PROTECTING THE SALMON: AN IMPLIED RIGHT OF HABITAT PROTECTION IN THE STEVENS TREATIES, AND ITS IMPACT ON THE COLUMBIA RIVER BASIN

INTRODUCTION

> *The people were starving because the fish could not ascend the Columbia and they appealed to their hero for help. Coyote was too well known to approach directly, so he craftily turned himself into a baby, was strapped onto a cradle board, and set adrift down the river. Eventually he bumped up against the dam. "Oh, look at the poor baby!" the Sisters cried, taking the infant home with them. The next day the Swallow Sisters decided to leave the child while they went to the mountains to dig roots, and as soon as they disappeared Coyote turned back to his real form and set to work attacking the dam . . . . When the Sisters rushed back unexpectedly early, there was Coyote, prying away at their dam! The Swallow Sisters attacked. Again and again they darted in angrily as Coyote dug, but he warded them off until the dam was critically weakened. Finally the barrier gave way with a roar. Its debris formed the rocks and rapids of Celilo Falls, and the cradle board a nearby outcrop. The salmon could swim by to feed the people. The swallows still build today, but only mud nests. Their return each spring signals the return of the salmon.*[1]

Today dams are built of steel and concrete, with fourteen dams barricading the Columbia River, and nine dams blocking the Snake River.[2] These dams have transformed the once wild rivers into slow moving reservoirs, controlled no longer by nature but by mechanical means.[3] This has adversely impacted the once thriving salmon runs, which have diminished to a shadow of their former selves.[4] The diminishment of salmon runs has an especial impact on the Native American tribes of the Pacific Northwest since salmon play an important role in tribal culture, religion, and history.[5] In the Stevens Treaties, tribes documented their interest in maintaining a connection

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1. WILLIAM DIETRICH, NORTHWEST PASSAGE: THE GREAT COLUMBIA RIVER 399 (1995).
2. *See id.* at 409-12.
3. *See* Henry B. Lacey, *New Hope For Pacific Salmon?*, 3 HASTINGS W. NW. J. ENVTL. L. & POL'Y 19, 21 (1995).
4. *See generally* John M. Volkman, *The Endangered Species Act and the Ecosystem of Columbia River Salmon*, 4 HASTINGS W. NW. J. ENVTL. L. & POL'Y 51, 52 (1997) (describing the history of salmon as an industry in the Columbia River Basin and the current decline in Columbia River salmon runs toward extinction).
5. *See* discussion *infra* Part I.B.

with salmon when tribal negotiators insisted on including a provision retaining usual and accustomed places to fish.[6]

According to the Supreme Court's interpretation of the Stevens Treaties, the Pacific Northwest tribes have a recognized treaty right to fish.[7] This is in contrast to non-Indians who fish by a privilege granted by the state which is limitable or entirely revocable.[8] In 1979, the United States Supreme Court ruled that Pacific Northwest tribes were entitled to fifty percent of each salmon run.[9] Subsequently, the Ninth Circuit found that fifty percent allocation also applied to hatchery fish since the fish were introduced to replace wild fish lost due to habitat degradation.[10] However, introduction of hatchery fish cannot make up for the destruction of wild salmon runs caused by obstructions in the Columbia River Basin.

The Stevens Treaties reserved the right to fish for tribes.[11] However, if fish habitat is destroyed causing salmon disappearance from the rivers, mere possession of this tribal right is of no importance. Enjoyment of the reserved right to fish depends on a healthy salmon habitat supporting a fish population sufficient enough for the tribes to exercise their right to fish. The question of whether tribes possess a right to protect salmon, through an implied right of habit protection in the Stevens Treaties, has not been addressed with finality by any court. The Ninth Circuit vacated a district court ruling that found an implied right of habitat protection incorporated in the Stevens Treaties' fishing clause.[12] The court claimed that a declaratory judgment on an implied

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6. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 667 (1979). *See generally* THE INST. FOR THE DEV. OF INDIAN LAW, TREATIES & AGREEMENTS OF THE INDIAN TRIBES OF THE PACIFIC NORTHWEST (1905) (showing copies of the Stevens Treaties and other treaties negotiated from 1853-1905) [hereinafter TREATIES & AGREEMENTS]. The Stevens Treaties were first negotiated December 26, 1854, with the Nisqually, Puyallup, Steilacoom, Squaxin, and others at Medicine Creek. The next treaty was negotiated on January 22, 1855, with the Duwamish, Suquamish, Snoqualmie, Stillaguamish, Snohomish, Skagit, Swinomish, Lummi, and others at Point Elliot. On January 26, 1855, a treaty was negotiated with the Clallam, Twana, and Chemakum at Point No Point. The treaty with the Makah was signed on January 31, 1855, at Neah Bay. On June 9, 1855, Stevens, along with Joel Palmer negotiated with the Walla Walla, Cayuse, and Umatilla at Camp Stevens. Also on June 9, 1855, Stevens negotiated with the Yakima and confederated bands at Camp Stevens. Three days later on June 11, 1855, at Camp Stevens, a treaty with the Nez Perce was negotiated. On July 1, 1855, at Quinault River and Olympia a treaty was negotiated with the Quinault and Quileute. On July 16, 1855, a treaty was negotiated with the Flathead, Kutenia, and Upper Pend d'Oreille at Hell Gate. The last Stevens Treaty was negotiated October 17, 1855, with Blackfeet Piegan, Blackfeet Blood, Blackfeet Gros Ventre, Flathead, Upper Pend d'Oreille, Flathead Kutenai, and Nez Perce at Judith River. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 447-501 (1994).

7. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 684-85.

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

9. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 684-85.

10. *See* United States v. Washington (Phase II), 759 F.2d 1353, 1359 (9th Cir. 1985).

11. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 684-85.

12. *See Washington (Phase II)*, 759 F.2d at 1360.

right of habitat protection was contrary to sound judicial discretion, and vacated the district court's ruling on that issue.[13]

The importance of salmon to Pacific Northwest tribes, and the insistence of tribes to include a right to fish in the Stevens Treaties makes it unlikely that the negotiators intended to allow fish habitat to become so degraded that it could no longer support salmon runs. Furthermore, in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, the Supreme Court found that the Stevens Treaties offered tribes more than merely an opportunity to dip their nets into the water.[14] Protection of salmon habitat is in accordance with tribal culture and history which emphasizes respect for the salmon. Therefore, the tribal right to habitat protection is a natural extension of the Stevens Treaties' fishing rights—an assurance that salmon will always be an available resource for the tribes of the Pacific Northwest. The district court's decision was correct, and the Stevens Treaties include an implied right of habitat protection that protects critical salmon habitat from destruction.

Salmon runs are declining primarily because of the proliferation of dams along the Columbia and Snake Rivers.[15] There are several options available to promote salmon on the river; however, change would decrease the economic potential of the Columbia River Basin.[16] Indeed, those with economic interests, who have strong political backing, oppose a salmon friendly river policy. Senator Slade Gorton of Washington is one example of such opposition. Senator Gorton is firmly opposed to both increased tribal rights and changes in dam operation.[17] In addition, public opinion is divided—while people want to save the salmon, many question the considerable economic costs involved.

This Note argues that an implied right to habitat protection is an integral part of the right to fish in the Stevens Treaties. This would impose a duty on the United States to prevent activities which degrade fish habitat to such a degree that tribes cannot maintain a moderate living from exercising their right to fish. Part I examines the impact that dams on the Columbia River Basin have on the salmon population and looks at the importance of salmon to the Pacific Northwest tribes. It shows that the importance of salmon to tribes was

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13. *See id.* at 1357; *See infra* Part II.

14. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 679. The Court found the Stevens Treaties granted the right to take an equal share of fish runs, not merely an equal opportunity to catch fish. *See id.*

15. *See* discussion *infra* Part I.A.

16. Several plans have been proposed to increase survival rates of salmon migrating down the Columbia River. These plans call for modification of current dam procedures. *See infra* notes 214-217 and accompanying text. Any change in dam operation has an impact on power production and irrigation capabilities. The Columbia and Snake Rivers, through power production, irrigation, and shipping are a significant revenue source for Washington State. *See infra* notes 88-89 and accompanying text.

17. *See* discussion *infra* Part IV.

evident even at the negotiation of the Stevens Treaties. Part II analyzes the Supreme Court's interpretation of the Stevens Treaties and the issue of tribal fishing rights. Part III argues that the right of habitat protection arises from tribal fishing rights, because the Stevens Treaties granted tribes a portion of the fish run sufficient to grant them a moderate living. Therefore, tribes have a right to protect fish habitat in order to ensure that a sufficient number of fish are available to fulfill their fishing rights. Part IV considers the political pressures opposing tribal use of habitat protection to change the management of dams. Congressional opposition to an implied right of habitat protection could have serious repercussions for Pacific Northwest tribes, resulting in abrogation of their fishing rights.

I. DAMS AND SALMON IN THE NORTHWEST

A. Impact of Dams on Salmon

There are five factors necessary for a healthy salmon habitat: "(1) access to and from the sea, (2) an adequate supply of good-quality water, (3) a sufficient amount of suitable gravel for spawning and egg incubation, (4) an ample supply of food, and (5) sufficient shelter."[18] Pacific salmon are anadromous; they reproduce in freshwater streams, migrate to the sea to grow and mature, and then return to freshwater streams to reproduce and die.[19] What makes anadromous fish unique is a behavior called "homing."[20] Homing occurs when adult salmon return to the stream where they were spawned.[21] Each stream produces salmon with specific genetic variation adapted to the local environment.[22] However, homing is not perfect and stray salmon may enter a stream similar to the one where they hatched and replenish that stream's population.[23] For a healthy population, salmon must pass into similar streams (such as tributaries on the same major river system).[24] The replenishment of a waning population by stray salmon is most likely to work if the stream is similar to the one where the stray salmon were hatched.[25]

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18. Dana Johnson, *Native American Treaty Rights to Scarce Natural Resources*, 43 UCLA L. REV. 547, 557 n.63 (1995).

19. *See* COMMITTEE ON PROTECTION AND MANAGEMENT OF PACIFIC NORTHWEST ANADROMOUS SALMONIDS, ET AL., UPSTREAM: SALMON AND SOC'Y IN THE PACIFIC NORTHWEST 29 (1996) [hereinafter UPSTREAM].

20. *See id.*

21. *See id.*

22. *See id.* at 8.

23. *See id.*

24. *See id.*

25. *See id.*

This network of local populations, known as a metapopulation, allows salmon to exchange genetic material while maintaining the local adaptation necessary for survival.[26]

The first settlers of the Pacific Northwest recognized the need for unobstructed passage of salmon upriver to their spawning grounds.[27] The Oregon Territory Constitution insisted that any dams on rivers or streams must allow passage for salmon runs.[28] As the Pacific Northwest developed, so did settlers' needs for factories, electricity, and irrigation for farms. In order to satisfy these needs, settlers constructed dams in the late 1800's.[29] In the 1930's an emphasis was placed on taming the Columbia River, and dam construction began in earnest.[30] Woodie Gunthrie, a folk singer and poet who wrote several anthems about the Pacific Northwest, relayed the region's feelings in his song about the Columbia River's "Grand Coulee Dam."

> Uncle Sam took up the challenge in the year of thirty-three
> For the farmer and the worker and all of you and me.
> But river while you're rambling, you can do some work for me.[31]

This attitude resulted in fifty-eight dams constructed exclusively for hydropower and seventy-eight dams classified as multipurpose within the Columbia Basin.[32] New towns sprung up and the basin population rose from 2.8 million in 1933 to more than seven million today.[33] The dams prevented flooding, created electricity crucial to industries, provided water for irrigation, and created shipping transport into Idaho.[34] Without the Columbia and Snake Rivers, the major cities of the Pacific Northwest would not exist at their present scale.[35]

Building dams on the rivers of the Pacific Northwest came with a price. While the Columbia River once held the greatest chinook salmon and steelhead trout runs in the world, today those runs have diminished an estimated eighty-five percent despite the artificial raising of salmon in hatcheries.[36] Columbia River salmon runs have diminished from ten to sixteen

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26. *See id.*
27. *See id.* at 60.
28. *See id.*
29. *See id.*
30. *See id.* at 60-61.
31. DIETRICH, *supra* note 1, at 300.
32. *See* UPSTREAM, *supra* note 19, at 61.
33. *See* DIETRICH, *supra* note 1, at 43.
34. *See id.*
35. *See id.*
36. *See id. See also* UPSTREAM, *supra* note 19, at 90 (estimating pre-development salmon runs in the Columbia River Basin, including all species except steelhead and sea-run cutthroat).

million adult fish to approximately one million.[37] A report by the Endangered Species Committee of the American Fisheries Society found that in Washington, Oregon, Idaho, and California, 214 salmon stocks were at risk of extinction and over one hundred populations were recently extinct.[38] The change of the Columbia and Snake Rivers from free flowing rapids to flow-controlled reservoirs has contributed greatly to salmon mortality.[39]

The greatest effect of dams on salmon occurs when there are no fish passage facilities and the upstream habitat is lost. One-third of the Columbia River watershed is blocked to salmon passage.[40] The effect of a blocked passage on salmon is best seen in the Snake River in central Idaho where five of the eight tributary and lake systems that Columbia River salmon use to spawn are completely shut off by dams.[41] The dams come in all types and sizes. Small splash dams, used to float logs down river, were in place long enough to damage or destroy salmon runs.[42] Smaller irrigation and hydroelectric dams blocked salmon passage in the early stages of human development of the river.[43] Currently, hatcheries often block upstream access in order to collect or isolate returning adult salmon.[44]

For those salmon with access to streams, dams impact them from the time the eggs are spawned until the salmon reach the ocean.[45] In the fall and spring female salmon dig depressions in the gravel of stream beds and deposit their eggs.[46] Male salmon compete to fertilize the eggs, which are then buried.[47] The eggs develop and hatch several months later, emerging as free-swimming fry which either migrate directly to the ocean or spend time feeding in the stream, depending on the species.[48] A sudden change in the level of water, for purposes of irrigation or power, can leave salmon spawning grounds dry.[49]

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37. *See* Volkman, *supra* note 4, at 52.

38. *See* UPSTREAM, *supra* note 19, at 77.

39. *See* Lacey, *supra* note 3, at 21.

40. *See* UPSTREAM, *supra* note 19, at 231.

41. *See* DIETRICH, *supra* note 1, at 330-31.

42. *See* UPSTREAM, *supra* note 19, at 231 (describing various types of dams and the rivers which were affected).

43. *See id.*

44. *See id.* This common practice is used to aid hatcheries in collecting returning salmon. It is also used to block migrating salmon that may be carrying diseases from the hatchery water supply. *See id.*

45. *See generally* DIETRICH, *supra* note 1, at 340-45 (explaining a chinook's migration from central Idaho's Salmon River to the ocean and back).

