THE TRIBAL PROPERTY RIGHT TO WILDLIFE CAPITAL (PART II): ASSERTING A SOVEREIGN SERVITUDE TO PROTECT HABITAT OF IMPERILED SPECIES*

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INTRODUCTION

Across the country, native nations currently face one of the greatest threats ever to their traditional livelihoods: the extinction of species they have harvested for millennia. Because federal statutes such as the Endangered Species Act have largely failed to protect wildlife populations from imperilment, tribes are beginning to look to their treaty rights as a basis of legal protection for species they harvest. This Article is the second part of a larger work, which sets forth a full sovereign property rights paradigm for protecting treaty species.[1] The paradigm relies on a conceptual framework that presents the wildlife asset as encompassing two fundamental components: capital and yield.[2] Wildlife capital consists of the set of conditions that sustain a species over time. Broadly stated, it includes both replenished wildlife populations and healthy habitats. The yield component consists of the actual returns of wildlife that may be harvested on an annual basis without depleting the capacity of the species to survive at such harvestable levels.

As Part I of this work suggested, courts have approached treaty rights issues by focusing nearly exclusively on the yield component of the wildlife resource.[3] Past landmark cases upheld tribal rights to harvest a fair share of treaty reserved species. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, for example, the Supreme Court construed language in the Stevens Treaties negotiated with Pacific Northwest Indian tribes as securing a right to take up to 50% of the harvestable quantities of salmon passing through usual and accustomed tribal fishing sites.[4] Such resounding decisions rendered over two decades ago, however, have little effect amidst the current extinction crisis. Over-exploitation and habitat degradation have so depleted the wildlife capital of many species that populations no longer return at harvestable levels.[5] The tribal harvest right is nearly meaningless within a context of species imperilment.[6] Therefore, as Part I of this work suggested, the next era of treaty interpretation must focus

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1. Part I is published as Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1 (2000) [hereinafter Wood, *Wildlife Capital Part I*].

2. *See id.* at Section III.B.

3. *See id.* at Section II.B.1.

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

5. The salmon of the Columbia River Basin present a stark example. For an overview of the salmon crisis, see Wood, *Wildlife Capital Part I*, *supra* note 1, at Section II.A.

6. *See id.* at Section II.B.3.

on the tribal treaty right to wildlife capital as a basis for rebuilding populations and protecting habitat.[7]

This work draws upon the current salmon crisis in the Columbia River Basin as a case study for applying property principles based on treaty rights.[8] In that Basin, returning salmon runs, which once numbered between ten and sixteen million, have plummeted to less than 500,000 wild fish, with several species in the Basin already extinct.[9] The collapse of the salmon runs imperils a tribal fishing culture that has survived throughout the Basin for over 10,000 years.[10] The scarcity of fish calls into question treaty language which expressly secures fishing harvest rights to the tribes across the territories that they ceded in 1855.[11] The focus on the Columbia River salmon crisis is appropriate not only because the salmon have been at the forefront of some of the most strenuous conservation efforts in the nation over the last two decades,[12] but also because landmark litigation establishing treaty interpretation principles nationwide has historically focused on Pacific Northwest treaty rights.[13]

Part I of this work addressed the first component of wildlife capital in the context of Columbia River Basin treaty rights. It offered a theory premised on a "sovereign trusteeship" in wildlife as a basis for protecting replenishing populations of species.[14] That article identified a basic property right held by sovereign governments in the wildlife populations that are within, or pass through, their borders.[15] Tracing back to the landmark decision of *Geer v. Connecticut*,[16] this property interest takes the form of a trust held by governments for the benefit of their citizens.[17] Part I suggested that the property interest is not limited to state sovereigns, but instead inheres in any sovereign, including tribal governments.[18] While the Supreme Court has manifestly repudiated a derivative doctrine known as the "state ownership

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7. *See id.*

8. Part I of this work sets forth a full background of the Columbia River salmon crisis. *See id.* at Section II.

9. *See id.* at 9 nn.33-35 and sources cited therein.

10. Letter from Donald Sampson, Umatilla Tribes, to Bill Clinton, President of the United States 1 (Mar. 15, 1994) (on file with author) (re: State of Emergency); John Daniel, *Dance of Denial*, SIERRA, Mar./Apr. 1993, at 64, 70.

11. The treaties negotiated with all four Columbia River Tribes are commonly called the "Stevens Treaties," because they were negotiated by Isaac Stevens, Governor of the Washington Territory, and contain substantially similar language concerning fishing rights. *See infra* note 89 and accompanying text.

12. For background, see Wood, *Wildlife Capital Part I*, *supra* note 1, at Section II.B.2.

13. For background, see *id.* at Section II.B.1.

14. *See id.* at Section IV.

15. *See id.* at Section IV.A.

16. Geer v. Connecticut, 161 U.S. 519, 534 (1896).

17. *See* Wood, *Wildlife Capital Part I*, *supra* note 1, at Section IV.A.

18. *See id.*

doctrine" when it conflicts with the constitutional status of states in the federalist system, the basic principles underlying the sovereign trusteeship in wildlife endure and provide a basis for tribes to assert property rights in wildlife populations of treaty species.[19]

This Article resumes the sovereign property rights analysis by focusing on the second component of wildlife capital: natural production areas, commonly called habitat. Without a basis for protecting habitat located off their reservations, tribes cannot carry out their treaty rights to harvest species. Sections I and II of this Article suggest a native conservation servitude that encumbers ceded lands, having its source in the aboriginal management that tribes exercised over their territories prior to treaty times. Such a servitude takes the form of a negative conservation easement supporting a tribal property right which could be enforced in ceded areas throughout the Columbia River Basin to protect against activities impairing salmon habitat. As a reserved sovereign servitude, such a property right is antecedent to the rights later acquired by the federal government, states, or individual private parties. Section III explores the geographic scope of the native conservation easement and analyzes the impact of changed conditions. Section IV of this Article then examines quantification issues with respect to the sovereign property rights paradigm. It explores the extent of the native property right to natural wildlife capital, including both populations and natural production areas. It suggests that the basic right ties to aboriginal wildlife conditions that framed treaty negotiations. The discussion argues that, while the Supreme Court's "moderate living" standard developed in prior harvest cases should guide courts in fashioning equitable remedies for treaty violations, it should not define the basic treaty right of environmental support for tribal species.

Finally, Section V of this Article broadly examines issues of enforcing the native property right to wildlife capital. It suggests a court-supervised, negotiated settlement process at the sovereign level among the federal government, states, and tribes to arrive at substantive and binding obligations to restore the wildlife resource. The discussion envisions a "judicial referee" role for the court, drawing from past judicial experience with harvest management. The section also addresses the damages component of a remedy, suggesting ongoing compensatory damages for tribes in the form of natural resource damages and economic losses.

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19. *See id.*

I. PARAMETERS OF THE NATIVE SOVEREIGN SERVITUDE

Part I of this work suggested a property-based paradigm through which to extend treaty rights protection to imperiled wildlife populations in the form of a "sovereign trusteeship" in wildlife. The same sovereign property rights paradigm should extend protection to natural production areas (NPAs), the other component of wildlife capital.[20] Otherwise known as "habitat," NPAs are vital to species survival and are therefore critical to the protection of Indian treaty rights. This Part suggests treaty protection of NPAs through recognition of a native conservation servitude. It explores this servitude using the Columbia River Basin salmon crisis as a case study.

A. General Principles and Precedent

Servitudes are property law devices to effectuate arrangements for the use of land.[21] Such devices can take the form of profits, easements, real covenants, or equitable servitudes.[22] Deriving from ancient property law concepts,[23] servitudes share three central characteristics: 1) they arise from transactions;[24] 2) they create nonpossessory rights in the land of another;[25] and 3) they permanently bind successive owners of encumbered land without the need for assigning obligations.[26] Servitudes held by governments ("sovereign servitudes") form a special class of land encumbrance.[27] They are deemed

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20. *See id.* at Section III.B.

21. *See* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1261-62 (1982) [hereinafter French, *Modern Law*].

22. "Servitudes" is a sweeping categorical term to describe all of these various interests in land. *Id.* at 1261; Susan F. French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1221 (1988) [hereinafter French, *Design Proposal*].

23. French, *Design Proposal*, *supra* note 22, at 1214; French, *Modern Law*, *supra* note 21, at 1262.

24. French, *Design Proposal*, *supra* note 22, at 1214 (describing servitudes broadly as "arrangements that bind particular burdens or benefits to land ownership or occupancy").

25. *Id.* Such rights result in a set of burdens on the encumbered parcel and a set of benefits for the dominant estate. *Id.* at 1214-15.

26. *See id.* at 1214:

> The common feature of easements, profits, covenants, and equitable servitudes is that they create interests running with the land. They create nonpossessory rights in the land of another, which pass with ownership or occupancy of the benefited land or estate, and corresponding duties, which pass with ownership or occupancy of the burdened land or estate. A change in ownership does not require an assignment, delegation, or assumption of the rights or duties to perpetuate the arrangement. Because these arrangements bind successive owners and occupiers of the land, servitudes often provide the stability needed for investments dependent upon maintenance of particular uses of land.

See also French, *Modern Law*, *supra* note 21, at 1264 (noting that servitudes of all sorts create permanent obligations).

27. Like private servitudes, sovereign servitudes form encumbrances on the use of land. Because

antecedent property rights underlying all subsequently acquired private property rights; as such, they generally defeat constitutional takings claims.[28]

Only one case has squarely confronted the question of whether the Stevens Treaties negotiated with the Columbia River tribes embrace a broad conservation servitude for protection of fish habitat.[29] In *Phase II* of the *United States v. Washington* litigation, the United States pursued a claim on

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the benefits inure to a sovereign party rather than a private party, they are appropriately classified as a distinct type of encumbrance. Sovereign servitudes subordinate conflicting individual property interests to the superior interests of the sovereign. There are at least three prominent examples of sovereign servitudes. One is the tribal property right to cross privately owned land to access usual and accustomed fishing sites. The Supreme Court has characterized such a right as an "easement" or "servitude" held by tribes that encumbers private land. United States v. Winans, 198 U.S. 371, 381, 384 (1905). This servitude is rooted in the treaties which reserved the tribes' rights to fish at usual and accustomed stations. *Id.* at 381. A second example is the federal navigation servitude, implied by federal common law to preserve national navigational interests. *See generally* WILLIAM H. RODGERS JR., 2 ENVTL. L. Part 4.14 (1986); Genevieve Pisarski, *Testing the Limits of the Federal Navigational Servitude*, 2 OCEAN & COASTAL L.J. 313, 315-16 (1997). A third example arises from the public trust doctrine, which imposes encumbrances on lands that are critical to the public interest, and thus, vital to sovereignty. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892), *and* Lake Mich. Fed'n v. United States Army Corps of Eng'rs, 742 F. Supp. 441 (N.D. Ill. 1990) (both cases finding submersible lands encumbered by the public trust doctrine). The public trust doctrine is most typically applied to submersible lands and adjacent areas, usually in the state sovereign context. *See* Richard J. Lazarous, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 636-40, 647-50 (1986) (reviewing public trust litigation). For a less familiar example of a sovereign servitude, see Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1994) (upholding citizen access along beach front under doctrine of custom), *cert. denied*, 510 U.S. 1207 (1994).

A significant difference between a native sovereign servitude and a federal or state sovereign servitude lies in its enforcement against private property owners. Typically, tribes cannot directly enforce any native servitudes existing off the reservation due to their lack of regulatory authority over non-Indian land. Enforcement of the servitude rests with the government having jurisdiction over the land. Of course tribes have a right to bring an action in court based on property law principles. *See, e.g., Winans*, 198 U.S. at 381, 384 (action to enforce tribal access to usual and accustomed fishing grounds).

28. *See, e.g., Winans*, 198 U.S. at 381-82 (recognizing tribal fishing access easement over private lands and noting: "The contingency of the future ownership of the lands, therefore, was foreseen and provided for.... [T]he right was intended to be continuing against the United States and its grantees as well as the State and its grantees."); Pisarski, *supra* note 27, at 314-15 ("The exercise of the [federal navigational servitude] is not an invasion of any private property right in such lands for which the United States must make compensation.... When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation.... There thus has been ample notice over the years that such property is subject to a dominant public interest."); Lazarous, *supra* note 27, at 648-49 (describing public trust doctrine). Key to fitting newly recognized servitudes into the private property rights regime is a recognition that sovereign rights enjoy the privilege of dormancy. Most sovereign servitudes are recognized for the first time after private property owners have gained substantial vested interests in property.

Of course, a tribal servitude off the reservation must be enforced, if at all, by the state or federal government having jurisdiction over the encumbered lands. Where this is the case, the federal or state action seemingly enjoys the same servitude immunity from takings claims. *See Winans*, 198 U.S. at 381 (tribal rights underlie subsequently acquired private property rights).

