 C.F.R. § 1502.14(a) (1978).

178. *See infra* note 209. The effect of the treaty right to habitat protection might transform the NEPA process into one seeking the most protective of treaty fishing right, a kind of substantive NEPA long sought by environmentalists. *See, e.g.*, Jamison E. Colburn, *The Risk in Discretion: Substantive NEPA's Significance*, 41 COLUM. J. ENVTL. L. 1 (2016).

179. However, it is clear that the treaty right burdens not only governmental actions but also private property. *See supra* note 46 and accompanying text (discussing the *Winans* decision).

treaties.[180] Second, the action must proximately cause significant damage;[181] *de minimis* harms do not apparently violate the treaties.[182] These fact-based considerations will invite trial courts to make case-by-case decisions.[183] They closely resemble the language used by Judge Orrick without the express burden shifting he prescribed.[184] In application, there might not be much of a difference from the Orrick

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180. *See* United States v. Washington, 827 F.3d 836, 853 (9th Cir. 2016) ("The facts presented in the district court establish that Washington has acted affirmatively to build and maintain barrier culverts under its roads.").

181. *See id.* (determining that: (1) the tribes' "moderate living" needs were not being met; and (2) the state's barrier culverts in the case area "block approximately 1,000 linear miles of streams suitable for salmon habitat, comprising almost 5 million square meters," concluding that fixing the barrier culverts would restore access to "several hundred thousand additional mature salmon" to pass them each year (citing Washington v. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979))). On the largely overlooked role of proximate cause in environmental law, see Sweet Home Chapter of Cmtys. for a Greater Or. v. Babbitt, 515 U.S. 687, 700 n.13 (1995) (explaining that in order for there to be an unlawful "take" under the Endangered Species Act, the action must be the proximate cause of death or injury to animals protected by the Act). Concerning the "notoriously malleable" proximate cause standard, see James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons From Tort Law About Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers,* 33 ENVTL. L. 595, 606–09 (2003) (discussing the *Sweet Home* opinions).

182. *See* Anderson*, supra* note 89, at 490–91 (explaining *de minimis* cases). At oral argument, Judge Ezra was particularly worried about not enjoining actions producing only *de minimis* effects. Oral Argument at 28:45, United States v. Washington, 827 F.3d 836 (9th Cir. 2016) (No. 13-35474), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008307 (last visited Jan. 24, 2017).

183. At oral argument before the Ninth Circuit, the tribes' attorney suggested that the facts would determine whether the treaties were violated by particular activities. Oral Argument at 23:33, 25:58, United States v. Washington, 827 F.3d 836 (9th Cir. 2016) (No. 13-35474), http://www.ca9.uscourts.gov/media/ view_video.php?pk_vid=0000008307 (last visited Jan. 24, 2017). The factual-based evaluation might resemble case-by-case balancing in which common law courts have long engaged in nuisance cases. Nuisance doctrine protects against substantial (non-*de minimis*) and unreasonable interferences with the use and enjoyment of property and community rights. RESTATEMENT (SECOND) OF TORTS: PRIVATE NUISANCE: ELEMENTS OF LIABILITY § 822 (AM. LAW INST. 1979). However, the defense of "reasonableness," which nuisance defendants often successfully invoke, *see infra* note 214, would not be available in case-by-case evaluation of actions affecting treaty rights, as that was part of the vacated 1982 panel decision which the en banc Ninth Circuit rejected in 1985. United States v. Washington, 759 F.2d 1353, 1354 (9th Cir. 1985) (en banc) (vacating the opinion of the panel which first heard the case in 1982); United States v. Washington, 694 F.2d 1374, 1381 (9th Cir. 1982) ("[T]he State and the Tribes must each take reasonable steps commensurate with their respective resources and abilities to preserve and enhance the fishery.").