46. *See* UPSTREAM, *supra* note 19, at 30.

47. *See id.*

48. *See id.* While the eggs develop in the gravel the larvae are called alevins. After the yolk sac is absorbed and the fish emerge they are termed fry. Different species migrate to the ocean at different times. "Pinks migrate directly to the sea, chum do so after a few days or weeks, chinook after a few months to a year, and coho generally after a year . . . . Young steelhead and cutthroat usually migrate to sea after about two years in freshwater; some never migrate." *Id.*

49. *See* DIETRICH, *supra* note 1, at 340.

Once the fry emerge they face danger from predators and disease.[50] As few as one percent of the eggs laid will start for the ocean.[51]

Once salmon start for the ocean they encounter dams blocking their way downstream. Dams hold water back in large reservoirs that form slack lakes that trap heat and fill with predators.[52] The reservoirs are a different habitat than the original river. The slower water speed found in reservoirs delays juvenile migration and increases the mortality rate.[53] The decreased flows slow salmon migration, increases exposure time to predation, raises water temperature which increases susceptibility to disease, and creates water quality problems.[54] Traditionally, salmon would migrate down the Snake River in twenty to thirty days in the spring.[55] Currently the same trip would take a chinook salmon two or three months.[56] During migration a salmon's body undergoes a complex chemical and biological transformation in order to adapt from freshwater to saltwater. This transformation is known as smoltification.[57] When a salmon's passage to the sea takes too long, the process can halt and even reverse.[58] If this occurs, the salmon's body, unprepared to survive in the saltwater environment, reverts back to live in freshwater and when the fish finally reaches the ocean, it will perish. [59]

B. Measures Available to Lessen Impact of Dams on Salmon Runs

There is a significant need for mitigation of the effects of dams on salmon runs. The Northwest Planning Council estimated that each year up to fifteen percent of juveniles die in each dam on the Columbia River.[60] Since the passage of the Northwest Power Act of 1980, one of the main objectives of the reservoir system operators is fishery protection and enhancement.[61] Currently, there are seven measures available to lessen the impact of dams on salmon runs: fish passage facilities, predator control, transportation, spill, flow augmentation, reservoir drawdown, and dam removal.[62]

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50. *See id.* Predators and disease claim up to ninety percent of emerging fry. *See id.*
51. *See id.*
52. *See id.* at 342.
53. *See* Michael C. Blumm et al., *Beyond the Parity Promise: Struggling to Save Columbia Basin Salmon in the Mid-1990s*, 27 ENVTL. L. 21, 33 (1997).
54. *See id.*
55. *See* DIETRICH, *supra* note 1, at 341.
56. *See id.*
57. *See* UPSTREAM, *supra* note 19, at 30.
58. *See* DIETRICH, *supra* note 1, at 341.
59. *See* UPSTREAM, *supra* note 19, at 137.
60. *See* DIETRICH, *supra* note 1, at 343.
61. *See* UPSTREAM, *supra* note 19, at 238.
62. *See id.*

The fish passage facilities used by most mainstream dams in the Columbia River Basin are deflection screens.[63] Deflection screens, situated next to the intake turbines of a dam, move fish away from the intake turbines and toward safe passage through the gateway.[64] It is important to ensure that juveniles avoid the intake turbines as "[t]hose that pass through the turbines, the least desirable passage route, suffer five to fifteen percent mortality."[65]

The transportation method moves juveniles to a point downstream from the dams, avoiding hydropower projects, often by barge or truck.[66] One study shows survival of adult capture hatchery coho salmon increased by nearly fifty percent when smolt were transported to Tongue Point near the mouth of the Columbia.[67] Transportation, which relies upon moving juveniles around obstructions in the river, must take into account the predators that thrive in the reservoirs. For example, in the John Day Dam, scientists studied squawfish to see the effects of the predation on salmon migration.[68] The study "estimated that 8%, 11%, 7%, 19%, and 61% of salmon that entered John Day pool were killed [by predators] in the months of April through August respectively; steelhead loss averaged 12% per month in April, May, and June."[69] The effect of predation is significant when salmon are transported around the dams, making this method less effective.[70]

Spill (discharging water over the dam so salmon avoid turbines) reduces salmon mortality rate caused by turbines.[71] However, the use of spill does not affect the reservoir mortality since it does not speed fish through the reservoir.[72] One study showed that the mortality of chinook spilled over dams was less than two percent.[73] However, spill can create problems by causing gas supersaturation downstream from the dam.[74] Gas supersaturation is caused when plunging water traps bubbles of gas in the water creating a

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63. *See id.*

64. *See id. See generally* UPSTREAM, *supra* note 19, at 238-40 (describing fish passage facilities and the Columbia River dams which utilize them).

65. Blumm, *supra* note 53, at 33.

66. *See* UPSTREAM, *supra* note 19, at 241.

67. *See id.*

68. *See id.* at 240.

69. *Id.*

70. *See id.* at 241. Those who object to using transportation of salmon around dams as a mitigation measure point to the continuing decline of salmon in the Snake River and center their opposition on unnatural migration conditions. Even though transportation by barges has been a major mitigation tool, the runs have continued to decline toward extinction. Many people see this as proof that transportation is not an effective measure. *See id.*

71. *See id.* at 242.

72. *See id.*

73. *See id.*

74. *See id.*

condition similar to the bends in humans.[75] While a panel of experts recommended that gas supersaturation be limited to 110%, it is often found to be in amounts in excess of 115% and sometimes as high as 143% in areas below major dams that use spills as a mitigation measure.[76]

Flow augmentation decreases the time spent in down river migration, allowing salmon to reach the ocean faster. Augmentation involves a "water budget" that allocates the release of stored reservoir water during key times in salmon migration. While the increase in water flow would help salmon move quicker through the river, it reduces the amount of water stored for electricity generation during peak demand.[77] Additionally, the effectiveness of flow augmentation on salmon populations has yet to be determined.[78]

Another option, reservoir drawdown, attempts to reduce the time that salmon travel by decreasing the area that the salmon must traverse.[79] The Snake River Salmon Recovery Team found, "on the basis of model predictions, that the natural-river drawdown option would produce the highest in river survival of yearling migrants in the Snake River basin."[80] However, this option comes with possible complications such as loss of habitat for non-salmon species, concentration of predators, and economic costs.[81]

Since dams have a significant impact on salmon runs, an obvious option is the removal of dams to rehabilitate rivers. Unfortunately, simply removing a dam will not restore a river to its natural state. The sediment trapped behind a dam can create a significant problem downstream, and possibly require restructuring of the reservoir bed.[82] Dealing with the sediment would require removal, erosion, or retention.[83] Removal is expensive, time consuming, and creates sediment storage problems.[84] Erosion allows the river to naturally move the sediment downstream, changing the ecology of the area and damaging downstream fish habitat.[85] Retention relocates some materials elsewhere in the lake bed, and requires costly revegetation which changes the ecology of the lake bed.[86] Dam removal includes the cost of sediment management and revegetation. The estimated final cost of removal of the

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75. *See id.*
76. *See id.*
77. *See id.* at 243.
78. *See id.* at 246.
79. *See id.* at 246-47.
80. *Id.* at 247-48.
81. *See id.*
82. *See id.* at 249.
83. *See id.* at 250.
84. *See id.* at 251.
85. *See id.*
86. *See id.*

Elwha Dam in Washington ranges from $70 million to $240 million.[87] The majority of the cost is associated with sediment management.[88] The cost of removing a middle Columbia or lower Snake River dam is likely to be much higher due to the increased sediment that moves along these rivers.[89]

Every solution to create salmon friendly rivers involves a great deal of time and money. Mitigating measures come at a high cost, and most measures decrease the economic potential of the rivers. The state receives a significant amount of revenue from the Columbia and Snake rivers. "The Columbia and Snake provide $3 billion in power per year, water $5 billion in irrigated crops, support eleven large aluminum mills, and move 8 to 10 million tons of cargo by barge."[90] Already an estimated $500 million has been spent on adapting the Columbia River dams for salmon, with fish program costs running over $140 million annually.[91] While the costs may be in excess of the economic value of salmon, the total value of the species is substantial and difficult to calculate.