29. United States v. Washington (Phase II), 506 F. Supp. 187 (W.D. Wash. 1980), *vacated*, United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (en banc). For background on this and other cases peripherally addressing the habitat question, see Wood, *Wildlife Capital Part I*, *supra* note 1, at 28 n.148.

behalf of treaty tribes against the State of Washington, seeking broad protection of fish habitat.[30] The case was the second phase of landmark litigation that had earlier resulted in the Supreme Court's affirmation of treaty harvest rights.[31] In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, the Supreme Court interpreted the Stevens Treaty language that "secured" the "right of taking fish, at all usual and accustomed grounds and stations, in common with all citizens of the Territory"[32] and found that such language supported a tribal right to take up to 50% of the harvestable quantity of fish, subject to a cap of the amount necessary to fulfill the tribes' moderate living needs.[33] The district court in Phase I had expressly deferred the second phase of litigation involving the environmental issue until final resolution of the allocation issue on appeal in *Washington Passenger Fishing Vessel*.[34]

When the district court finally confronted the environmental issue in *United States v. Washington (Phase II)*, it adopted a "common sense" approach[35] to treaty interpretation, finding that the treaties contained an implied right of protection for the fisheries:

> [T]he Court holds that implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation.
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> . . . .

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30. *Washington (Phase II)*, 506 F. Supp. at 190.

31. *See id.* at 191.

32. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674 (1979).

33. *Id.* at 686-87.

34. *Washington (Phase II)*, 506 F. Supp. at 191. Accordingly, the Supreme Court has never addressed the environmental issue. At least one court, however, has badly misinterpreted the *Washington Passenger Fishing Vessel* decision, construing it as negative precedent on an issue it never addressed. In the ongoing Snake River Basin Adjudication (SRBA), the Idaho state court reasoned that because the Supreme Court had not articulated any treaty right greater than an access or allocation right, the Court would now refuse to acknowledge a right of environmental protection for the fishery. *In re* SRBA, No. 39576, Subcase No. 03-10022, at 31-33 (Idaho Dist. Ct. Nov. 10, 1999). In fact, however, the Supreme Court in *Washington Passenger Fishing Vessel* had not been presented with the environmental issue and expressly declined to review issues which had been reserved for decision in the trial court. *See* Michael D. 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, 462-63 (2000) [hereinafter Blumm et al., *Treaty Water Rights*] (reviewing procedural history of the litigation). As several commentators have pointed out in criticizing the SRBA decision, the judge's interpretation of *Washington Passenger Fishing Vessel* as binding on an issue not even before the Court "represents a novel method of applying precedent—one which offends accepted jurisprudence and depletes the precedent of any meaning." *Id.* at 463.

35. Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COL. L. REV. 407, 414 (1998) [hereinafter Blumm, *Piscary Profit*].

> The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. In order for salmon and steelhead trout to survive, specific environmental conditions must be present.[36]

Though the court did not actually employ the term "servitude," judges and commentators have characterized this language as recognizing an environmental servitude encumbering ceded lands for the protection of salmon.[37] The court's ruling was later vacated by the Ninth Circuit in a drawn-out appeal,[38] but the court of appeals' decision rested on procedural grounds and does not foreclose an environmental servitude approach in the future.[39]

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36. *Washington (Phase II)*, 506 F. Supp. at 203.

37. *See* United States v. Washington, 694 F.2d 1374, 1381, 1384, 1389 (9th Cir. 1985), *vacated en banc*, 759 F.2d 1353 (9th Cir. 1985); *see also* Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 809 (D. Idaho 1994) (quoting *Washington*, 694 F.2d at 1381-83, 1389); Blumm, *Piscary Profit*, *supra* note 35, at 411-12; Gary D. Meyers, United States v. Washington (Phase II) *Revisited: Establishing an Environmental Servitude Protecting Fishing Rights*, 67 OR. L. REV. 771 (1988).

A second part of the district court's holding dealt with the scope of the servitude. This is an entirely separate question from the general existence of the servitude. Judge Orrick approached the question by recognizing, "It is well established that the scope of an impliedly-reserved right may not be broader than the minimal need which gives rise to the implied right." *Washington (Phase II)*, 506 F. Supp. at 208. The court determined that the tribes were entitled to environmental protection of the fishery to the extent necessary to fulfill their "moderate living needs." *Id.* *See also* discussion *infra* notes 279-81 and accompanying text.

38. The appeal lasted over four years. For detailed background, see Blumm, *Piscary Profit*, *supra* note 35, at 417-18. The appeal was first heard by a three-judge panel, resulting in an opinion written by Judge Sneed. *See* United States v. Washington, 694 F.2d 1374 (9th Cir. 1985). That opinion was later vacated by an en banc opinion. *See* United States v. Washington, 759 F.2d 1353, 1354 (9th Cir. 1985) (en banc). It is important to focus narrowly on the basis of the en banc panel's reversal to discern the precedential effect of the Phase II litigation on the servitude issue. The Sneed panel acknowledged a general environmental duty on the part of the state to preserve the fishery but objected to the scope of the environmental right as defined by Judge Orrick, characterizing it as a "comprehensive environmental servitude" across the ceded lands. *United States v. Washington*, 694 F.2d at 1389, 1381. Undoubtedly reflecting the weight and potentially sweeping precedential effect of the environmental issue, the en banc panel issued a per curium opinion which was accompanied by five other separate opinions presenting the concurring and dissenting views of eight out of eleven judges on the panel. *United States v. Washington*, 759 F.2d at 1353. Perceived by some commentators as "duck[ing]" the environmental issue squarely before it, *see* Blumm, *Piscary Profit*, *supra* note 35, at 418, the en banc panel found that the case lacked sufficient concrete facts to allow a decision. *United States v. Washington*, 759 F.2d at 1357. Accordingly, it passed no judgment on the existence of a conservation servitude or the scope of such a servitude. Courts will likely confront the environmental servitude issue in the future. *See* Blumm, *Piscary Profit*, *supra* note 35, at 411.

39. *See* Blumm, *Piscary Profit*, *supra* note 35, at 411. Several courts have interpreted the treaties to find an implied right of environmental protection extending to habitat conditions supporting the fish. For review of the cases, see *id.* at 462-81. However, all but the district court in *United States v. Washington (Phase II)* have stopped short of clearly situating the right in the context of the sovereign property paradigm that frames treaty rights. This may be because most of the cases involved very site-specific circumstances of environmental harm to fish habitat, so it was not necessary to define property-based obligations on a broad sovereign-to-sovereign level.

One court has rejected treaty-based environmental protection of the fisheries in the context of a claim for damages against a private party operating a dam under license from the Federal Power Commission.

Focusing on the Columbia River salmon crisis as a context for broader principles, the discussion below locates the origin of a native conservation servitude (or easement)[40] in the aboriginal sovereignty exercised by tribes over their territorial lands and waters. Analyzing the Stevens Treaties executed with the four Columbia River treaty tribes, this Article suggests three approaches supporting a native conservation servitude. The first relies on the express language in the treaties that "secures" the native right to take fish. The second argues that a servitude arises by implication as a necessary corollary to the reserved property rights that tribes retained in the treaty fishing clauses. The third suggests that courts can recognize a native conservation servitude as a critical incident of tribal sovereignty. In other contexts, courts have judicially implied "sovereign servitudes" to protect resources vital to citizen welfare.

B. Origins of the Native Sovereign Servitude

Recognition of a native servitude must be consistent with the property paradigm that framed the treaty transactions between the tribes and the United States. Because the treaties represent grants of land from the tribes to the United States, and not the reverse, a servitude is best expressed as a property right reserved by tribes as part of the treaty transactions. As the Supreme Court recognized long ago in *United States v. Winans*, those rights not granted by treaty to the federal government were reserved to the tribes.[41]

Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 793 (D. Idaho 1994). Commentators sharply criticize the decision and point out that it is limited to the context of retrospective monetary damage awards. Blumm, *Piscary Profit*, *supra* note 35, at 483 (further noting that the decision reflects "an extremely unsophisticated view of property rights"). The case does not offer an analysis of inter-sovereign environmental obligations, as the defendant was a private party, not a sovereign. For a full analysis of the case, see *id.* at 481-89. The tribe appealed the district court's decision but reached a settlement before the Ninth Circuit heard it. *See id.* at 488 n.406 (describing the settlement).

40. In this Article, the terms "servitude" and "easement" are used interchangeably unless the relevant text notes a distinction. Technically, easements fall into a broader category of "servitudes," which also includes profits, real covenants, and equitable servitudes. *See* French, *Design Proposal*, *supra* note 22 and accompanying text. It is important to distinguish easements from real covenants and equitable servitudes, however, because the doctrine of changed conditions applies to the latter two, but not to easements. *See infra* note 241 and accompanying text. The underlying distinction, generally, is that "[e]asements [are] treated as property rights created by executed transactions, while covenants and equitable servitudes [are] treated as property rights arising out of contracts." French, *Design Proposal*, *supra* note 22, at 1221. Since the reserved tribal fishing rights arose out of treaties that conveyed title to land, it is appropriate to conceive of them as incorporating easements rather than covenants or equitable servitudes. *See also* United States v. Winans, 198 U.S. 371, 384 (1905) (describing treaty fishing rights as "easements.").

41. *Winans*, 198 U.S. at 381 ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").

The reserved rights of the Columbia River treaty tribes represent a significant encumbrance across ceded lands. Rather than deeding away full and absolute title to their lands, the tribes reserved a set of fishing rights that amount to usufructory property interests in the ceded aboriginal territory. As the Ninth Circuit explained in *Sohappy v. Hodel*, "[t]he treaties were a grant of rights *from* the Indians *to* the government. . . . As translated to the Indians, the concept of ceding the land would have meant that henceforth the Indians would no longer have *exclusive* possession of the land—they would have to share it with white settlers—but not that they would be deprived of possession altogether."[42] The intent underlying the treaty transaction was to reserve small areas as homelands for the native population, with corollary usufructory rights across the ceded lands to allow full pursuit of the hunting and harvesting lifestyle: "The reservations were to be residential bases from which the Indians were to continue to utilize the total environment, including specifically all of their fishing locations, in order to maintain themselves and to contribute to the economy of the entire population."[43] Accordingly, ceded lands assume a character altogether distinct from lands that were conveyed by tribes to the government without restriction. As the Supreme Court made clear in *United*

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42. Sohappy v. Hodel, 911 F.2d 1312, 1319 (9th Cir. 1990) (emphasis in original). In several other cases, the Ninth Circuit and the Supreme Court have similarly emphasized the reservation of native rights and the limited grant of fishing rights to non-Indian settlers in ceded lands. In *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 668 n.12 (1978), the Court stated:

> There is nothing in the written records of the treaty councils or other accounts of discussions with the Indians to indicate that the Indians were told that their existing fishing activities *or tribal control over them* would in any way be restricted or impaired by the treaty. The most that could be implied from the treaty context is that the Indians may have been told or understood that non-Indians would be allowed to take fish at the Indian fishing locations along with the Indians.

(Emphasis added). *See also* Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974), where the court noted:

> [T]he Treaty of 1855 does not expressly state that the Yakima Nation relinquished its jurisdiction over matters pertaining to fishing rights. As the treaty constitutes a grant of rights *from* the Indians to the Government . . . any rights not granted must be considered retained by the Tribe. Here, the Indians qualified their fishing right *only* to the extent of permitting citizens of the territory to fish "in common" with them at "usual and accustomed fishing places" off the reservation. . . . [W]e conclude that the Yakima Nation did reserve the authority to regulate Tribal fishing . . . whether on or off the reservation.

See also United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975):

> Although ceding their right to occupy the vast territories in which they had been accustomed to roam unimpeded, the Indians reserved their traditional right to fish at their accustomed places. They granted the white settlers the right to fish beside them. In a sense, *the treaty cloaks the Indians with an extraterritoriality while fishing at these locations.*

(Emphasis added).

43. BARBARA LANE, POLITICAL AND ECONOMIC ASPECTS OF INDIAN-WHITE CULTURE CONTACT IN WESTERN WASHINGTON IN THE MID-19TH CENTURY 1, 42-43 (1973), *cited and discussed in* Blumm, *Piscary Profit*, *supra* note 35, at 428 n.96.