184. *See supra* note 83 and accompanying text. Both Judge Orrick and the Ninth Circuit tied the habitat right to the tribes' moderate living needs. *See* Orrick Decision*,* 506 F. Supp. 187, 208 (1980); *1985 Washington*, 759 F.2d at 1359.

formula announced in 1980.[185] If so, the tribes will have lost thirty-six years of enforcement but not the fundamental right to protect the fish that was the tribes' principal concern in negotiating the treaties of the 1850s. Although widespread disruption of state and local economies are unlikely, all non-tribal entities should now feel prodded to improve salmon habitat-harming processes of their activities.[186]

CONCLUSION

The rules of interpretation concerning Indian treaties[187] were crucial to the decisions of Judge Martinez and the Ninth Circuit, both of which emphasized the Indian understanding of the treaties they signed in the 1850s.[188] The resort to such foundational interpretative principles echoed some recent United States Supreme Court decisions.[189] But the promises made to the tribes in the Stevens Treaties 160 years ago—the right of taking fish in common with the settlers at usual fishing places—were express, not implied.[190] And this express promise had been construed, largely favorably to the tribes, numerous times by the Supreme Court

185. Although the en banc Ninth Circuit vacated the Orrick Decision, it did so only on the ground of the imprudence of making treaty rights declarations in the absence of concrete facts. *1985 Washington*, 759 F.2d at 1357.

186. One way to minimize conflicts between damaging developments and treaty rights would be to consult with the tribes in advance of considering the merits of such proposals. Under Executive Order 13,007, federal agencies must, "to the extent practicable, . . . avoid adversely affecting the physical integrity of [tribal] sacred sites." 61 Fed. Reg. 26,771 (1996). Presumably, this directive requires some sort of consultation with affected tribes. However, it is not entirely clear that treaty fishing and other off-reservation usufructuary rights are sacred sites, and the executive order does not apply to states or to private actions not requiring federal approval, does not override other law or "essential agency functions" and does not create a cause of action. *Id.* at 26, 771–72.

187. *See supra* notes 35, 119–20, 127–29 and accompanying text.

188. United States v. Washington, 827 F.3d 836, 851 (9th Cir. 2016); Martinez Decision, No. CV 9213RSM, 2007 WL 2437166 at *8 (W.D. Wash. Aug. 22, 2007)

189. *See supra* note 119 (discussing the *Mille Lacs* decision); Michigan v. Bay Mills Indian Cmtys., __ U.S. __, 134 S. Ct. 2024, 2032 (2014) (employing the canons in upholding tribal sovereign immunity); Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, __ U.S. __, 136 S. Ct. 2159 (2016) (affirming a Fifth Circuit decision, Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167 (5th Cir. 2014), which upheld tribal court jurisdiction over a dispute between a tribal member and a non-member corporation doing business on reservation).

190. Judge Fletcher would have implied the habitat right; however, see *Washington*, 827 F.3d at 852 ("Thus, even if Governor Stevens had made no explicit promise, we would infer, as in *Winters* and *Adair*, a promise to 'support the purpose' of the Treaties. That is, even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a 'moderate living' to the Tribes.") (citing Washington v. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979)).

over the course of the twentieth century.[191] Both parties to the treaties—the tribes and their federal trustee—urged the courts, in light of this substantial precedent, to construe the treaty language to include habitat protection for fish. The State of Washington, which was not in existence in the 1850s, not only was not party to the treaty negotiations but had a long and reprehensible history of discriminating against the treaty fishing right.[192]

A. *The State's Failed Efforts to Resist the Treaty Right*

The state's arguments were all met with judicial dubiety. For example, the state argued that restoring salmon passage at state-owned culverts was not the only or best way to fix the salmon problem.[193] Even if this contention contained an element of truth, the allegation was ultimately irrelevant because the issue was whether state-owned and operated road culverts significantly damaged the tribes' fishing rights. Moreover, promises of "comprehensive" salmon restoration have, over the past three decades, produced very little restoration, at least in terms of spawning fish,[194] despite large-scale public expenditures.[195]

The state did have a plan to restore fish passage at barrier culverts, but fully implementing it would not be achieved, in the district judge's estimation, for at least 100 years,[196] if ever.[197] Identified barrier culverts

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191. *See Washington*, 827 F.3d at 842–48 (retracing the history of the adjudication of the Tribes' treaty rights); *see* SACRIFICING SALMON, *supra* note 12, at 37–45, 60–64; *Piscary Profit, supra* note 18, at 440–53, 457–59.