The total value of preserving the salmon is made up of three parts: direct value, indirect value, and option value.[92] Direct value looks at the commodity value of salmon in economic terms.[93] Indirect and option values encompass the salmon's contribution to genetic diversity and future place in the ecosystem.[94] Also of importance is the species' existence value, which includes the appreciation of salmon as wildlife.[95] Salmon have a distinct social value in the Pacific Northwest. They are valued for recreation, tourism, and the public has adopted salmon as a symbol of the Northwest.[96] In addition, salmon hold great spiritual value for the Native American tribes of the Pacific Northwest.[97] When balancing the economic costs of salmon restoration, these values must be taken into account.

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87. *See id.* The cost range reflects the difference between the lowest cost alternatives of dam removal (those alternatives that remove sediment only from the river channel) and the higher cost of managing sediment throughout the reservoir basin. *See id.* at 251-52. This amount does not include the cost of hydropower loss once the dam is no longer functioning. *See id.* at 251.

88. *See id.* at 252. Seventy-five percent of the lowest cost alternative, and over ninety percent of the higher cost alternative would be used for sediment management. *See id.*

89. *See id.* at 253.

90. DIETRICH, *supra* note 1, at 351.

91. *See id.* at 352; UPSTREAM, *supra* note 19, at 244.

92. *See* UPSTREAM, *supra* note 19, at 119.

93. *See id.* at 120.

94. *See id.*

95. *See id.* at 119.

96. *See id.* at 123.

97. *See id.*

C. Salmon and the Pacific Northwest

1. Importance of Salmon to Pacific Northwest Native American Tribes

The tribes of the Pacific Northwest have a long history of using salmon for food, trade, and as an important component of their religion.[98] According to some Native American religions, all objects in nature, including game species, have an immortal spirit.[99] The animals sacrifice their mortal existence so the tribe can have food to eat.[100] In return, the tribe acts in accordance with taboos and rituals to ensure the continued cooperation of the prey species.[101] Virtually all tribes have legends explaining why the salmon return each year from the sea.[102] Some legends say that the salmon will only return to the river if the tribe is in the salmon's favor. Rituals were developed to secure that favor.[103] For example, the Yakima felt animals and plants had intelligence and will,[104] and in their stories about Coyote, Raven, and Salmon, the animals act as people.[105] When a salmon is netted in the river, it is the sacrifice of an individual for the tribe.[106]

Most Pacific Northwest tribes begin each season with a religious ceremony to welcome the first salmon.[107] Among the coastal Salish no one began to fish until the first catch had been ceremonially welcomed.[108] As the fish was cooked, a leader prayed that salmon would return in great numbers.[109] The entire community would share in the fish and then would collect the bones and entrails to return them to the river.[110] This would ensure that the salmon would return to life and lead its companions to the Indian fishing sites.[111] Representing the tribal connection with salmon, a Northwest Indian

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98. *See* discussion *supra* Part I.B.

99. *See* DOUGLAS E. BOOTH, VALUING NATURE: THE DECLINE & PRESERVATION OF OLD-GROWTH FORESTS 63 (1994).

100. *See id.*

101. *See id. See also id.* at 64 (explaining certain taboos which surround salmon, such as not wasting salmon meat or the fish will not return to the river).

102. *See* BOOTH, *supra* note 99, at 64. *See also* FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 22-23 (1986) (explaining the stories of the Nisqually, Twana, and Columbia River tribes).

103. *See* JOSEPH CONE, A COMMON FATE: ENDANGERED SALMON AND THE PEOPLE OF THE PACIFIC NORTHWEST 9 (1995).

104. *See id.* at 146.

105. *See id.*

106. *See id.*

107. *See* COHEN, *supra* note 102, at 23-24.

108. *See* CONE, *supra* note 103, at 147-48.

109. *See id.* at 148.

110. *See id.*

111. *See id. See also* BOOTH, *supra* note 99, at 64 (describing commonalties found among first salmon ceremonies held by various Pacific Northwest Indian tribes).

motif depicts a salmon with the human face represented in the salmon's body.[112] Tribal dependence on salmon was so great that "according to a Chinook man at the time of early contact with whites, 'if he was three days without (it), his heart failed him.'"[113]

2. The Stevens Treaties and Pacific Northwest Tribes

The tribes' concern with preserving their link with salmon prompted them to insure a preservation of this right when negotiating treaties with the United States. In the 1770's, there were approximately 100,000 Native Americans in settlements throughout the Pacific Northwest.[114] However, by the late 1850's, disease spread by European American settlers decreased Indian populations by eighty to ninety percent, destroying some tribal groups.[115] European American settlement in the area also created conflict over ownership of land. To minimize conflicts between land hungry European American settlers and Native American tribes, the United States began to negotiate treaties beginning with the Medicine Creek Treaty of 1854.[116]

Beginning in 1854, Washington Territory Governor and Superintendent of Indian Affairs, Isaac Ingalls Stevens, negotiated a series of treaties with Pacific Northwest tribes that secured sixty-four million acres of land for the emerging territory.[117] Treaty negotiations took place in Chinook Jargon, which contained as few as three hundred words.[118] Chinook Jargon was a difficult negotiating tool since one word in Chinook Jargon was the equivalent of several different English words.[119] The language barrier was complicated since the government could not trust their negotiators to relay their true intentions. Indian Commissioner, Francis A. Walker, spoke of "the extreme untrustworthiness of many of the interpreters on whom the Government is obliged to rely in bringing its intentions to the knowledge of the Indians."[120]

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112. *See* CONE, *supra* note 103, at 9-10.

113. COHEN, *supra* note 102, at 20.

114. *See* UPSTREAM, *supra* note 19, at 46.

115. *See id.* at 47.

116. *See id.* at 48. *See also* Prucha, *supra* note 6 (listing Pacific Northwest tribes, treaties, and dates negotiated); *Id.* at 251-52 (describing the negotiations at Medicine Creek, including one of Stevens' speeches).

117. *See* Johnson, *supra* note 18, at n.3. *See generally* TREATIES & AGREEMENTS, *supra* note 6 (including the Stevens Treaties and others negotiated from 1853-1905).

118. *See* DIETRICH, *supra* note 1, at 155. Chinook Jargon is also identified as containing a vocabulary of five hundred words. *See* PRUCHA, *supra* note 6, at 214-15.

119. *See* PRUCHA, *supra* note 6, at 214-15.

120. *Id.* at 215.