States v. Winans, the fishing rights which tribes reserved to themselves in their ceded lands "imposed a servitude upon every piece of land as though described [in the treaty]."[44]

The servitude finds its source in the pre-treaty territorial sovereignty that tribes exercised across their lands.[45] Recognizing this sovereignty as a foundation for finding a reserved tribal water right in another context, the Supreme Court in *Winters v. United States* stated:

> The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting [or grazing], or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? . . . [A]mbiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.[46]

Likewise drawing upon native sovereignty as a source for a reserved access easement to fishing sites, the Court in *United States v. Winans* noted:

> The right to resort to the fishing places in controversy *was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment,* and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. . . . Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.[47]

By ceding lands to the federal government, the tribes relinquished their ability to exercise native jurisdiction and to directly control activities in the ceded territory. Any retained authority over non-Indians in this territory would be inconsistent with the tribes' domestic dependent status within the Constitutional framework.[48] But the tribal rights did not dissolve; they merely

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

45. *See Washington*, 520 F.2d at 685 (recognizing the pre-treaty sovereignty tribes exercised and noting that "the treaty cloaks the Indians with an extraterritoriality while fishing at these [ceded] locations").

46. Winters v. United States, 207 U.S. 564, 576-77 (1908).

47. *Winans*, 198 U.S. at 381 (emphasis added).

48. Courts have clearly recognized the continuing inherent sovereign status of tribes. Worcester v. Georgia, 31 U.S. 515, 559 (1832); *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 32 (1982) [hereinafter HANDBOOK] ("Indian tribes consistently have been recognized, first by the European

changed form. What had previously been the exertion of native sovereign authority transformed into a servitude across the ceded lands.[49]

Judicial enforcement of property rights provides the appropriate medium in which sovereign entities may exercise rights against other sovereigns and parties over which they lack jurisdiction.[50] The *Winans* Court made clear that the native servitude across ceded territory is antecedent to any subsequently acquired private property rights and freights those lands with obligations emanating from the reserved tribal property right to fish:

> The contingency of the future ownership of the lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.[51]

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nations, later by the United States, as 'distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty.") (citation omitted).

The courts have made clear, however, that tribes have lost some inherent sovereign powers by virtue of their domestic "dependent status" within the Constitutional framework of the United States. *See* Montana v. United States, 450 U.S. 544, 563-64 (1981) (noting that incorporation into United States divested tribes of some attributes of sovereignty, particularly with respect to relations between tribes and non-members, stating: "[E]xercise of tribal power beyond what is necessary to protect tribal self government or to control internal relations is inconsistent with the dependent status of the tribes."); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n.14 (1982) (Tribes retain "all inherent attributes of sovereignty that have not been divested by the Federal Government."); United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1981) ("[W]hen a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe's sovereign dependent status.").

Though the tribes have no regulatory authority over non-Indians in ceded territory, courts have held that they do retain their aboriginal regulatory and enforcement powers with respect to all tribal fishing at usual and accustomed fishing sites off the reservation. Settler v. Lameer, 507 F.2d 231, 239 (9th Cir. 1974).

49. *See Winans*, 198 U.S. at 381 (holding that the treaties reserved rights which "imposed a servitude upon every piece of land as though described therein.").

50. *See* Wood, *Wildlife Capital Part I, supra* note 1, at 34 n.170 and accompanying text. *See also* Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1030 (O'Connor, J., dissenting) (noting the role of federal courts in resolving inter-sovereign disputes over the management and conservation of transient natural resources, such as the Columbia River Basin salmon fishery).

51. *Winans*, 198 U.S. at 381-82. The native sovereign servitude reflects attributes of servitudes in general. First, it arises from a land transaction. The cession of land by tribes and the corollary reservation of certain rights on that land created burdened servient parcels across the ceded territory. Second, the servitude gives rise to a non-exclusive right of use. As the Court in *Winans* stated: "There was a right outside of those [reservation boundaries] reserved 'in common with citizens of the Territory.' As a mere right, it was not exclusive in the Indians." *Id.* at 381. Third, the servitude is permanent and binds future landowners. "The contingency of future ownership of the lands . . . was foreseen and provided for." *Id.*

In the context of the Columbia River treaties, the full extent of the reserved native servitude is ill-defined, except insofar as its outer parameters are established by the purpose of the fishing clause itself.[52] Aspects of sovereign servitudes, however, often do remain dormant until public necessity prompts their judicial recognition for the first time. It is clear that one strand of the servitude is an access easement to the fishing sites, as first recognized in *United States v. Winans*.[53] But another vital component of pre-treaty sovereignty was the inherent tribal authority to control human-caused ecological degradation of salmon production areas. This environmental sovereignty exercised to support a fishing lifestyle provides the basis for a reserved negative conservation easement as another strand of the broad native servitude encumbering ceded territory.[54] Negative easements are devices to control land use by "impos[ing] a duty on the owner or occupier of the servient tract to refrain from specific uses of the property."[55]

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52. *See* United States v. Washington (Phase II), 506 F. Supp. 187, 195, 205 (W.D. Wash. 1980) (noting, "Indian treaties must be interpreted so as to promote their central purposes," and holding that a paramount purpose of the Stevens Treaties "was to reserve to the tribes the right to continue fishing as an economic and cultural way of life"); *Adair*, 723 F.2d at 1408-09 (water rights are implied to fulfill the purpose of the reservation, a primary purpose of which was "to secure to the [Klamath] Tribe a continuation of its traditional hunting and fishing lifestyle").

53. *Winans*, 198 U.S. at 381-84. Professor Blumm has identified another strand as the piscary *profit a prendre*, which allows parties to remove fish from the encumbered land. Blumm, *Piscary Profit*, *supra* note 35, at 445. A corollary to such a profit is the right to prevent the owner of the encumbered land from unreasonably interfering with the fishing right. *See id.* at 419. For discussion of the geographical reach of the profit, as compared with the Winans' access easement, see *infra* notes 217-22 and accompanying text.

54. The idea of asserting a reserved right to co-manage ecological resources located in ceded land was first suggested in terms of reclaiming a "native sovereign prerogative." *See* Mary Christina Wood, *Tribal Management of Off-Reservation Living Resources: Regaining the Sovereign Prerogative*, *in* THE WAY FORWARD: COLLABORATION AND COOPERATION 'IN COUNTRY' 34, 66 (Gary D. Meyers ed., 2d ed. 1995) [hereinafter Wood, *Regaining the Sovereign Prerogative*] (describing Columbia River Basin co-management). *See also* Mary Christina Wood, *Native Environmental Sovereignty in the New Millennium*, OPEN SPACES, vol.2, Issue 3, 9, 14 (1999) [hereinafter Wood, OPEN SPACES] (tribes asserting "native environmental sovereignty" based on pre-treaty "aboriginal ecosystem management throughout their territories"). Building upon the same concept, more recent commentary has explored the indigenous practice of "participatory resource management concerning shared usufructuary resources," suggesting that this practice forms an element in the bundle of rights reserved by tribes through treaties. Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 309, 321-22 (2000).

55. French, *Modern Law*, *supra* note 21, at 1267; *see also* John W. Weaver, *Easements Are Nuisances*, 25 REAL PROP. PROB. & TR. J. 103, 107 & n.17 (1990). When dealing with property rights held by individuals, courts generally disfavor the creation of new forms of negative easements through common law. This reluctance is not manifest at the sovereign level, where courts have recognized various forms of negative sovereign servitudes. *See infra* notes 170-71 and accompanying text. While such servitudes are partially affirmative in nature by allowing access over private property, they also have corollary negative elements preventing private land exploitation which could interfere with the public interest. *See infra* notes 171, 183 and accompanying text.

There is historical evidence that, despite the rudimentary conditions of life, native people throughout the Pacific Northwest developed management techniques to assure the return of healthy numbers of salmon each year.[56] Such management, certainly, was essential to providing security for the people of the region who were completely dependent on the fish for survival. The management consisted of two elements geared toward assuring the perpetual supply of salmon capital. First, the tribes carefully tailored their harvest to the renewing capacity of the species.[57] Tribal take was culturally regulated to ensure adequate escapement to sustain the species in harvestable quantities.[58]

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56. *See* United States v. Washington, 384 F. Supp. 312, 334 (W.D. Wash. 1974) (noting "strictly enforc[ed] tribal customs and practices which, . . . for innumerable prior generations, had so successfully assured perpetuation of all fish species in copious volume"); *see also* COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, WY-KAN-USH-MI, WA-KISH-WIT, SPIRIT OF THE SALMON: THE COLUMBIA ANADROMOUS FISH RESTORATION PLAN OF THE NEZ PERCE, UMATILLA, WARM SPRINGS AND YAKAMA TRIBES 2-5 to 2-8 (1996) [hereinafter TRIBAL RECOVERY PLAN], describing traditional tribal management of salmon harvest and habitat throughout the Columbia River Basin:

> Within the context of their systems frame of reference (i.e. their ecological and spiritual values), tribal people applied this extensive knowledge to fisheries practice and management. Today, tribal people use some of the same methods that were used for thousands of years—[r]ules and regulations, management areas, law enforcement, and research and analysis (the accumulated observations and interpretations [which were transmitted to succeeding generations as part of their inheritance]). The result was that *for thousands of years, and until the arrival of non-Indians, tribal leaders managed their resources successfully.* The people fished and the salmon returned.

Id. at 2-7 (emphasis added). Aboriginal resource management is evident with respect to other tribes' use of species as well. *See* Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENV. L. & POL'Y 127, 130 (1994) (describing tribal resource management systems for harvesting wild rice, white fish, and other resources to insure sustained yield). *See also* Goodman, *supra* note 54, at 309 nn.177-78 (noting indigenous systems of "participation resource management" in shared wildlife). Nevertheless, despite its apparent prevalence, aboriginal management and regulation of natural resources remains largely unrecognized in the dominant paradigm of modern environmental thinking. LaDuke, *supra* at 137. Instead, the prevailing conception assumes that the aboriginal, pre-treaty era was characterized by a "lawless, free-for-all situation in which no one owned or had responsibility for anything." *Id.* at 146. Winona LaDuke addresses this misconception by demonstrating a complex system of native regulation based on property rights of the occupying group. *Id.* at 129-30, 146.

It cannot be said, however, that all tribes managed the environment to maintain sustainable levels of wildlife. Traditional customs and practices must be evaluated on a case-by-case basis using anthropological evidence; simplistic generalizations should be avoided. At least one court has seriously doubted whether a tribe exercised conservation efforts towards a species upon which it relied in aboriginal times. *See* Blackfeet v. United States, 81 Ct. Cl. 101, 122 (Ct. Cl. 1935) ("[B]oth Indians and white settlers disregarded the essential necessity of preserving the buffalo and took them in numbers beyond their living necessities. It would be impossible . . . to ascribe to the Government alone the responsibility for the disappearance of game and wild animals from the hunting ground. The Indians participated in this devastation.").

57. *See Washington*, 384 F. Supp. at 387; *see also Hearings Before the Columbia River Fisheries Task Force* 3-4 (Oct. 28, 1992) (testimony of Jerry Meninick, Yakama Nation) (on file with author); Yvonne Smith & Laura Berg, *Ancient Tradition Modern Reality, Is There a Future for a Salmon-based Culture?* WANA CHINOOK TYMOO, Issue 1, 10, 11 (1998); TRIBAL RECOVERY PLAN, *supra* note 56, at 2-7 to 2-8.

58. *Washington*, 384 F. Supp. at 357 (noting pre-treaty regulation of fish harvest by tribal leaders to assure adequate escapement for spawning as well as supply for upriver fishermen); Smith & Berg, *supra*

In this way, the tribes preserved the population component of natural capital. Second, in exercising sovereign authority over all of what is now ceded territory, the tribes ensured that the salmon's natural production areas within their control remained healthy.[59] Failure to protect these areas would necessarily result in depleted natural capital, diminished yields, and loss of a vital food supply. One well-documented manifestation of native conservation

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note 57, at 11 ("In traditional fish management, tribal leadership set the season and monitored the fishery, the fishermen, and the harvest. . . . Fishing was halted periodically to allow for escapement and for disasters."); *Hearings Before the Columbia River Fisheries Task Force,*, *supra* note 57, at 3-4 (noting traditional conservation practices and stating: "We took what fish we needed, while remaining mindful of the need to let enough escape to provide for the health of the resource."). *See also* TRIBAL RECOVERY PLAN, *supra* note 56, at 2-7 to 2-8, describing aboriginal harvest management in Columbia River Basin:

> The mainstem Columbia River was divided into territories, each with its own regulatory body. . . . Among the tribes and bands who fished the river there was a general recognition of each other's areas, who fished there, and when. Although fishing rules varied according to area, they were similar and were usually enforced by a headman (sometimes referred to as a salmon chief) and his committee.
>
> More is known about the Celilo Falls fishery because it was in continuous use until 1957. . . . At Celilo, the headman was responsible for conducting an orderly fishery in compliance with the traditional laws of his people so that the salmon returned year after year.
>
> Following the traditional law, the headman determined when and how long fishing occurred. For example, no fishing could take place until the first salmon feast was held. The headman determined when the feast would occur. To prevent over[-] harvest, fish were caught at their prime. . . .
>
> To maintain an orderly fishery, a headman, along with his committee, enforced other regulations. They often dealt with matters such as property rights, standards of behavior, polluting the water or safety.