192. *See, e.g.*, *Washington*, 827 F.3d at 841–45; SACRIFICING SALMON, *supra* note 12, at 63–64, 74–82; *supra* notes 27, 67–68 and accompanying text.

193. *Washington*, 827 F.3d at 861.

194. *See* SACRIFICING SALMON, *supra* note 12, at 129–60, 173–217 (describing the disappointing restoration results under the Northwest Power and Endangered Species Acts).

195. For example, in fiscal year 2015, the Bonneville Power Administration claimed fish and wildlife costs of some $757 million on fish and wildlife restoration in the Columbia Basin alone, including nearly $200 million in so-called "forgone hydropower revenues." In total, Bonneville claimed to incur $15.3 billion in fish and wildlife costs between 1978 and 2015, not counting $2.66 billion spent on capital improvements such as fish-passage facilities. NORTHWEST POWER AND CONSERVATION COUNCIL, 2015 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM COSTS REPORT: 15TH ANNUAL REPORT TO THE NORTHWEST GOVERNORS 5, 23, 25 (2015). A report for the Governor's Salmon Recovery Office in Washington estimated a cost of $5.5 billion between 2010 and 2019 for habitat-related elements of salmon recovery within the state. *See* DENNIS CANTY ET AL., FUNDING FOR SALMON RECOVERY IN WASHINGTON STATE 6 (2011), www.rco.wa.gov/documents/gsro/SalmonRecoveryFundingReport2011.pdf [https://perma.cc/68J8-THED].

196. Martinez Injunction, No. CV 70-9213, 2013 WL 1334391, at *17 (W.D. Wash. Mar. 29, 2013).

197. *Id.* at *18.

actually increased from 2009 to 2011.[198] And state assertions about the costs of implementing the district court's injunction met with deep judicial skepticism and were ultimately rejected.[199]

The state's legal strategy failed as well. Its principal mistake was abstaining from negotiations over the scope of the injunction during the six years the state denied the validity of the district court's decision.[200] The upshot was that both Judge Martinez and the Ninth Circuit accepted the injunction proffered by the tribes and their trustee,[201] and the state likely forfeited an opportunity to urge more flexible implementation.[202]

B. *The Federal Role in Protecting the Treaty Right*

The federal trustee's role in the case was remarkable. The trustee never wavered as the nearly half-century-old litigation proceeded from securing a harvest share, including hatchery fish in that share, and implying a right of habitat protection. The federal trustee has not always been so steadfast in pursuing the interest of the tribes.[203] This resoluteness was all the more surprising in this case, given the federal government's ownership of road culverts that violated the treaty right as much as the state's.[204] The state tried to make something of the federal government's compromised position, arguing that it was unfair to make the state fix its culverts while overlooking the federal culverts,[205] but the Ninth Circuit ruled, on sovereign-immunity and standing grounds, that the state had no viable claim, since the treaty right was the tribes' to

198. *Id.* at *17.

199. United States v. Washington, 827 F.3d 836, 862 (9th Cir. 2016); *see also supra* notes 148–52 and accompanying text.

200. *Washington,* 827 F.3d at 864.

201. Martinez Injunction, at *25; *Washington*, 827 F.3d at 865.

202. The Ninth Circuit was critical of the state's unwillingness to participate in negotiating the scope of the injunction. *Id*. at 858. On the other hand, given the district court's findings about the state's schedule for fixing faulty culverts—described as both "taking a hundred years" and never finishing, *see supra* notes 196–97 and accompanying text—perhaps the state was not in a strong negotiating position.

203. *See, e.g.*, United States v. Navajo Nation, 537 U.S. 488 (2003) (holding that there was no trust violation in the Secretary of Interior's secret meetings with coal companies leasing Indian lands for arguably below-market royalties); Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008) (en banc) (ruling 8-3 that the Forest Service did not violate its trust obligation by approving the use of treated sewage water to make snow promoting winter skiing on sacred sites of several tribes). For a recent assessment of the obligations of the federal trustee, see Anderson, *supra* note 89, at 476–85.

204. *Washington*, 827 F.3d at 856; *see also supra* notes 135, 157 and accompanying text.

205. *See supra* text accompanying note 158.

assert.[206] The tribes may decide to proceed against the federal government in the future but, as suggested above,[207] they may choose to not to do so if the federal government applies this legal standard to all of its activities as a matter of course.