Those who signed the treaty would touch the hand that held the pen marking an X next to their name.[121]

Tribal negotiators insisted on maintaining a tribal right to fish.[122] In the six treaties referred to as the Stevens Treaties the tribes reserved:

> 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. [123]

Governor Stevens understood the importance of fish to the tribes, as well as their interest in protecting the right to take fish whether on or off the reservations.[124] "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."[125] Governor Stevens assured the tribes gathered at Point No Point that "[t]his paper secures your fish."[126] Tribes had an economic interest as well as a religious interest in salmon. The tribes used salmon in commerce with the settlers.[127] In late December 1854, a territorial officer described how the Puget Sound Indians supplied the area

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121. *See* DIETRICH, *supra* note 1, at 155.

122. *See id.* at 156.

123. United States v. Washington (Shellfish), 157 F.3d 630, 640 (9th Cir. 1998) (quoting Treaty of Medicine Creek) (emphasis omitted); *See* TREATIES & AGREEMENTS, *supra* note 6, at 13 (showing identical language in Treaty with the Nisqualli, Puyallup, etc., 1854. The fishing clause is stated in identical, or nearly identical language in the other Stevens Treaties).

124. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 667 (1979).

125. *Id.* at 676.

126. COHEN, *supra* note 102, at 37-38. The treaty of Point No Point was negotiated on January 26, 1855, with the Clallam, Twana, and Chemakum. *See* PRUCHA, *supra* note 6, at 447-501. Stevens' words to the gathered tribes represented the paternalistic view of the times:

> This paper [treaty] 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 gives you a school. Does not a father send his children to school? It gives you Mechanics and a Doctor to teach and cure you. Is not that fatherly? This paper secures your fish. Does not a father give food to his children? Besides fish you can hunt, gather roots and berries. Besides it says you shall not drink whiskey, and does not a father prevent his children from drinking the *"fire" water*? Besides all this, the paper says you shall be paid for your lands as has been explained to you.

PRUCHA, *supra* note 6, at 253.

127. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 666 n.8.

with fish, clams, and oysters, making up a considerable portion of the Sound's trade.[128]

Pacific Northwest tribes used salmon and shellfish for commercial, subsistence, and ceremonial purposes. Despite the negotiation of the Stevens Treaties in Chinook jargon, which made it difficult to convey exact meanings, the tribes were adamant about preserving their right to fish.[129] The reservation of this right was included in each of the Stevens Treaties and emphasized by Governor Stevens, who assured the tribes that salmon would be available for them.[130] At the time of the treaty negotiation territorial officers realized tribal reliance on salmon for religious and commercial reasons. The understanding of the tribes at the time of treaty negotiation is important to modern courts when they are called upon to interpret treaty provisions.

II. INTERPRETATIONS OF THE RIGHT TO FISH IN THE STEVENS TREATIES

During the negotiation of the Stevens Treaties, the supply of salmon seemed endless. However, as the fish stock declined and competition for the remaining salmon increased, the courts were called upon to interpret the meaning of the Stevens Treaties.[131] In dealing with Indian treaties the Supreme Court developed the trust doctrine. Beginning with *Cherokee Nation v. Georgia*, the Supreme Court stated that the United States had a relationship with tribes which resembled "that of a ward to his guardian."[132] Since the United States maintains this special relationship with tribes, courts view treaties and other federal action in a way that protects Indian rights and is favorable to the tribes.[133] To accomplish this, the courts have developed canons of construction in cases involving interpretation of Indian treaties.[134] "These canons call for promoting the treaties' central purposes; construing treaties as they were originally understood by the tribal representatives, rather than according to legal technicalities; resolving the ambiguities in favor of the Indians; and interpreting the treaties in the Indians' favor."[135] Courts cannot

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128. *See id.*

129. *See supra* notes 125-28 and accompanying text.

130. *See supra* notes 125-26 and accompanying text.

131. See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, (1979). *See generally* United States v. Winans, 198 U.S. 371 (1905); United States v. Washington (Shellfish), 157 F.3d 630 (9th Cir. 1998); United States v. Washington (Phase II), 759 F.2d 1353 (9th Cir. 1985).

132. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). *See also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220 (1982 ed.) (describing the development of the trust doctrine).

133. *See* COHEN, *supra* note 102, at 222.

134. *See id.* at 221.

135. *Washington (Phase II)*, 759 F.2d at 1358; *See also* COHEN, *supra* note 102, at 222-23 (describing the canons of construction of Indian treaties).

ignore the canons of construction because interpretation of treaties may cause political, social or economic hardship to non-Indians. Therefore, "the Court may not rewrite the Treaties or interpret the Treaties in a way contrary to settled law simply to avoid or minimize any hardship to the public or to the intervenors."[136]

In 1905, the Supreme Court first interpreted the Stevens Treaties' fishing clause in *United States v. Winans*.[137] In *Winans*, private parties erected a state-licensed fish wheel on the Columbia River, giving them exclusive possession of the space to the detriment of the Yakima tribe's fishing rights.[138] The Supreme Court found that the right to fish was integral to the Native American society.[139] While citizens may share the privilege of fishing, "the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted."[140] The Supreme Court held that the treaty granted the Indians the right to cross land to fish the river and occupy it for the purpose of curing fish.[141] This created an easement in the land, so far as necessary to fulfill the rights mentioned in the Stevens Treaties.[142]

For many years, however, tribes rarely asserted their treaty rights due to their lack of legal and financial resources.[143] In the 1960's, the federal government sought legal action to advance tribal rights.[144] Tribal litigation gave legal definition and provided enforcement for rights that laid dormant for years.[145] In 1974, the United States, on its own behalf and as trustee of seven Indian tribes, filed suit to protect Indian fishing rights, as established in the Stevens Treaties.[146] In *United States v. Washington (Phase I)*, Senior District Judge Boldt found that the Stevens Treaties established an equal allocation of fish between citizens and tribal fishermen.[147] The Ninth Circuit Court of Appeals affirmed Judge Boldt's decision, and the Supreme Court denied certiorari.[148] Disputes over allocation and salmon runs arose and hundreds of

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136. *Washington (Shellfish)*, 157 F.3d at 651.

137. *See Winans*, 198 U.S. at 371.

138. *See id.* at 380. A fish wheel was a wooden water wheel built over channels where migrating salmon swam. As the river's current moved the wheel, a bucket or lip would catch the salmon and dump it into a wooden box. *See* DIETRICH, *supra* note 1, at 336.

139. *See Winans*, 198 U.S. at 381.

140. *Id.* at 381.

141. *See id.*

142. *See id.* at 384.

143. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 873 (4th ed. 1998).

144. *See id.*

145. *See id.*

146. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 658.

147. *See* United States v. Washington (Phase I), 384 F. Supp. 312, 344 (W.D. Wash. 1974).