Traditionally, tribal harvest in the basin amounted to approximately five million fish out of runs approaching sixteen million fish. *See* Blumm, *Piscary Profit, supra* note 35, at 409 n.5; *Hearings Before the Columbia River Fisheries Task Force* 6 (Oct. 28, 1992) (testimony of Delbert Frank, Sr., Warm Springs Tribe) (on file with author); COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, 1994 ANNUAL REPORT 29-31 (1994) (graphs depicting treaty harvest). Fish were processed and stored for winter and early spring months, which the Nez Perce Tribe referred to as the "starvation season," reflecting the scarcity of available food during the months preceding the return of the fish runs. United States' and Nez Perce Tribe's Joint Memorandum in Opposition to Objectors' Motions for Summary Judgment, *In re* Snake River Basin Adjudication, No. 39576, 40-41 (Sept. 17, 1998) [hereinafter Nez Perce Brief]. During the salmon harvest cycle, Indians had to affirmatively refrain from over-harvest, even anticipating lean months ahead, so as to assure perpetuation of the resource, for "'any substantial drop in fish production meant starvation and death for the Nez Perce.'" *Id.* at 30 (quoting anthropological study by Dr. A.G. Marshall).

Culturally regulated harvest to ensure sustainable returns of species is also evident in other native cultures. LaDuke, *supra* note 56, at 129 (describing Anishinabeg resource management system which included monitoring condition of species populations and "regulat[ing] the killing so as not to deplete the stock"); Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F. Supp. 1362, 1393 (D. Minn. 1997) (noting Chippewa Indians' "strong cultural tradition against over-harvest and over-exploitation of natural resources").

59. *See Hearings Before the Columbia River Fisheries Task Force, supra* note 57, at 4; *see also* TRIBAL RECOVERY PLAN, supra note 55, at 2-8 (describing aboriginal environmental management in the Columbia River Basin).

was the tribal control of water pollution,[60] which could result from activities of the many thousands of Indians living along the rivers.[61] Such management was particularly evident during the salmon spawning season when the fish were most vulnerable.[62] It may be that anthropologists have yet to describe a myriad of conservation behaviors to protect natural production areas of salmon. Nevertheless, tribal people today refer to a tradition of land management in the ceded territories extending back thousands of years.[63]

The central component of environmental management, whether historical or contemporary, is human restraint in the interest of conservation, achieved through appropriate social mechanisms.[64] The necessity of such restraint, particularly in natural production areas along rivers in the salmon's migratory reach, was just as vital at a time when thousands of Indians inhabited the Basin (primarily living along its rivers)[65] as it is today.[66] However, such historical tribal management may escape contemporary attention for two reasons.

First, the type of human activities which called for restraint in order to preserve salmon habitat were on a different order of magnitude, in terms of their potential to harm the environment, in comparison to the effects of human activity in the modern industrial era. In pre-treaty times, controlling environmental pollution might have entailed "beach[ing] canoes to bail the foul water from them,"[67] whereas today it might entail use of elaborate technology to control toxic effluent from major polluting industries located along the river.[68] The dramatic juxtaposition of the two different eras may

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60. *See* Blumm, *Piscary Profit*, *supra* note 35, at 423 ("Water pollution was proscribed, and refuse was never deposited in streams during salmon season."); TRIBAL RECOVERY PLAN, *supra* note 56, at 2-6 to 2-8; FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS 24 (1986); *Washington*, 384 F. Supp. at 351.

61. *See* COHEN, *supra* note 60, at 30 (estimating 50,000 Indians living along the Columbia River in pre-treaty times).

62. *See* Blumm, *Piscary Profit*, *supra* note 35, at 423; TRIBAL RECOVERY PLAN, *supra* note 56, at 2-7 to 2-8; COHEN, *supra* note 60, at 24, 29 (describing rituals by which the tribes "opene[d] the season and . . . prepar[ed] the environment so that it would not be offensive to the salmon").

63. *See* TRIBAL RECOVERY PLAN, *supra* note 56, at 2-5 to 2-8 (describing systems of management in Columbia River Basin). Aboriginal land management is apparent in hunting/harvest cultures elsewhere in traditional Native America. LaDuke, *supra* note 56, at 129-30 (describing the native "resource management system that used techniques for sustained yield," but noting that "[t]he governance of this land by traditional ecological knowledge has been adversely affected by genocide [and] colonialism").

64. *See* TRIBAL RECOVERY PLAN, *supra* note 56, at 2-5 (noting traditional and contemporary native recognition of "nature's preeminence and the need for human society to harmonize itself with the structures and rhythms of nature").

65. *See* COHEN, *supra* note 60. Indians established village locations near rivers and streams to facilitate access to fish. Nez Perce Brief, *supra* note 58, at 40.

66. In some sense, the necessity of restraint was perhaps more vital in aboriginal times, because the consequences of depleting the salmon asset, which supplied nearly fifty percent of the Indian diet, meant starvation and death. Nez Perce Brief, *supra* note 58, at 15.

67. Blumm, *Piscary Profit*, *supra* note 35, at 423; COHEN, *supra* note 60, at 24.

68. For example, dioxins released by pulp mills into the Columbia River accumulate in fish

cause some to overlook the element of human restraint practiced as a part of sovereign management in pre-treaty times.[69]

However, courts have recognized affirmative aboriginal resource management of land and water in pre-treaty times. In *United States v. Adair*, the Ninth Circuit found that the Klamath Tribe made an aboriginal use of waters which was non-consumptive in nature.[70] Such use, which had continued since "time immemorial,"[71] was adequate to support a modern-day instream water right to benefit tribal fish and wildlife resources.[72] Likewise, in *Winters v. United States*, the Supreme Court similarly recognized pre-treaty native environmental sovereignty as supporting a modern implied tribal water right, noting: "The Indians had command of the lands and the waters—command of all their beneficial use."[73] Implicit in these cases is judicial recognition of an affirmative, aboriginal management of natural resources in order to preserve natural conditions necessary for the primary occupation of tribes—which in the Pacific Northwest was fishing and hunting. The fact that the aboriginal use of land was non-depleting is not an accidental phenomenon, much less an indication of an under-developed culture. Viewed against the approach taken in *Winters* and *Adair*, it was a manifestation of affirmative

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samples "in unprecedented amounts," posing a significant health risk to humans who consume fish. Kathie Durbin, *Dioxins Taint Northwest Fish*, OREGONIAN, Dec. 9. 1989, at A1. *See also* TRIBAL RECOVERY PLAN, *supra* note 56, at 3-16 to 3-17 (describing industrial water pollution in Columbia River Basin).

69. As Winona LaDuke suggests:

> Traditional management practices have often been dismissed by North American settlers as useless in the current circumstances of more significant populations. However, it is important to note that previous North American indigenous populations were substantially higher than they are now. This indicates that these management practices were applied in greater population densities, an argument which is useful in countering the perceptions that all Native American practices have occurred with very low populations.

LaDuke, *supra* note 56, at 130.

70. United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1981):

> [T]he Tribe had lived in Central Oregon and Northern California for more than a thousand years. This ancestral homeland encompassed some 12 million acres. Within its domain, the Tribe used the waters that flowed over its land for domestic purposes and to support its hunting, fishing, and gathering lifestyle. This uninterrupted use and occupation of land and water created in the Tribe aboriginal or "Indian title" to all of its vast holdings . . . [including] an aboriginal right to the water used by the Tribe.

71. *Id.* at 1414.

72. *Id.* at 1410-11; *see also* Board of Control of Flathead Irrigation Dist. v. United States, 832 F.2d 1127, 1131 (9th Cir. 1987) (finding reserved water right supporting tribal fishery based on tribal exercise of "aboriginal title and rights to fish on the lands and waters in question before the reservation was created"). Because the right is an instream one, the *Adair* court found: "[D]iversion of water is not required to support the fish and game that the Klamath Tribe take in exercise of their treaty rights. Thus the right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive." *Adair*, 723 F.2d at 1410-11.

73. Winters v. United States, 207 U.S. 564, 576 (1908).

action making "beneficial use"[74] of resources vital to sustaining the primary occupation of the native people. While the view may differ from industrial land use perspectives of the majority's culture, some modern courts emphasize the preservation of environmental context as an organizing force in property law. As one court stated in the context of a takings claim: "[A landowner] has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state."[75]

Second, some may minimize pre-treaty tribal management, because the social mechanism it employed to achieve human restraint was fundamentally different than that used in the modern industrial society. Whereas contemporary non-Indian environmental management relies upon written regulations and judicial enforcement to achieve human restraint and conservation, traditional tribal society achieved the same through reliance on cultural norms and spiritual mandates.[76] Salmon was so central to survival that great reverence and respect for the species was an integral part of native

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74. *Id.*

75. Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972). *See also* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (finding public trust easement encumbering tidelands for "the preservation of those lands in their natural state").

76. *See* TRIBAL RECOVERY PLAN, *supra* note 56, at 2-5 to 2-8 (describing native management based on "an ecologically sound approach that is at the same time sacred and regulatory"). Native people often refer to "natural law" which is a spiritually-based code of conduct to harmonize human activity with the requirements and mandates of nature. *See* Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1069 (1997) (quoting statement of Ted Strong, Executive Director of the Columbia River Inter-Tribal Fish Commission):

> We have proven to the world that it is possible for tribal peoples and thus any peoples to sustain their life and their culture if they are willing to respect the laws of nature. These are the laws that have been here since the beginning of time, that should provide the guidance, whether it be legally, spiritually, or otherwise, for such things as the Endangered Species Act. But it is difficult to take that sense of spiritualism that is inherent in natural law and transform that into legal language. The tribes have done that over the years by their practices, their customs, their traditions, that are heavily endowed in their ceremonies. The ceremonies that we have helped insure that the laws of nature are implemented. Our elders taught our children by the use of our ceremonies.

See also Hearings Before the Columbia River Fisheries Task Force (testimony of Delbert Frank), *supra* note 58, at 2 (noting that traditional tribal peoples of the Columbia Region "recognized that the ultimate source of power and authority is the set of natural laws governing the relationship between man and the natural world around him. These laws were made known to the Indian people by the Creator."); COHEN, *supra* note 60, at 23-24 (describing native culture of reverence and responsibility towards salmon). The reliance on cultural mandates to achieve human restraint is characteristic of traditional indigenous systems of government. *See* HANDBOOK, *supra* note 48, at 230 ("While historically most tribes had no written laws, individual behavior was guided by norms of conduct that evolved as custom. These strictures were normally enforced by peer pressure in the form of mockery, ostracism, ridicule, and religious sanctions.").

culture.[77] Cultural mandates, many of which continue in tribal society today, prohibited the destruction of natural production areas critical to the species' viability.[78] Though this social mechanism was effective, some today may discredit it as merely a cultural or religious rite rather than a firm component of sovereign environmental management.

Long-standing principles of Indian law, however, recognize inherent tribal sovereignty, even though native governance may take forms vastly different from majority society.[79] If tribal practices are viewed in their appropriate historical context, it is clear that sovereign control over the ceded territories entailed human restraint in order to preserve natural production areas for salmon. The authority to achieve such restraint rested with the tribal structure and was a critical aspect of sovereignty. Such restraint, even if it took a form vastly different from what would fit modern conditions, provides an appropriate basis for a negative tribal conservation easement.

II. APPROACHES TO RECOGNIZING A NATIVE CONSERVATION EASEMENT

A native conservation easement must either rest on express language in the treaties or arise through judicial interpretation as an implied right. There

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77. *See* United States v. Washington, 384 F. Supp. 312, 351 (W.D. Wash. 1974) (noting "attitudes of respect and reverence, and concern for the salmon [which] reflected a ritualistic conception of the interdependence and relatedness of all living things which was a dominant feature of the native Indian world view"). For a tribal description of the native cultural relationship to salmon, see *Hearings Before the Columbia River Fisheries Task Force* 1-2 (Oct. 28, 1992) (testimony of Levi Holt, Nez Perce Tribe) (on file with author):

> The salmon plays a major role in Nez Perce Tribal culture and tradition. Our people always enjoyed the use of the salmon, elk, deer, roots, berries and traditional medicines, and we used the habitat that these natural resources depended upon. However, our ethics and religion compelled our people to revere the natural powers that were inherent in the resources the Creator made available to us. . . . [Our] ceremonies taught us reverence of the natural world—to leave things undisturbed so that the natural cycles would repeat themselves, so that the seasons would continue to bring back the natural abundance of food and medicines which filled an important niche within our cultural style of survival.