But the federal role in adversely affecting salmon migration and habitat is considerable, particularly in the Columbia Basin, where federal dams predominate. A recent district court decision found, for the fourth time, that the federal plan of annual hydroelectric operations violated the Endangered Species Act.[208] Quite possibly, the operation of these dams also violates treaty fishing rights. In retrospect, it now seems quite apparent that the approval of federal dams that blocked salmon migration entirely—like the Grand Coulee and Chief Joseph dams—also violated the treaties.[209]

C. The Road Ahead

Less clear treaty right violations concern federal land management decisions like timber sales and grazing permits that produce sedimentation, temperature increases, and loss of riparian habitat that damage fish runs, as the significance of the damage may be subject to

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206. *Washington*, 827 F.3d at 855; *see also supra* notes 159–60 and accompanying text.

207. *See supra* note 159 and accompanying text (discussing difficulties in filing suit against the federal government). There is some case law suggesting that the tribes might have a viable claim for injunctive relief against the federal government. *See, e.g.*, Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) (requiring the federal government to adopt not merely a reasonable interpretation of oil and gas royalties but a reasonable interpretation benefiting the tribe); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (requiring the federal government to intervene in land claims litigation). These and other injunctive relief cases are discussed in RESTATEMENT OF INDIAN LAW § 10 cmt. c at 165–68 (AM. LAW INST. 2015).

208. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 2016 WL 2353647 (D. Or. May 4, 2016). *See also* Michael C. Blumm & Aurora Paulsen, *The Role of the Judge in ESA Implementation: District Judge James Redden and the Columbia Basin Salmon Saga*, 32 STAN. ENVTL. L.J. 87 (2013); Michael C. Blumm, Julianne L. Fry & Olivier Jamin, *Still Crying Out For a "Major Overhaul" After All These Years–Salmon and the Fourth Failed Biological Opinion on Columbia Basin Hydroelectric Operations*, 47 ENVTL L. (forthcoming 2017), https://ssrn.com/abstract=2858098. Unlike the ESA, treaty rights do not impose an affirmative obligation to restore salmon runs. They do, however, restrict state actions—like the building and maintenance of road culverts—which damage fish runs and affect their right to a moderate living from fishing. *See generally* United States v. Washington, 827 F.3d 836 (9th Cir. 2016).

209. The Ninth Circuit ruled that neither the states nor administrative agencies may abrogate treaty fishing rights, and that Congress may do so only in clear legislation. *Washington*, 827 F.3d at 854 (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999) (ruling that the tribe's rights survived a number of legislative and executive actions)). The Supreme Court has ruled treaty abrogation requires Congress to actually consider the issue and clearly resolve the issue in favor of abrogation. United States v. Dion, 476 U.S. 734 (1986) (deciding that the Bald Eagle Protection Act terminated treaty hunting rights).

dispute. But federal land managers will no doubt hear from tribes that monitor and comment on federal actions that affect their treaty fishing. There is some evidence that the managers—even state agencies—are listening.

In 2015, the Oregon agency with regulatory authority over state lands denied a permit for a marina that would have hosted a large coal transport facility on the Columbia River, citing treaty fishing concerns.[210] And in 2016, the U.S. Army Corps of Engineers denied a permit for the largest coal port in North American on grounds of interfering with the Lummi Tribe's treaty rights.[211] These decisions could auger poorly for several proposed oil port terminals with treaty rights' effects.[212] The Ninth Circuit's decision affirming Judge Martinez's injunction vindicates those decisions by making clear that regulatory agencies cannot approve developments that block access to treaty fishing sites or diminish the availability of harvestable fish.[213] The prospects of projects that would significantly and adversely affect treaty

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210. In August 2014, the state of Oregon rejected a permit from Ambre Energy, an Australian company that sought to construct the Coyote Island Terminal on the Columbia River to export 8.8 million tons of coal annually to Asia. Although environmental groups opposed the terminal on grounds that it would unwisely expand the use of coal and accompanying greenhouse gas emissions, the state based its denial largely on the disruption the terminal would cause to tribal fisheries. Then Governor John Kitzhaber stated, "Columbia River tribes have fundamental rights to these fisheries," and "any project that threatens those rights should be held to high standards." *See* Timothy Cama, *Oregon Blocks Major Coal Export Terminal*, HILL (Aug. 19, 2014, 8:54 AM), http://thehill.com/policy/energy-environment/215463-oregon-blocks-major-coal-export-terminal [https://perma.cc/F87H-HVXT].