148. *See* United States v. Washington (Phase I), 520 F.2d 676, 677 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

post-judgment orders followed.[149] The Supreme Court granted certiorari in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* to address the issues raised by Judge Boldt's decision.[150] The Supreme Court affirmed Judge Boldt's decision, stating that his conclusion was "a fair appraisal of the purpose of the treaty negotiations, the language of the treaties, and particularly, this Court's prior decisions construing the treaties."[151] The Supreme Court held that:

> [b]oth sides have a right, secured by treaty, to take a fair share of the available fish . . . . [A]n equitable measure of the common right should initially divide the harvestable portion of each run that passes through a 'usual and accustomed place' into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount.[152]

The Supreme Court found that the Stevens Treaties did more than establish an equal opportunity to catch fish. Commenting on the current salmon runs and the state of tribal commercial fishermen, the Court found that "the concept of the Indians' 'equal opportunity' to take advantage of a scarce resource is likely in practice to mean that the Indians' 'right of taking fish' will net them virtually no catch at all."[153] In discussing tribes understanding at the time of treaty negotiations, the Court felt tribes were unlikely to have understood the treaty to merely offer them the right "to dip their nets into territorial waters."[154] The Court emphasized that their decision did not give tribes an opportunity for unlimited catch. Both citizens and tribes have a right to take a fair share of the salmon run.[155] The allocation measure of fifty percent assured that the tribes and citizens received an equal share of the salmon resource.[156] However, the Supreme Court acknowledged that "the treaties provide Indians with certain rights—i.e., the right to fish without a license and to cross private lands—that non-Indians do not have."[157] While tribes have a right for a fair share of salmon runs, the fifty percent allocation may be adjusted according to tribal need. The Supreme Court's holding on this

149. *See* GETCHES, *supra* note 143, at 882.
150. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 658-59.
151. *Id.* at 659.
152. *Id.* at 684-85.
153. *Id.* at 677 n.22.
154. *Id.* at 679.
155. *See id.* at 685.
156. *See id.* at 684-85.
157. *Id.* at 676 n.22.

issue established the Moderate Living Doctrine, which states the fifty percent allocation could be reduced provided the portion still meets tribal needs.[158]

The Ninth Circuit reviewed the issue of whether hatchery fish were included in the fifty percent allocation in *United States v. Washington (Phase II)*.[159] The court stated that since hatchery fish were introduced to the river to replace wild fish lost to degradation of habitat, these replacement fish should be subject to treaty allocation.[160] The court held that hatchery fish should be included in the allocation amount "[f]or the Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries, would be an inequity and inconsistent with the Treaty."[161] Several factors influenced the court's decision that hatchery fish should be included in the fifty percent allocation: "(1) the lack of State ownership of the fish once released; (2) the lack of any unjust enrichment of the Tribes; (3) the fact that hatchery fish and natural fish are not distinguished for other purposes; and (4) the mitigating function of the hatchery fish programs."[162] Because of these factors, the court believed that tribes had a right to receive an equal portion of the increased supply of fish, regardless of whether they were natural fish or hatchery fish.

The Ninth Circuit recently extended the Boldt decision, holding the Stevens Treaties allocation of fifty percent of the salmon run to Indian tribes, to also include harvestable shellfish.[163] However, the Stevens Treaties set forth a singular limitation on tribal right to harvest shellfish which provided that Indian Tribes "shall not take shell fish from any beds staked or cultivated by citizens."[164] Therefore, the court limited the tribes to fifty percent of all beds that exist solely by natural means.[165]

The cases interpreting the Stevens Treaties recognize that Indian fishing rights depend on the existence of salmon, and acknowledge the importance of salmon to Pacific Northwest tribes. In *Winans*, the Supreme Court held that an easement had been placed on the land so the reserved right of fishing may

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158. *See id.* at 686.

159. *See Washington (Phase II)*, 759 F.2d at 1359.

160. *See id.* at 1360.

161. *Id.*

162. *Id.* at 1359.

163. *See Washington (Shellfish)*, 157 F.3d at 638-39. The holding in United States v. Washington (Phase I), 384 F. Supp. 312 (W.D. Wash. 1974), is commonly known as "the Boldt decision," referring to the district court judge who issued the milestone ruling. *See* COHEN, *supra* note 102, at xxii-xxiii.

164. *Washington (Shellfish)*, 157 F.3d at 640 (quoting Treaty of Medicine Creek) (emphasis omitted); *See also* TREATIES & AGREEMENTS, *supra* note 6, at 13 (showing identical language in Treaty with the Nisqualli, Puyallup, etc., 1854. The fishing and shellfish clause is stated in identical, or nearly identical language in the other Stevens Treaties).

165. *See Washington (Shellfish)*, 157 F.3d at 640.

be utilized by the tribe.[166] The Supreme Court acknowledged that tribes did not, at the time of the signing of the Stevens Treaties, agree to merely dip their nets into water without catching any salmon.[167] Therefore, under the canons of construction, and considering the history of the Stevens Treaties, tribes maintain a reserved right of habitat protection. This right requires federal, state, and private parties to refrain from activities which would degrade fish habitat to the extent that a tribe is deprived of their moderate living needs.

III. RIGHT OF HABITAT PROTECTION IN THE STEVENS TREATIES

In *United States v. Washington (Phase II)*, the Ninth Circuit declined to rule on whether the tribal right to fish included a right to protect the fish from man-made degradation of habitat.[168] The court vacated the judgment of the district court on the issue of environmental protection of fish habitat, stating that the lower court should not have granted declaratory judgment.[169] The court stated, "[d]eclaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties."[170] For declaratory relief the court must give precise answers, not a general statement.[171] The court found that the environmental degradation issue in *Phase II* would not allow the court to announce firm legal rules, and so declaratory relief should not have been granted.[172]

The dissenting opinions in *Phase II* provide strong support for finding an implied right of habitat protection in the Stevens Treaties, and suggests that the declaratory judgment requirements can be fulfilled by this controversy.[173] Declaratory relief would settle the uncertainty of the rights and duties of the tribes and the State under the Stevens Treaties regarding habitat protection. However, declaratory judgment need not decide all aspects of the implied right of habitat protection in one hearing. Rather, "declaratory judgments may appropriately resolve only the existence of certain rights (e.g., the right to have the fishery protected from environmental degradation) claimed by the

166. *See* United States v. Winans, 198 U.S. 371, 384 (1905).

167. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 679 (1979).

168. *See* Unites States v. Washington (Phase II), 759 F.2d 1353, 1355 (9th Cir. 1985).

169. *See id.* at 1360.

170. *Id.* at 1357.

171. *See id.*

172. *See id.*

173. *See id.* at 1367. (Nelson, J., concurring in part, dissenting in part).

plaintiff."[174] In the instance of Phase II, declaratory judgment would have provided all parties with an answer to their question and ended the uncertainty of whether an implied right of habitat protection exists under the Stevens Treaties.

If an implied right of habitat exists, then the court should find, in keeping with the canons of treaty interpretation and past court decisions, that tribes have a right to protect fish habitat from being degraded to such a degree that available fish runs do not meet the moderate living standard. This would create a duty on the federal government and the state to avoid damaging, or authorizing others to damage, fish habitat to the degree that it impacts fish runs. The canons of treaty interpretation require the court to view the treaty as understood by the tribal representatives, with ambiguities resolved in favor of the tribes.[175] The Supreme Court found in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* that "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."[176] It would be equally inconceivable that tribes would allow the state or individuals to degrade the rivers so that salmon runs would dwindle to a point that tribes could no longer make a living. The tribes negotiated a reservation of their right to fish, a right that is worthless unless there are fish in the river. The high regard in which tribes held salmon, both as a religious icon and as a means for subsistence, indicates that they would not have agreed to the degradation of streams to the point where salmon rarely returned.[177]

The Supreme Court found in *United States v. Winans* that the use of a fishing wheel device effectively took away the tribes' fishing rights.[178] The Supreme Court stated that "white men may not be confined to a spear or crude net, but it does not follow that they may construct and use a device which gives them exclusive possession of the fishing places."[179] However, use of a modern device may not completely cut tribes off from the salmon runs. The Supreme Court acknowledged that the right to fish does not mean the right merely to go through the motions and return empty handed.[180] A structure that blocks fish from passing through effectively robs the tribes of their right to fish. Few modern structures restrict the migration of salmon as effectively as dams. As a result of the dams, "[S]cientists know that about 3.5 percent of the young

174. *Id.* at 1364. (Nelson, J., concurring in part, dissenting in part).