See also TRIBAL RECOVERY PLAN, *supra* note 56, at 2-5:

> Tribal management begins with a recognition of nature's bounty as a gift from the Creator. They are humbled by the salmon's faithful return to the rivers to serve human and other needs . . . . [T]ribal respect for nature is evidenced in time-honored ceremonies such as the seasonal first food feasts held each year, when the human world stops to honor the return of nature's gifts.

78. *See supra* notes 59-63 and accompanying text; *see also* TRIBAL RECOVERY PLAN, *supra* note 56, at 2-6.

79. *See* HANDBOOK, *supra* note 48, at 230-31 (describing traditional native systems of government and noting that the inherent power of tribal self-government is "recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice . . . in accordance with a relationship designed to insure continued viability of Indian self-government").

are examples of tribally-held rights deriving from each category. The Supreme Court's allocation of up to 50% of the harvest, for example, derives from the judicial interpretation of "in common with" language in the Stevens Treaties.[80] On the other hand, judicial recognition of a tribal water right is an example of an implied right because the right does not draw upon any express language in the treaty.[81] While treaty interpretation necessarily differs according to individual historical circumstances of the tribes, the approach suggested below with respect to the Columbia River treaties has potentially broad applications to other tribes as well.

The Supreme Court has long recognized an Indian treaty as essentially "a contract between two sovereign nations."[82] In interpreting treaties, courts search for the intent of the parties,[83] applying canons of construction designed to mitigate for the superior negotiating position of the United States.[84] These principles apply to the task of discerning a habitat protection servitude. A court must determine whether the degradation of fish habitat was foreseeable and covered by any express treaty language. If so, the court's task is to construe the language, which may be vague or ambiguous.[85] On the other hand, a court may find that the sovereign parties did not provide for the contingency of fish decline in the treaty. The situation is analogous to an "omitted case" in contract law, where the court's task is to imply a term to resolve the situation.[86] In either case, courts place particular emphasis on the historical context surrounding the treaty negotiations,[87] in part to compensate

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80. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 659 (1979).

81. United States v. Adair, 723 F.2d 1394, 1408 (9th Cir. 1981) (describing *Winters* doctrine). Another example is the implied right of environmental protection. *See* United States v. Washington (Phase II), 506 F. Supp. 187, 203 (W.D. Wash. 1980), *vacated on other grounds*, 759 F.2d 1353 (9th Cir. 1985) (en banc) ("[I]mplicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoilation."). For discussion of implied treaty rights, see HANDBOOK, *supra* note 48, at 222 nn.44-46 and accompanying text.

82. *Washington Passenger Fishing Vessel*, 443 U.S. at 675.

83. United States v. Washington, 873 F. Supp. 1422, 1429 (W.D. Wash. 1994), *aff'd*, 135 F.3d 618 (9th Cir. 1988).

84. *Washington Passenger Fishing Vessel*, 443 U.S. at 675-76; HANDBOOK, *supra* note 48, at 22-23. Three primary canons of construction frame treaty interpretation: 1) treaties must be liberally construed to favor Indians; 2) ambiguous treaty expressions must be resolved in favor of the Indians; and 3) treaty provisions should be construed as the Indians would have understood them. *Id.* To a large extent, the favorable canons of construction derive from the federal trust responsibility towards the Indians. *See* Tulee v. Washington, 315 U.S. 681, 684-85 (1942) (noting that Indian treaties are to be construed "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people").

85. *See* E. ALLAN FARNSWORTH, Contracts § 7.8 (2d ed. 1990) (discussing judicial role in interpreting ambiguous contract provisions). In the treaty context, courts have emphasized that ambiguities must be construed to favor the Indians. *See supra* note 84.

86. *See* FARNSWORTH, *supra* note 85, § 7.15.

87. *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999);

for linguistic barriers and the sparse language of treaties.[88] Viewing the question of habitat protection in light of the historical context, there is a strong argument that express treaty language supports a reserved native conservation easement. Such an easement may also arise by implication either as a natural right corollary to the reserved property right of fishing or as a critical incident of sovereignty.

A. Express Reservation of the Right

The task of discerning a native conservation servitude from the express language of the Stevens Treaties begins with the fishing clause. Though the treaties vary slightly in their language, the phrase in the treaty with the Yakamas, executed June 9, 1855, is representative: "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, *is further secured* to confederated tribes and bands of Indians, *as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory.*"[89] The express treaty language thus not only recognizes that the tribe's fishing activity amounts to a "right" but also that such a right is "secured." While courts have focused extensively on the phrase "right of taking fish . . . in common with"[90] in resolving harvest issues, there has been scant judicial focus on the word "secured" in the treaties. The Supreme Court has, on at least one occasion, recognized that the language "secur[ing]" fishing rights adds meaning to, and is not superfluous with, the language conveying the core right of taking fish "in common with" the citizens of the territory.[91]

In construing treaty language, courts look to the plain meaning of the words, as the Indians themselves would have understood them.[92] Courts have found it appropriate to refer to Webster's Dictionary definitions for guidance in interpreting the fishing clause in the Stevens Treaties.[93] The Webster

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United States v. Washington, 384 F. Supp. 312, 350-57 (W.D. Wash. 1974); Sohappy v. Smith, 302 F. Supp. 899, 906 (D. Or. 1969); *United States v. Washington*, 873 F. Supp. at 1429; United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1981).

88. *See Washington Passenger Fishing Vessel*, 443 U.S. at 667 n.10 (noting the difficulty of translating English words, and the limited number of words in Chinook jargon corresponding to treaty terms).

89. Treaty with the Yakamas, June 9, 1855, art. 3, 12 Stat. 951, 953 (emphasis added). *See also* Treaty with the Nez Perces, June 11, 1855, art. 3, 12 Stat. 957; Treaty with Indians in Middle Oregon, June 25, 1855, art. 1, 12 Stat. 963; Treaty with the Walla-Wallas, June 9, 1855, art.1, 12 Stat. 945.

90. *Washington Passenger Fishing Vessel*, 443 U.S. at 677-78.

91. *Id.* at 678.

92. *Id.* at 677; *United States v. Washington*, 873 F. Supp. at 1429.

93. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 356 (W.D. Wash. 1974) (citing 1828 and 1862 editions) (defining "accustomed," "common," and "usual" for interpretation of treaty terms "usual

definition of "secure" as reported in the 1828 edition, includes the following: "To guard effectually from danger; to make safe . . . . To make certain; to put beyond hazard . . . . To insure, as property."[94] The Webster Dictionary approved by Acts of Congress in the years 1840, 1847, and 1856, defines "secure" to include in relevant part: "To make safe; to relieve from apprehensions of, or exposure to, danger; to guard; to protect. . . . To put beyond hazard of not receiving, or of losing; to make certain; to assure; to *insure*."[95] Thus, the treaties not only provided for the continued right to fish, but they also "secured" such right, which by the prevailing definition of the word at the time of the treaties, meant protecting and even insuring continued enjoyment of the right. The term implies a separate duty on behalf of the United States, one of assuring conditions necessary to exercising the fishing right. Such a meaning broadly extends to control of human conditions degrading essential fish habitat. Notably, few other treaties use the word "secure" in hunting and fishing clauses.[96] In fact, many treaties state only that the particular tribe shall be "at liberty to hunt" within ceded territory,[97] or that the tribe will have the "privilege" of hunting on ceded lands,[98] or will be

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and accustomed" and "in common with").

94. NOAH WEBSTER, LL.D., AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

95. NOAH WEBSTER, LL.D., AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1193 (1840) (emphasis added).

96. Most simply reserve the "right" to hunt on ceded lands, with no mention of the federal obligation to "secure" the right. *See, e.g.*, Treaty with the Navajo Indians, June 1, 1868, art. 13, 15 Stat. 667, 671; Treaty with the Cheyenne Indians, Oct. 28, 1867, art. 15, 15 Stat. 593, 597; Treaty with the Kiowas and Comanches, Oct. 21, 1867, art. 16, 15 Stat. 581, 585; Treaty with the Pottawatamies, Oct. 16, 1826, art. 7, 7 Stat. 295, 297; Treaty with the Miamies, Oct. 23, 1826, art. 8, 7 Stat. 300, 301; Treaty with the Ottawa and Chippewa Nations, Mar. 28, 1836, art. 8, 7 Stat. 491, 495; *see also* Agreement with the Blackfeet, Sept. 26, 1895, art. 1, 29 Stat. 353, 354. An exception is found in treaties executed with the Chippewa Nation. *See* Treaty with the Chippewas, June 16, 1820, art. 3, 7 Stat. 206 ("The United States will secure to the Indians a perpetual right of fishing at the falls of St. Mary's."); Treaty with the Chippewas, 1829, art. 7, 7 Stat. 320, 322 ("The right to hunt on the lands hereby ceded, so long as the same shall remain the property of the United States, is hereby secured to the nations who are parties to this treaty.").

97. *See, e.g.*, Treaty with the Wyandot, Delaware, Ottawa, Chippewa, Pottawatamie, and Sac Nations, Jan. 9, 1789, art. 4, 7 Stat. 28, 29; Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Pottawatamies, Miamis, Eel-rivers, Weea's, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. 7, 7 Stat. 49, 52; Treaty with the Cherokees, Oct. 2, 1798, art. 7, 7 Stat. 62, 63-64.

98. *See, e.g.*, Treaty with the Kaskaskias, Aug. 13, 1803, art. 6, 7 Stat. 78, 79; Treaty with the Sacs and Foxes, Nov. 3, 1804, art. 7, 7 Stat. 84, 86; Treaty with the Piankashaws, Dec. 30, 1805, art. 5, 7 Stat. 100, 101; Treaty with the Ottawa, Cheppewa, Wyandot, and Pottawatamie Nations, Nov. 17, 1807, art. 5, 7 Stat. 105, 106; Treaty with the Chippewa, Ottawa, Pottawatamie, Wyandot, and Shawanoese Nations, Nov. 25, 1808, art. 4, 7 Stat. 112; Treaty with the Chippewas, July 29, 1837, art. 5, 7 Stat. 536, 537; *see also* Treaty with the Wyandot, Seneca, Delaware, Shawnee, Pottawatamie, Ottawa, and Chippewa Tribes, Sept. 29, 1817, art. 11, 7 Stat. 160, 165 ("The Indians shall . . . enjoy the privilege of making sugar upon the same land."); Treaty with the Chippewas, Sept. 24, 1819, art. 5, 7 Stat. 203, 204 (same).

"permitted" to hunt on ceded lands.[99] The Stevens Treaties appear to grant not only a firm right to fish, but also to extend additional protection of that right.[100]

In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, the Supreme Court drew upon the earlier *Winans* opinion and noted that the term "secure" as used in the Stevens Treaties is "synonymous with 'reserving rights previously exercised.'"[101] As noted earlier, part of the sovereign right exercised by tribes in pre-treaty times was to achieve human restraint and conservation in the natural production areas. With the extinguishment of tribal sovereignty over ceded lands, the restraint that had previously been an inherent part of native sovereignty arguably converted to a property right held by tribes in the new sovereign regime. A negative conservation easement most closely embraces the ability of one party to ensure restraint on the part of a property owner for purposes of conservation; such an easement falls broadly within the class of servitudes that the *Winans* court recognized.[102]

The context surrounding the treaty negotiations gives support for construing the word "secure" in this way. The negotiators and Congress were well aware of the vital importance of salmon to the Indians,[103] and that the

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99. *See, e.g.*, Treaty with the Osage, Nov. 10, 1808, art. 8, 7 Stat. 107, 109; Treaty with the Pawnees, Oct. 9, 1833, art. 2, 7 Stat. 448; Treaty with the Pottawatamies, Oct. 20, 1832, art. 4, 7 Stat. 378, 379 (similar); Treaty with the Comanche and Witchetaw Indians, Aug. 24, 1835, art. 4, 7 Stat. 474, 474-75 ("free permission to hunt and trap"); Treaty with the Kioway, Ka-ta-ka, and Ta-wa-ka-ro Nations, May 26, 1837, art. 4, 7 Stat. 533, 534 (same).

100. Of course, the lack of express "secure" language in other treaties in no way undermines arguments that such treaties incorporate implicit protection of treaty species. *See infra* Sections II.B.-C. The term "secure" adds an additional ground for Pacific Northwest tribes to find a right of environmental protection from their treaties, based on express language, but the omission of such language in other treaties will not be construed against tribes who are party to such treaties. *See supra* note 84 (principles of treaty construction favoring tribal position).

101. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678 (1979)(citation omitted); *see also* HANDBOOK, *supra* note 48, at 446 ("The scope of reserved Indian hunting, fishing, trapping, and gathering rights that have been recognized by the courts is very broad, virtually as broad as the exercise of those rights by the Indians prior to their settlement on reservations.").