211. In May 2016, the U.S. Army Corps of Engineers rejected a permit for the largest coal port ever proposed in North America, at Cherry Point, Washington, north of the Lummi Tribe's coastal reservation. The Corps did so on the ground that the project, which could have involved nearly 500 ships per year serving Asian markets, would interfere with tribal treaty fishing rights, particularly crab and herring fisheries. The Lummi Tribe opposed the project not only due to vessel traffic and pollution risks but also to its adverse effects on one of the tribe's oldest and largest villages and a burial site. *See, e.g.*, Lynda V. Mapes, *Tribes Prevail, Kill Proposed Coal Terminal at Cherry Point*, SEATTLE TIMES (May 9, 2016, 1:10 PM), http://www.seattletimes.com/seattle-news/environment/tribes-prevail-kill-proposed-coal-terminal-at-cherry-point/ [https://perma.cc/769T-Z2JT]. The Corps' reasoning in rejecting the permit makes for surprisingly good reading. *See* Memorandum from Michelle Walker, Chief, Regulatory Branch, U.S. Army Corps of Engineers (May 9, 2016), https://turtletalk.files.wordpress.com/2016/05/160509mfruademinimisdetermination.pdf [https://perma.cc/6XB3-HGXL].

212. *See* Ralph Schwartz, *Northwest Tribes Band Together to Stop Oil-by-Rail*, YES MAGAZINE (July 14, 2016), http://www.yesmagazine.org/planet/northwest-tribes-band-together-to-stop-oil-by-rail-20160712 [https://perma.cc/ZY4F-W9RK] (noting that the Cherry Point Terminal would have imposed a direct interference with the Lummi's fishing practices; other projects with a less direct effect on treaty fishing might fare differently) (quoting Robert Anderson, law professor at the University of Washington).

213. *See Piscary Profit, supra* note 18, at 467–70 (discussing lower courts' interpretations of the effect of treaty fishing rights on the siting of pipelines, sea farms, and residential developments).

fishing rights is especially questionable given the fact that resource developers cannot defend on the basis of the reasonableness of their proposals, claiming that the social utility of their actions outweighs the gravity of the harm inflicted.[214] A reasonableness defense was once articulated by a Ninth Circuit panel but later vacated,[215] and the 2016 decision did not revive it. The result justifies the tribes' and their federal trustee's long and winding litigation road, begun nearly a half-century ago.

In a larger sense, however, the culverts case may not signal that all tribes may use their treaties to block developments of which they oppose. For one thing, not all treaties include off-reservation property rights. For another, the federal trustee may not support the tribes—and may, in fact, be permitting the development.[216] These complications may distinguish the culverts decision and limit its precedential reach. But the significance of the case for salmon restoration not only in the case area of the Puget Sound basin but throughout the Pacific Northwest should not be underestimated.[217] It is not an overstatement to suggest that the decision is the Stevens Treaty tribes' most significant victory since the Supreme Court's affirmation of Judge Boldt in 1979.[218]

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214. The utility of the conduct versus the gravity of the harm is the classic articulation of a reasonable use in the nuisance balancing formula. *See* RESTATEMENT (SECOND) OF TORTS: GRAVITY OF HARM—FACTORS INVOLVED §§ 827–28 (AM. LAW INST. 1979).

215. *See supra* notes 84, 86 and accompanying text.

216. *See, e.g., supra* note 203 and accompanying text.

217. *See, e.g.*, *supra* notes 90, 144, 157–78 and accompanying text. Beyond the facts of the case, the decision may signal greater judicial reliance on fundamental principles of Indian law. *See supra* notes 35, 119 and accompanying text; *Winans Centennial*, *supra* note 3, at 536–44 (explaining the concept of "reserved rights").

218. *See supra* notes 71–76 and accompanying text.