175. *See* discussion *supra* Part II.

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

177. *See supra* notes 95-110 and accompanying text.

178. *See* United States v. Winans, 198 U.S. 371, 382 (1905).

179. *Id.*

180. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 679.

salmon of the Columbia River Basin survive to return as adults."[181] The Columbia River Basin is clogged with dams, which take their toll on salmon migrating to the sea, as well as on those rare few that return.

Since the Supreme Court acknowledged that the Stevens Treaties reserved the right to fish in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, this right should include the ability to ensure that fish remain in the rivers.[182] Destruction of fish habitat has taken its toll on the amount of fish returning each year on their migratory journey.[183] The Stevens Treaties' and Supreme Court's interpretation of the fishing rights maintained by tribes provides support for a right of habitat protection. The Supreme Court in *Winans* acknowledged that the impact created by granting tribal rights to cross private property to exercise their fishing right, was not unreasonable, "[i]t only fixes in the land such easements as enables the right to be exercised."[184] This right includes not only federal and state land, but also privately owned land. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n* the court stated that the importance of *Winans* can be found in the disposition of the court, even more than the language.[185] *Winans* required removal of enough fishing wheels to allow passage of salmon to the upstream fishing areas.[186] The Supreme Court's assurance was that the tribes would receive a share of the salmon, and that a structure that robs tribes of the ability to meaningfully exercise their right by blocking salmon from usual and accustomed fishing places is not allowed.[187]

In *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, an Oregon tribe used its right to fish to receive a declaratory judgment stating that building a dam would eliminate their treaty rights.[188] While the Confederated Tribes of the Umatilla were not part of the Pacific Northwest tribes who negotiated with Stevens, their treaty language is very similar and provides the same protected treaty right to fish.[189] Therefore, interpretation of

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181. DIETRICH, *supra* note 1, at 347.

182. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 684-85.

183. *See supra* notes 35-38 and accompanying text.

184. *Winans*, 198 U.S. at 384.

185. *See Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 681.

186. *See id.*

187. *See id.*

188. *See* Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 555-56 (D. Or. 1977).

189. *See id.* at 554. Treaty language for the Confederated Tribes of the Umatilla states "the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations." *Id.* Compare this with the language of the Stevens Treaties "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians." United States v. Washington (Shellfish), 157 F.3d 630, 640 (9th Cir. 1998).

their treaty is consistent with the interpretation of the Stevens Treaties. The threat to the Confederated Tribes of the Umatilla's fishing rights came when the United States Army Corps of Engineers planned to build a dam on Catherine Creek.[190] This dam would have created a reservoir flooding the Confederated Tribes of the Umatilla's fishing stations.[191] The District Court of Oregon found that the steelhead run would be eliminated entirely at all upstream fishing stations, and that the chinook run would have to be barged around the dam.[192] The dam's prevention of wild fish from migrating upstream would nullify treaty rights.[193] One of the canons of treaty construction states that only Congress has the ability to nullify treaty rights and that must be done in a specific act expressly taking the Indian fishing rights.[194] Therefore, the court held that by authorizing the dam construction without knowledge that it would impact Indian rights; Congress had not authorized a taking of tribal fishing rights.[195] Since construction of the dam would not begin for two years, the court concluded an injunction was unwarranted. However, specific Congressional authorization would be needed to authorize flooding of the Indian fishing stations.[196] The court would not allow construction that would deprive the tribe of their right to have salmon reach all usual and accustomed places.[197]

IV. POSSIBLE IMPLICATIONS OF TRIBAL USE OF RIGHT OF HABITAT PROTECTION

Saving the salmon stock in the Columbia River Basin will require modification or removal of the dams, with a resulting economic impact on the region. Dam building enabled the development of the Pacific Northwest because settlers were able to harness hydroelectric energy, which in turn drove the Industrial Revolution.[198] This development had a cost, which came in the form of a decrease in salmon runs that Native American tribes depended on for their culture, religion, and commerce. If the Supreme Court recognizes an implied right of habitat protection, then tribes would have authority to protect and minimize damage to fish runs, including the removal of dams.

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190. *See Confederated Tribes of the Umatilla Indian Reservation*, 440 F. Supp. at 554.

191. *See id.* at 555.

192. *See id.*

193. *See id.*

194. *See id. See also* GETCHES, *supra* note 143, at 3 (noting under the reserved rights doctrine, those rights could not be taken away or lost unless Congress passes legislation specifically removing those rights).

195. *See Confederated Tribes of the Umatilla Indian Reservation*, 440 F. Supp. at 555.

196. *See id.*

197. *See id.*

198. *See* DIETRICH, *supra* note 1, at 43.

Furthermore, tribes would have a tool to ensure that their interests will retain equal footing with economic interests in deciding Columbia River Basin policy.

While a recognized tribal right of habitat protection would require the state to implement salmon friendly practices, the tribes will likely encounter strong opposition from political and economic groups. The strongest opposition may come from Senator Slade Gorton, a Republican from Washington. Senator Gorton has repeatedly attacked tribal sovereignty and is a firm opponent to dam removal.[199] As Attorney General for Washington State from 1969 to 1981, Senator Gorton led several cases opposing tribal fishing rights.[200] As Senate Appropriations Interior Subcommittee Chair, Senator Gorton has significant power over dam removal.[201] With the recent interest in removal of dams in Washington State, Senator Gorton withheld $22 million in funding for the removal of the Elwha River dam from the 1999 spending bill.[202]

Senator Gorton also attached a rider to the omnibus bill that would require congressional approval before allowing any changes to the 261 dams in the Pacific Northwest.[203] The provision was stripped from the bill after receiving severe criticism from environmentalists.[204] As Interior Secretary Bruce Babbitt stated, "the rider would have amended the Clean Water Act, the Endangered Species Act, the Federal Power Act, 'and all of the relevant environmental laws.'"[205] Senator Gorton's concern lies not only over the removal of the Elwha River dam, but the proposed removal of four dams on the Upper Snake River.[206]

Senator Gorton's decision to prevent dam removal from the Columbia River Basin is seen by many environmentalists as a death sentence to the

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199. *See* Michael Paulson, *Gorton Demands Trade-Offs On Dam*, SEATTLE POST-INTELLIGENCER, Apr. 3, 1998, at B1, *available in* 1998 WL 4289903.

200. *See* Charles Levendosky Casper, *Once Again, A U.S. Senator Targets Tribal Sovereignty*, ROCKY MTN. NEWS, Apr. 20, 1998, at 35A, *available in* 1998 WL 7936852.

201. *See* Paulson, *supra* note 199, at B1.

202. *See Natural Resources Dams: Gorton Pulls Funding For Elwha Dam Removal*, AM. POL. NETWORK GREENWIRE, Oct. 27, 1998, at 15.