102. United States v. Winans, 198 U.S. 371, 381 (1905).

103. *Washington Passenger Fishing Vessel*, 443 U.S. at 666 (noting that the federal negotiators "recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries"); *see also infra* note 106 and accompanying text.

Congress was also on notice of the vital importance of salmon to the Indians. An 1848 report submitted by a United States Navy Lieutenant commissioned to examine "the coast, harbors, rivers, soil, productions, climate, and population of the Territory of Oregon," contains the following description of Indian reliance on salmon in the Pacific Northwest:

> When it is remembered that the many thousand Indians living upon this river, throughout its course of more than twelve hundred miles, *are almost entirely dependent upon salmon for their subsistence*, it would lessen our surprise that these simple-minded people should devise some propitiatory means of retaining this inappreciable blessing. The annual inroad of these multitudinous shoals into the

Indians would not have relinquished millions of acres of land but for the promise that they could continue fishing as they had done for millennia.[104] Statements made by the negotiators induced reliance by tribes on the good faith of the government to protect the fishing right.[105] The Supreme Court has recognized that the tribes expected their treaties to secure perpetual rights to the resource:

> At the treaty council the United States negotiators promised, and the Indians understood, that the Yakimas would *forever be able to continue the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising.* The Yakimas relied on these promises and they

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> Columbia may, in its effects upon the happiness and lives of the inhabitants, be compared to the effect produced upon the Egyptians by the rising of the Nile; a subject upon which they are described as reflecting not with lively solicitude and interest, but with feelings of religious solemnity and awe.

REPORT OF LIEUT. NEIL M. HOWISON, UNITED STATES NAVY, TO THE COMMANDER OF THE PACIFIC SQUADRON, H.R. MISC. DOC. No. 29-5, 30th Cong. (1st Sess. 1848) (emphasis added).

104. *See Washington Passenger Fishing Vessel*, 443 U.S. at 667-68 (noting that the federal government's promises of continued fishing "formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty") (quoting district court opinion) (citation omitted); Sohappy v. Smith, 302 F. Supp. 899, 906 (D. Or. 1969):

> During the negotiations which led to the signing of the treaties the tribal leaders expressed great concern over their right to continue to resort to their fishing places and hunting grounds. They were reluctant to sign the treaties until given assurances that they could continue to go to such places and take fish and game there. The official records of the treaty negotiations prepared by the United States representatives reflect this concern and also the *assurances given to the Indians on this point as inducement for their acceptance of the treaties.*

(Emphasis added). *See also* United States v. Washington, 135 F.3d 618, 627 (9th Cir. 1998) (upholding Indians' treaty right to take shellfish in Washington):

> The United States Treaty negotiators under the leadership of Governor Isaac Stevens, were well aware of the Tribes' use and reliance on a wide variety of fish. . . . The United States' primary purpose [in entering into the Treaties] was to extinguish the Indians' title to the lands. . . . Because of the Tribes' extensive reliance on fish, however, "[t]he United States was aware that . . . it was clearly necessary to preserve the Indians' fishing rights. *Whatever land concessions [the Tribes] made, the Indians viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty with the United States.*"

(quoting district court opinion) (emphasis added).

105. *Washington Passenger Fishing Vessel*, 443 U.S. at 667 (noting that "the Indians were vitally interested in protecting their right to take fish at usual and accustomed places . . . and that they were invited by the white negotiators to rely, and in fact did rely, heavily on the good faith of the United States to protect that right"). *See also infra* note 135 and accompanying text (quoting Governor Stevens' and Joel Palmer's statements to Indians during treaty negotiations).

> formed a material and basic part of the treaty and of the Indians' understanding of the meaning of the treaty.[106]

A cardinal principle of treaty interpretation is to construe terms as the Indians would have understood them.[107] Because of linguistic barriers, it is likely the Indians did not know the meaning of the term "secure."[108] But it is more plausible that, having exercised sovereignty over their aboriginal lands since time immemorial with the inherent ability to restrain human conduct in order to preserve natural salmon production areas, the tribes would have relinquished the ceded lands only with the expectation that a measure of human restraint would continue in the new ownership framework to ensure the health of their primary resource.

Of course, in construing the term "secure," it is equally important to discern the mind-set of the United States negotiators on the issue of fish habitat protection. Interestingly, there appears to be a widespread assumption that neither the federal negotiators nor the tribal leaders could have foreseen scarcity of fish due to human factors. In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, the Supreme Court noted:

> [W]hen the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, *a resource that had always been thought inexhaustible* would be allocated between the native Indians and the incoming settlers when it later became scarce.
>
> . . . .
>
> At the time the treaties were executed there was a great abundance of fish and a relative scarcity of people. No one had any doubt about the Indians' capacity to take as many fish as they might need. Their right to take fish could therefore be adequately protected by guaranteeing them access to usual and accustomed fishing sites.[109]

Approaches to treaty interpretation on the habitat issue are very much influenced by assumptions regarding the foreseeability of environmental destruction. Implicitly embracing the Supreme Court's assumption of unforeseeability, the first Ninth Circuit panel to consider the appeal in *United States v. Washington (Phase II)* concluded, with no analysis, that the treaty did not grant assurance against environmental destruction of fish habitat, and "[i]n

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106. *Washington Passenger Fishing Vessel*, 443 U.S. at 667-68 (quoting district court opinion) (emphasis added).

107. *See supra* note 84.

108. *See Washington Passenger Fishing Vessel*, 443 U.S. at 666-67.

109. *Id.* at 669, 675 (emphasis added).

its absence, losses arising from reasonable development should be born fifty-fifty by treaty and non-treaty fishermen."[110] Though the opinion was later vacated by the Ninth Circuit sitting en banc,[111] the panel's presumption that environmental conditions were unforeseeable, and therefore not covered by explicit language in the treaty, significantly influenced at least one district court that later considered the environmental protection issue,[112] and may influence judicial approaches in the future.

The apparent confidence that the United States negotiators could not foresee environmental destruction of these presumably "inexhaustible" runs seems misplaced.[113] Dams had decimated many Atlantic salmon runs along the eastern seaboard by the early 1800s, decades before the Pacific Northwest treaties were negotiated.[114] The two primary negotiators of the Northwest Indian treaties were Joel Palmer, Superintendent of Indian Affairs for the Oregon Territory, and Isaac Stevens, Governor and Superintendent of Indian Affairs for the Washington Territory.[115] Both came from the East,[116] and

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110. United States v. Washington, 694 F.2d 1374, 1382, *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc); *but see United States v. Washington*, 694 F.2d at 1390 (Reinhardt, J., concurring) (quoting *Washington Passenger Fishing Vessel*, 443 U.S. at 676-77 (finding it "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")). For background on the *United States v. Washington (Phase II)* litigation, see *supra* notes 29-37 and accompanying text.

111. *United States v. Washington*, 759 F.2d at 1354.

112. Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 808 (D. Idaho 1994) (considering the panel's vacated opinion "persuasive" and quoting it at length). For a thorough criticism of the Nez Perce v. Idaho Power decision, see Blumm, *Piscary Profit*, *supra* note 35, at 481-89.

113. In a letter by Governor Stevens reporting to the Commissioner of Indian Affairs on the negotiation of the treaty with the Yakama Nation, Stevens described the retained reservation lands as having "nearly inexhaustible Salmon fisheries." Nez Perce Brief, *supra* note 58, exh. 15. But this reference could reflect an assumption that the treaties guaranteed conditions which would assure perpetuation of the runs. The reference itself suggests Governor Stevens' awareness that a fisheries resource could be exhausted under certain conditions.

114. R.W. DUNFIELD, THE ATLANTIC SALMON 112 (1985) (reporting 1300 dams in Maine by 1837, obstructing migratory routes for salmon and destroying runs); *see also* ANTHONY NETBOY, THE ATLANTIC SALMON, A VANISHING SPECIES? 322-23 (1968) (documenting New England dams and harm to salmon species); RICHARD BUCK, SILVER SWIMMER 4 (1993) (noting that with few exceptions, by 1848 "salmon runs had virtually disappeared in New England"). *See also* THEODORE STEINBERG, NATURE INCORPORATED (1991) (describing a journey of Henry David Thoreau in the summer of 1839 along the Merrimack River in which Thoreau noted the devastating effects of the dam at Lowell on salmon runs). Many of the dams were constructed to support mills and factories. NETBOY, *supra* at 322-25; DUNFIELD, *supra* at 112 (noting that by 1840, 1200 factories had been erected in the United States, supported by dams that obstructed rivers).

115. *See* C.F. Coan, *The Adoption of the Reservation Policy in Pacific Northwest, 1853-1855*, OR. HISTORICAL SOC'Y Q., Vol. XXIII, No. 1, Mar. 1922, 14-15. Between November, 1854 and January 1856, a total of fifteen treaties were negotiated, extinguishing native title to nearly all of the Pacific Northwest. *Id.* Some treaties were negotiated by Palmer and Stevens separately, but some were negotiated jointly where the Indian lands subject to the treaty fell in both the Territory of Washington and the Territory of Oregon. *See id.* at 15-16, 18. In the Columbia River Basin, the Treaty with the Yakamas, The Treaty with the Nez Perces, and the Treaty with the Walla-Wallas were negotiated jointly by Stevens and Palmer. *See* Treaty with the Yakamas, June 9, 1855, 12 Stat. 951; Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957;

presumably knew about these conditions.[117] Moreover, the potential threat to Pacific salmon from dams was formally recognized in law prior to, and during, the period from 1854 to 1856 in which the Stevens Treaties were made.[118] The Act of 1848 establishing the Territory of Oregon set forth mandates which applied throughout the Oregon and Washington Territory—a land base which now encompasses the present states of Oregon, Washington, and Idaho.[119] The 1848 Act provides:

Treaty with the Walla-Wallas, June 9, 1855, 12 Stat. 945. The Treaty with the Indians in Middle Oregon was negotiated solely by Joel Palmer. Treaty with Indians in Middle Oregon, June 25, 1855, 12 Stat. 963.

116. Isaac Stevens was born in Andover, Massachusetts, in 1818. HOWARD R. LAMAR, THE READER'S ENCYCLOPEDIA OF THE AMERICAN WEST 1144 (1977). He was a graduate of West Point. *Id.* Joel Palmer was born in Canada but moved to Pennsylvania as a boy. FRED LOCKLEY, HISTORY OF THE COLUMBIA RIVER VALLEY 846 (1928). Before traveling to Oregon he served in the Indiana Legislature. *Id.*

117. In a related context, courts have charged the negotiators with constructive knowledge of East Coast circumstances bearing upon treaty interpretation. Interpreting tribal rights to take shellfish pursuant to the fishing clause of the Stevens' treaties, the district court of Washington relied upon East Coast practices and found "there is no doubt that the United States treaty negotiators were generally familiar with the East Coast shellfish industry and its practices." United States v. Washington, 873 F. Supp. 1422, 1434 (W.D. Wash. 1994), *aff'd*, 135 F.3d 618 (9th Cir. 1988). Affirming the district court's conclusion that the treaty rights include the right to take shellfish, the Ninth Circuit also noted the negotiators' knowledge of east coast shellfish industry practices. *United States v. Washington*, 135 F.3d at 627.

118. *See* Coan, *supra* note 115, at 14 (describing treaty negotiation period).

119. Act Establishing the Territorial Government of Oregon, 9 Stat. 323 (1848). From 1848 to 1853, the Act applied directly throughout the original Territory of Oregon, which included all of the land within the present states of Oregon, Washington, and Idaho. LEONARD J. ARRINGTON, HISTORY OF IDAHO, Vol. 1, 212 (1994) (map depicting the progression from territory to statehood of Oregon, Washington, and Idaho). In 1853, the Territory of Washington was created from the Territory of Oregon. Act Establishing the Territorial Government of Washington, 10 Stat. 172 (1853); *see also* United States v. Washington, 384 F. Supp. 312, 354 (W.D. Wash. 1974). The Territory of Washington included all of what is now Washington state and northern Idaho. ARRINGTON, *supra* at 212. The southern border of the Washington Territory which joined with the remaining portion of the Oregon Territory ran east-west along the Columbia River from its mouth, then east-west along the forty-sixth degree of latitude to the summit of the Rocky Mountains. Act Establishing the Territorial Government of Washington, § 1, 10 Stat. at 172; *see also Washington*, 384 F. Supp. at 354; ARRINGTON, *supra* at 212. What is now southern Idaho remained in Oregon Territory. *See id.* The 1848 laws governing the Territory of Oregon continued to apply to both the Territory of Oregon and the Territory of Washington after the latter was created in 1853; the Act establishing the Territory of Washington expressly provided that Oregon Territory laws were applicable in the new Territory of Washington. *See infra* note 127 and accompanying text; *see also* Washington, 384 F. Supp. at 354 ("All federal laws relating to the Oregon Territory not inconsistent with the 1853 Act were expressly continued in force in Washington Territory."). Accordingly, the provisions of the 1848 Act, with its prohibition on dams, *see infra* note 120 and accompanying text, applied throughout what are now the states of Oregon, Washington, and Idaho, during the period of treaty-making, from 1854 and 1856.

In 1859, Oregon achieved statehood. Act Admitting the State of Oregon into the Union, 11 Stat. 383 (1859). The residual Oregon territory which is now southern Idaho was incorporated into Washington Territory. *See id.* § 5, 11 Stat. at 384; ARRINGTON, *supra* at 212 (map depicting territorial and state land base). In 1889, Washington achieved statehood, and Idaho became a state in 1890. Act Admitting the State of Washington into the Union, 25 Stat. 676 (1889); Act Admitting the State of Idaho into the Union, 26 Stat. 215 (1890).

> The rivers and streams of water in said territory of Oregon in which salmon are found, or to which they resort, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.[120]

Importantly, the Act's protection for fish extends to both salmon capital and natural production areas. The language recognizes the importance of in-river habitat and explicitly contemplates the devastating effects of dams on salmon migration. The mandate was undoubtedly intended to protect Indian treaty resources. The Act begins in section 1 by stating: "[N]othing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said [Oregon] Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians."[121] At the time the Act was passed, in 1848, there was no substantial non-Indian fishery;[122] the Indians had exclusive rights to, and use of, the fish. A report transmitted to Congress in the same year by a Navy explorer states: "Strange to say, up to this day *none but Indians have ever taken a salmon from the waters of the Columbia*; it seems to have been conceded to them as an inherent right, which no white man has yet encroached upon."[123] As the Supreme Court noted in *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, the Indians continued to harvest most of the fish for several decades following the treaty signing in 1855, and it was not until the "last few years of the 19th century did a significant non-Indian fishery develop."[124] Accordingly, the language of the Act is directed towards protecting an exclusively Indian interest.

The Act's express prohibition against damming rivers so as to allow free passage of salmon and maintenance of natural production areas forms the legal backdrop against which the word "secured" in the treaties should be interpreted.[125] Certainly the mandate is evidence that Congress, when ratifying the treaties, was at least on constructive notice of the devastating potential of dams on salmon runs, and the same is true for both lead negotiators of the treaties. The Act of 1848, from which the dam prohibition clause derives,

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120. Act Establishing the Territorial Government of Oregon, § 12, 9 Stat. at 328.

121. *Id.* § 1., 9 Stat. at 323.

122. *See infra* notes 123-24 and accompanying text.

123. LIEUT. HOWISON, *supra* note 103, at 27 (emphasis added).

124. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 668 (1979).

125. *See supra* note 89 (citing treaty language) and accompanying text.

established the Territorial Government of Oregon.[126] The Act establishing the Territory of Washington in 1853 expressly incorporated and made binding on the new Washington Territory the laws existing throughout the Territory of Oregon, including the 1848 Act.[127] Isaac Stevens' authority to act as Governor of the new Washington Territory and as Superintendent of Indian Affairs, and to negotiate treaties with tribes in the new Washington Territory, derived from the 1853 Act establishing the Washington Territory.[128] As Governor, Stevens was charged with carrying out the laws of the Washington Territory[129] and, by explicit incorporation, the existing laws in the Territory of Oregon[130]—including the provision prohibiting dams.[131] As Superintendent for Indian Affairs for the Territory of Oregon, Joel Palmer was also bound by existing law in the negotiation of treaties throughout the Territory of Oregon.[132] The assurances of Governor Stevens and Joel Palmer to the tribes

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126. Act Establishing the Territorial Government of Oregon, § 1, 9 Stat. at 323.

127. Act Establishing the Territorial Government of Washington, § 12, 10 Stat. at 177 (providing that "the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon . . . be, and they are hereby, continued in force in said Territory of Washington").

128. *Id.* § 2, 10 Stat. at 173 (vesting the Governor of the Territory with the authority to act as Superintendent of Indian Affairs); *see also* United States v. Washington, 384 F. Supp. 312, 354 (W.D. Wash. 1974).

129. *See* Act Establishing the Territorial Government of Washington, § 2, 10 Stat. at 173 ("The governor shall reside in said Territory . . . [and] shall perform the duties and receive the emoluments of Superintendent of Indian Affairs . . . and shall take care that the laws be faithfully executed.").

130. *See supra* note 127 and accompanying text.

131. *See supra* note 120 and accompanying text.

132. Palmer, however, did not derive his authority to act as Superintendent of Indian Affairs directly from the 1848 Act Establishing the Oregon Territory. While the 1848 Act contains a provision substantially similar to the Washington Territorial Act, which vests the duties of Superintendent of Indian Affairs in the Governor of the Territory, *see* Act Establishing the Territorial Government of Oregon, § 2, 9 Stat. at 324, Congress passed a statute in 1850 divesting the Governor of the Oregon Territory the authority to act as Superintendent of Indian Affairs, and provided for the appointment of a new Superintendent. Act Authorizing the Negotiation of Treaties with the Indian Tribes in the Territory of Oregon, §§ 2-3, 9 Stat. 437, 437 (1850). Palmer was subsequently appointed Superintendent for Indian Affairs for the Territory of Oregon in 1853. Coan, *supra* note 115, at 1.

Although Palmer was not charged as a Governor with implementing the laws of the Territory, nevertheless he acted as a federal agent and, implicitly, could not take action contrary to a federal statute which governed the territory in which he acted as Superintendent of Indian Affairs. Moreover, the direct responsibility of Governor Stevens to carry out the laws of the Territory of Oregon, *see supra* notes 126-31 and accompanying text, is part of the context of all fifteen treaties negotiated with the Pacific Northwest tribes. Of the fifteen treaties, Governor Stevens is signatory alone to six, Palmer is signatory alone to six, and Palmer and Stevens are signatory together to three. *See* Coan, *supra* note 115, at 15-16. Governor Stevens signed three of the four treaties with the Columbia River tribes. *See supra* note 115. Despite whether Stevens or Palmer negotiated and signed a particular treaty alone or separately, all of the treaties contained nearly the exact, or substantially similar, language regarding fishing rights (as well as most other provisions), because all were based on a model developed by Governor Stevens. *See In re* Snake River Basin Adjudication, Case No. 39576, Order on Motions to Strike, Motion to Supplement the Record and Motions for Summary Judgment, slip op. at 21, no.4 (Nov. 10, 1999) (on file with author) ("Stevens

during the treaty negotiations should be construed against the existing laws of the Territories of Washington and Oregon, which the negotiators were bound to not only comply with, but in the case of Governor Stevens, to implement.

During the negotiation process Governor Stevens assured the Pacific Northwest Indians of the continued protection of their fisheries in ceded lands.[133] Inducing a tribal reliance that provided the consideration for a cession of sixty-four million acres of land,[134] the negotiators made statements such as the following by Governor Stevens in negotiating the Treaty of Point Elliott:

> Are you not my children and also the children of the Great Father? What will I not do for my children and what will you not for yours? Would you not die for them? 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?[135]

It is a basic principle of contract law that terms should be construed against the drafter.[136] This rule has added force in contracts in which the parties are in unequal bargaining positions.[137] Recognizing that Indian

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prepared a 'model treaty' to be used at the various treaty councils."); Coan, *supra* note 115, at 15 (noting, "It is hardly necessary to consider the details of each treaty as the general character of all of them is the same. . . . All of the treaties include . . . the reservation of fishing rights to the Indians.").

133. *See supra* notes 105-06; *infra* note 135.

134. *See* Blumm, *Piscary Profit*, *supra* note 35, at 426.

135. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 n.11 (1979) (emphasis added); *see id.* at 666-67 & n.9 (noting, "Stevens' concern with protecting the Indians' continued exploitation of their accustomed fisheries was reflected in his assurances to the Indians during the treaty negotiations that under the treaties they would be able to go outside of reservation areas for the purpose of harvesting fish."). In a similar vein, Governor Stevens said to the Indian representatives at the Council in the Walla Walla Valley: "You will not be called according to the paper to move on the Reservation for two or three years; *then is secured to you your right to fish, to get roots and berries, and to kill game;* then your payments are secured to you as agreed." Nez Perce Brief, *supra* note 58, exh. 14, at 40 (emphasis added). Joel Palmer concluded the negotiations with further assurances of good faith surrounding the treaty promises:

> My brothers, I wish to say a few words before we part . . . . We have been together a long time and have talked a great deal. We have listened to what you have said. . . . Some of you have sometimes been afraid that we were not working for your good. Your willingness to come forward and sign the Treaty is evidence that you have decided that we intended to do you good. We have shown you our hearts and you have shown us yours. We commenced a long way apart but now we are together. We are one. I hope we shall always remain one and have but one heart.

Id. at 45.

136. FARNSWORTH, *supra* note 85, § 7.11, at 287 ("[I]f language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party that supplied the language is preferred.").

137. *Id.*

negotiators were at an extreme disadvantage due to language barriers, courts have liberally construed terms in Indian treaties to favor the tribal interest.[138] Construing a general term against the drafter makes even more sense in situations where a contingency is foreseeable by the drafter (but perhaps not by the other party) and the drafter chose not to address the situation with more explicit language.

The negotiators were constructively aware of the environmental conditions that could threaten salmon. Had they intended for each party to assume the loss from development equally, they could have provided for that outcome explicitly. Several other treaties with fishing and hunting clauses seemingly anticipate some environmental loss. For example, treaties executed in 1867 and 1868 with the Kiowas, Comanches, Cheyennes, and the Sioux Indians provided for reserved rights to hunt on ceded lands "so long as the buffalo may range thereon in such numbers as to justify the chase."[139] Treaties executed in 1868 with the Crow Indians and the Shoshone and Bannock Indians reserve the right to hunt on unoccupied lands "so long as game may be found thereon,"[140] and an 1874 agreement with the Utes permits tribal hunting on ceded lands "so long as the game lasts."[141] Had Governor Stevens and Palmer intended that the tribes of the Pacific Northwest assume the loss of environmental devastation of their fisheries merely a century and a half after the treaties were executed, they could have explicitly provided for that contingency.[142]

In light of the negotiators' constructive knowledge of the vital importance of fish habitat, the 1848 Act's prohibition against dams which would impede fish passage, and the negotiators' promises to tribal leaders that their fisheries would be "secured" forever, a reasonable interpretation of the word "secure" in the treaties would provide a tribal right of environmental protection for the

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138. *See supra* note 84.

139. Treaty with the Kiowas and Comanches, Oct. 21, 1867, art. 11, 15 Stat. 581, 584. *See also* Treaty with the Cheyenne Indians, Oct. 28, 1867, art. 11, 15 Stat. 593, 596; Treaty with the Sioux Indians, April 29, 1868, art. 11, 15 Stat. 635, 639; Treaty with the Cheyenne Indians, May 10, 1868, art. 2, 15 Stat. 655, 656 (reserving to Indians the "right to roam and hunt while game shall be found in sufficient quantities to justify the chase").

140. Treaty with the Crow Indians, May 7, 1868, art. 4, 15 Stat. 649, 650; Treaty with the Shoshonee and Bannocks, July 3, 1868, art. 4, 15 Stat. 673, 674-75.

141. Agreement with the Utes, April 29, 1874, art. 2, 18 Stat. 36, 37.

142. Of course, comparison between the Stevens Treaties and other treaties is necessarily limited. Various treaties were negotiated by different parties and under different circumstances. The language in some treaties, which seemingly anticipates environmental loss, cannot be construed as any indication that the tribes assumed the risk of loss. Each treaty must be evaluated against the unique historical circumstances which gave rise to it. At most, such language creates ambiguities. Courts construe such ambiguities in favor of the tribal interest. *See supra* note 84. This rule of construction has particular force in a case where the tribe had a firm reliance on the treaty species, held reasonable expectations of continued species abundance, and ceded lands in partial consideration for the opportunity of perpetual harvest.

habitat component of salmon capital. Such a reserved right would take the form of a negative conservation easement enforceable by tribes to protect the natural production areas in the ceded territories that had been, for millennia, so vital to ensuring perpetual harvestable runs.