203. *See id.*

204. *See id.*

205. *Id.*

206. *See id.* Senator Gorton is concerned over the possible removal of four dams on the Upper Snake River. These include the Lower Granite, Little Goose, Lower Monumental and Ice Harbor dams. *See* John Hughes, *Tug of War Over Northwest Dams Far From Over / Gorton Seeks to Prevent Unilateral Removals*, MORNING NEWS TRIBUNE, Oct. 25, 1998, at C11, *available in* 1998 WL 4096545. Those who ask for removal of the four Upper Snake River dams claim it was only after the construction of those four dams that the salmon population declined to alarmingly low levels. *See* Richard A. Lovett, *Will The Feds Tear Down 4 Northwest Dams?*, THE SACRAMENTO BEE, June 21, 1998, at FO1, *available in* 1998 WL 8828119.

region's salmon.[207] Bill Arthur, Northwest regional director for the Sierra Club said, "Gorton is trying to play emperor in the Roman Colosseum, turning his thumbs down on the Columbia and Snake river salmon and saying, 'Kill them all, kill them now,'. . . . This is vintage Gorton—fighting Indians and killing salmon."[208] Senator Gorton is reluctant to allow changes to be made to regional dams. He has consistently attempted to restrain tribal rights.[209] It is unlikely Senator Gorton will remain silent while tribes are granted such a potentially important right.

Indeed, the Supreme Court has held treaty rights may be abrogated without the consent of the tribe by Congress because tribal treaty rights are not inviolable.[210] However, pursuant to the canons of construction the Supreme Court has determined that if Congress is going to abrogate a treaty right it must show that a "clear and plain" intention to nullify specific treaty rights.[211] Yet, courts do not recognize abrogation of a treaty right easily. While it is unlikely that Senator Gorton could receive enough support in Congress to abrogate Pacific Northwest tribes' right of habitat protection, tribes must consider this possibility.

If Senator Gorton does receive support for an act of Congress that abrogates tribal fishing rights, and with them the treaty right of habitat protection, the tribes are entitled to just compensation for their loss. "The Supreme Court has stated that Indian treaty hunting and fishing rights are valuable property rights and that their abrogation by Congress gives rise to a claim for compensation for loss under the Fifth Amendment to the United States Constitution."[212] Congress is unlikely to abrogate treaty rights if compensation must be given to the tribes for the loss of their right to habitat protection.

Public opinion is an additional source of protection for tribes from a political attempt to abrogate or weaken their treaty rights. Politicians scheduled for reelection are likely to listen to the popular viewpoint. Public opinion is in favor of restoring salmon runs; however, the public is still split on how much they are willing to pay. According to a poll by environmental groups, "[r]estoring and protecting wild salmon is 'extremely or very important' to 70% of Washington state residents . . . . Some 53% said that salmon recovery should get a higher priority than logging, farming, hydropower and other industrial operations."[213] In a poll by the *Portland*

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207. *See* Paulson, *supra* note 199, at B1.
208. *Id.*
209. *See* Casper, *supra* note 200, at 35A.
210. *See* COHEN, *supra* note 102, at 222.
211. *Id.* at 223.
212. *Id.* at 468.
213. *Natural Resources Salmon: BPA Has Withheld $300M From Recovery Programs*, AM. POL.

Oregonian "60 percent of Oregonians want salmon recovery to be given higher priority than commercial uses of the Columbia drainage, and 38 percent favor the removal of 'some' dams in order to aid salmon runs. Thirty-five percent said they'd be willing to pay $5 a month or more in higher utility rates to achieve this goal."[214] While there still exists an anti-Indian sentiment in the Pacific Northwest, the public appears to support attempts to restore salmon runs. If tribes use public relations to their advantage they may be able to combat the political opposition that Senator Gorton is likely to direct against them.

Government attempts to solve the decline of salmon populations are criticized for ineffectiveness as well as failure to listen to agency and tribal objections to the plans.[215] There are two agencies in charge of creating plans to protect salmon runs: the Northwest Power Planning Council (Council) under the Northwest Power Act and the National Marine Fisheries Service (NMFS) under the Endangered Species Act (ESA).[216] The Council's failure to effectively regulate hydropower on the Columbia River system led to the listing of several salmon species under the ESA in 1991 and 1992.[217] While the NMFS overlooks the Council's plans, it is not always protective of salmon. "[T]he record reveals that NMFS decision making under the ESA was actually more sensitive to economic and political concerns than Council decision making under the Northwest Power Act."[218] Currently there is a failure to listen to tribal concerns over operation of the dams and the impact the current plan has on salmon runs. A tribal right of habitat protection would resolve these issues by giving the federal government a duty to listen to the tribes, and to work with them in order to minimize the degradation of salmon habitat.

Three plans have been proposed to improve the survival rates of juveniles on the Columbia River Basin: the Council plan, the NMFS BiOp, and a tribal plan. The tribes of the Nez Perce, Umatilla, Warm Springs, and Yakama reservations released a tribal plan for salmon restoration in June 1995.[219] The Columbia River Anadromous Fish Restoration Plan attempted to restore fish to the river and streams, maintain a healthy river system, and reclaim the fish resource for future generations.[220] The plan recommended use of short and long term measures such as increasing flow and drawing down reservoirs.[221]

NETWORK GREENWIRE, Feb. 24, 1998, at 13.

214. Lovett, *supra* note 206, at FO1.
215. *See* Blumm, *supra* note 53, at 23.
216. *See id.*
217. *See id.* at 119.
218. *Id.* at 120.
219. *See id.* at 75.
220. *See id.* at 75-76.
221. *See id.* at 76.

Although the Council reported to Congress in 1996 that all three plans should be brought together, no plans have been made to accomplish this objective.[222] With a tribal right of habitat protection, the government should become more sensitive to tribal concerns than economic concerns. This could break the current deadlock and create an incorporation of the three recommended plans.

Presently, the restoration of Columbia River salmon runs is blocked by the NMFS BiOp, which allows the Army Corps of Engineers to ignore the recommendation to drawndown reservoirs.[223] "In 1995, these compromises resulted in failure to meet mainstem flow targets, widespread failure to shape flows to maximize salmon migration, and a wholesale commitment to barging and trucking salmon on the Snake."[224] The best plans are worthless if the federal agencies, such as the Army Corps of Engineers, refuse to implement them. While there is a collection of laws to protect the salmon, the restoration process is not working, and the Columbia River salmon are slipping further into extinction. The use of the tribal right to habitat protection provides another strong point to adopt salmon friendly plans in the Columbia River Basin system. This right has the potential to provide support for the tribal view of habitat protection in river management.

CONCLUSION

Salmon hold an important place in the culture, religion, and history of the tribes of the Pacific Northwest. In the treaty negotiation with Governor Stevens, tribes allowed a transfer of land while preserving their right to fish.[225] The courts have affirmed that the right to fish includes an allotment of equal portion to non-treaty fishermen.[226] This allotment allows tribes a moderate living. With the blocking of the Columbia River Basin by dams, the tribal right to fish is again threatened.[227] Salmon are quickly disappearing, and the current solutions have not slowed the decline. The courts should recognize that within the right to fish is an implied right of habitat protection. This would ensure that the rivers could support a fish habitat, and give meaning to tribal rights to fish.

Unfortunately, current law is not adequate to stop the destruction of the salmon runs. "In truth, the chief impediment to effective restoration of Columbia Basin salmon has always been the resistance of those who have

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222. *See id.* at 120-21.

223. *See id.* at 121.

224. *Id.*

225. *See supra* Part I.B.1.

226. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 684-85 (1979).

227. *See supra* Part I.A.1.

benefitted economically from the construction and operation of the Columbia Basin."[228] Using the Endangered Species Act and the Northwest Powers Act, environmental groups and tribes must work together to provide a workable plan to rebuild salmon runs. Acknowledgement of the right of habitat protection in the Stevens Treaties provides the best way for tribes to protect the salmon and pursue an effective restoration program.

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228. Blumm, *supra* note 53, at 123.