B. An Implied Right as a Necessary Corollary to the Reserved Property Right to Fish

Common law is replete with judicial implication of corollary rights necessary to the full enjoyment of property.[143] When dealing with Indian property, the Supreme Court has invoked the reserved rights doctrine to imply such rights. The landmark case of *Winters v. United States*, for example, found an implied reservation of water necessary to irrigate an arid Indian reservation.[144] Though the tribe failed to make an express reservation of water in its treaty with the federal government, the Court inferred that the tribe would not have relinquished its aboriginal control over its territorial waters when water was so indispensable to making the smaller reservation habitable.[145]

Courts have made clear that the reserved rights doctrine reaches beyond merely the land interests of tribes to the tribal hunting and fishing rights as well.[146] Clauses reserving these usufructory harvest rights in ceded lands constitute separate reservations of property rights which are distinct from the reservation of land.[147] The Supreme Court in *Winans* recognized the fishing property right and upheld an implied tribal right of access to traditional fishing sites, noting that the treaty "fixes in the [ceded] land such easements as enables the [fishing] right to be exercised."[148]

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143. On the individual level, for example, the law recognizes by implication riparian rights, which enhance the use and enjoyment of land located adjacent to water bodies; the right to lateral support from neighboring land; and implied easements by necessity to provide access to landlocked parcels. *See* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 65 (2d 1997) (discussing riparian rights); *id.* at 291 (discussing implied negative easement of lateral support); *id.* at 407 (discussing implied easement of necessity). And on the federal sovereign level, the law implies a reservation of water to benefit a federal reservation of land. *See* Arizona v. California, 373 U.S. 546, 548 (1963).

144. Winters v. United States, 207 U.S. 564, 576-77 (1908).

145. *Id.*

146. United States v. Winans, 198 U.S. 371, 381 (1905); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679-80 (1979) (citing *Winans*).

147. *Winans*, 198 U.S. at 381; *In re* Snake River Basin Adjudication, Case No. 39576, Order on Motions to Strike, Motion to Supplement the Record and Motions for Summary Judgment, slip op. at 25-27 (Nov. 10, 1999). Despite recognizing the separate and distinct character of reserved usufructory rights off the reservation, the court overseeing the Snake River Basin adjudication refused to find that the Nez Perce Tribe had reserved water rights to support its off-reservation hunting and fishing right. *Id.* at 38. *See* discussion at *infra* notes 152-53 and accompanying text.

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

The reserved rights doctrine provides a sound basis for implying a negative conservation easement to protect the natural production areas of salmon. Such an easement, like the access easement in *Winans* and the water rights in *Winters*, is a necessary corollary to the enjoyment of a tribal property interest. Ninth Circuit precedent already recognizes a major component of such a conservation easement. In *United States v. Adair*,[149] the court found that an 1864 treaty with the Klamath Tribe entitled the tribe to an instream flow necessary to support its treaty fishing and hunting activities—in essence, a water right to support habitat.[150] The court clearly distinguished such a right from the water right necessary to support the reservation lands.[151] Courts have recognized the instream habitat water right in the context of several other tribal fisheries as well.[152] Moreover, the United States, in its capacity as trustee for the Nez Perce Tribe, is currently advocating for such a right in the ongoing Snake River adjudication, taking the position that "the Tribe . . . [is] entitled to an instream flow right in all streams which are necessary to produce fish for harvest by the Tribe at its fishing places, both on and off the present-day reservation."[153]

Collectively, these cases establish a type of servitude in water for the purpose of protecting the treaty fishing right.[154] As an implied reserved right,

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149. United States v. Adair, 723 F.2d 1394 (9th Cir. 1981).

150. *Id.* at 1414.

151. *Id.* at 1410 (finding reservation of "a quantity of water . . . not only for the purpose of supporting Klamath agriculture, but also for the purpose of maintaining the Tribe's treaty right to hunt and fish on reservation lands").

152. *See, e.g.*, Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th. Cir. 1981) (recognizing the Colville Tribe's "right to water to establish and maintain the Omak Lake replacement fishery which includes the right to sufficient water to permit natural spawning of the trout"); Flathead Irrigation Dist. v. United States, 832 F.2d 1127, 1132 (9th Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988) (recognizing the Flathead Tribe's right to instream flows to preserve the tribal fisheries); United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982) (holding that the Spokane Tribe "has the reserved right to sufficient water to preserve fishing in the Chamokane Creek"); Dept. of Ecology v. Aquavella, No. 77-2-01484-5, slip op. at 15, *Memorandum Opinion: Treaty Reserved Water Rights at Usual and Accustomed Fishing Places* (Wash. Super. Ct. Sept. 1, 1994) (extending treaty fishing right "to include *all* Yakima River tributaries affecting fish availability at the [Yakama Indian Nation's] 'usual and accustomed' fishing stations") (emphasis in original); *see also* Blumm, *Piscary Profit*, *supra* note 35, at 470-78 (discussing cases). *But see In re* Snake River Basin Adjudication, Case No. 39576, Order on Motions to Strike, Motion to Supplement the Record and Motions for Summary Judgment, slip op. at 25-27 (Nov. 10, 1999) (denying Nez Perce Tribe's off-reservation water rights claims to support fisheries); *see infra* note 153 (criticizing decision).

153. Nez Perce Brief, *supra* note 58, at 120. The state district court recently rejected the Government's position. *See supra* note 152. That decision is being appealed and has been the subject of strong criticism. *See* Blumm et al., *Treaty Water Rights*, *supra* note 34, at 460 (noting that the opinion "resembles an advocate's brief more than a dispassionate judicial opinion").

154. Because the tribal water rights are implied as pre-existing aboriginal rights, they take precedence over later acquired rights in water. *See supra* notes 51, 149-52 and accompanying text; *see also infra* notes 156, 258 (discussing cases which find that the reserved tribal water right to support treaty hunting and fishing carries a priority date of "time immemorial").

the servitude is anchored in the aboriginal management the tribe had exercised over its ancestral territory.[155] As the *Adair* court explained:

> In 1864, at the time the Klamath entered into a treaty with the United States, the Tribe had lived in Central Oregon and Northern California for more than a thousand years. This ancestral homeland encompassed some 12 million acres. Within its domain, *the Tribe used the waters that flowed over its land for domestic purposes and to support its hunting, fishing, and gathering lifestyle.* This uninterrupted use and occupation of land and water created in the Tribe aboriginal or "Indian title" to all of its vast holdings . . . . Aboriginal title is "considered sacred as the fee simple of the whites." The Tribe's title also included aboriginal hunting and fishing rights, and by the same reasoning, an *aboriginal right to the water used by the Tribe as it flowed through its homeland.*
>
> . . . [It is not] possible that the Tribe would have understood [the] reservation of land to include a relinquishment of its right to use the water as it always used it on the land it had reserved as a permanent home.[156]

The primary thrust of the modern servitude in water is to secure natural conditions essential to enjoying the property right of taking fish.[157] As the Ninth Circuit in *Adair* noted, the scope of the water right "is circumscribed by the necessity that calls for its creation."[158] Accordingly, courts have

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155. *See* Wood, OPEN SPACES, *supra* note 54, at 14 (identifying the pre-treaty "environmental sovereignty" exerted by native nations over their territories as a basis for modern tribal co-management of ecosystems). Pursuing this theme to suggest a reserved right of tribal participation in off-reservation ecosystem management, commentator Ed Goodman highlights a defining principle articulated by Professor Charles Wilkinson in his landmark work, AMERICAN INDIANS, TIME, AND THE LAW 63 (1987):

> In the cases of the modern era the exceptions have proved far less important than the *remarkable and crucial premise* that tribal powers will be measured initially by the sovereign authority that a tribe exercised, or might theoretically have exercised, in a time so different from our own as to be beyond the power of most of us to articulate.

(Emphasis added). *See* Goodman, *supra* note 54, at 319 n.250 and accompanying text (noting that this "'remarkable and crucial premise' . . . provides the foundation for recognizing that tribal participation in off-reservation decision-making concerning reserved rights resources is an aspect of inherent tribal sovereignty that the tribes reserved . . . .").

156. United States v. Adair, 723 F.2d 1394, 1413-14 (9th Cir. 1981) (emphasis added). The case involved water rights on lands which were no longer part of the reservation as a result of the Klamath Termination Act. *See id.* at 1398.

157. *Id.* at 1409 (finding that one of the "very purposes" of establishing the Klamath Reservation was to "secure to the Tribe a continuation of its traditional hunting and fishing lifestyle"). In the ongoing Snake River Basin adjudication, the United States, on behalf of the Nez Perce Tribe, is advocating for instream water rights in "all stream reaches that are biologically necessary to support the [tribal] fishery." Nez Perce Brief, *supra* note 58, at 114.

158. *Adair*, 723 F.2d at 1409.

recognized that the habitat water right extends protection beyond tribal fishing locations to upstream areas where spawning takes place,[159] and that it supports water temperatures,[160] flows,[161] and other conditions vital for perpetuation of fish life.[162] As a Washington state court recently explained in holding that the Yakama Tribe's instream flow right "extends . . . to include all Yakima River tributaries affecting fish availability at the [Tribe's] 'usual and accustomed' fishing stations:"[163]

> [A]ll water courses in the Yakima Basin are connected, in regard to fish . . . and each cannot be looked at entirely in their individual capacity. The [earlier judgment] defined the diminished water right[164] as an amount necessary to maintain fish life in the Yakima

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159. Kittikas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033-35 (9th Cir. 1985); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981) (recognizing tribal right "to sufficient water to permit natural spawning [of a replacement fishery]").

160. United States v. Anderson, 591 F. Supp. 1, 5 (E.D. Wash. 1982) (finding that the Spokane Tribe has a reserved water right to "preserve fishing in the Chamokane Creek [and that the] quantity of water needed to carry out the reserved fishing purposes is related to water temperature rather than to simply minimum flow," and noting that the Water Master has authority to adjust water allocations to achieve necessary temperature).

161. *Adair*, 723 F.2d at 1410; Dept. of Ecology v. Acquavella, No. 77-2-01484-5, *Amendment to Memorandum Opinion Re: Motions for Partial Summary Judgment Dated May 22, 1990* (Wash. Super. Ct., Oct. 22, 1990) [hereinafter *Amended Opinion*], *aff'd*, Dept. of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1310 (Wash. 1993); *see also* Dept. of Ecology v. Acquavella, No. 77-2-01484-5, slip op. at 2, *Memorandum Opinion Re: Flushing Flows* (Wash. Super. Ct. Dec. 22, 1994) [hereinafter *Flushing Flows Opinion*]; *see also supra* note 152 and cases cited therein.

162. *Flushing Flows Opinion*, No. 77-2-01 484-5, slip op. at 2, 5 (interpreting treaty right to "maintain fish life" and quoting earlier opinion, noting that "'there are other variables that may enter into the determination, on an annual basis, of how much instream flow may be necessary to merely preserve fish life in the river—such things as water quality, climatic and temperature changes, changes in substrate location within the stream, etc.'"); *id.* at 4 (finding tribal right to an instream flow sufficient to "maintain fish life" therein).

163. Dept. of Ecology v. Acquavella, No. 77-2-01484-5, slip op. at 15, *Memorandum Opinion: Treaty Reserved Rights at Usual and Accustomed Fishing Places* 15 (Wash. Super. Ct. Sept. 1, 1994) [hereinafter *Treaty Reserved Rights Opinion*] (citation omitted).

164. The court spoke in terms of a "diminished" water right because of its earlier holding that the tribal reserved treaty right for instream water to support "optimum habitat" for fisheries had been "diminished [but not] extinguished" by various actions on the part of the federal government since the treaty had been negotiated in 1855. *See Amended Opinion*, No. 77-2-01484-5, slip op. at 5, 10. That opinion was affirmed by the Washington Supreme Court which, in notably vague terms, held that various "inconsistent actions of Congress, the executive branch and administrative agencies" had "significantly damage[d]" the Indian treaty rights, and that a subsequent settlement before the Indian Claims Commission precluded the Yakama Indians from now asserting their treaty rights to the fullest extent. *Dept. of Ecology*, 850 P.2d at 1323, 1331. The Washington Supreme Court's endorsement of a "diminished" treaty right departed from well-established principles of Indian law regarding treaty abrogation and, for that reason, has been strongly criticized. *See* Blumm, *Piscary Profit*, *supra* note 35, at 475-78. It is doubtful that the court's unfounded characterization of treaty rights would survive scrutiny in federal courts, but even apart from that, the circumstances identified by the court to support a diminished right were unique to the Yakama Nation and do not have broader reach to other tribes. Even despite the finding of a "diminished" water right to support

> River. To achieve that, in light of the anadromous fish life cycle, a diminished [water] right is imperative for the tributaries that serve as spawning grounds. Fish life cannot be maintained without a place for fish to spawn.[165]

The water-rights servitude already well established in the case law is a component of the broader servitude necessary to protect natural production areas of Columbia River salmon. Water conditions necessary for fish survival are impaired to a large extent by upland activities, such as logging, grazing, road construction, mining, and some forms of outdoor recreation.[166] The same understanding of biological necessity which prompted courts to recognize an instream water right for fish, to extend that right to tributaries, and to rely on that right to secure adequate flows, appropriate water temperature, and other conditions necessary to sustain fish life,[167] should support a servitude extending to the full natural production areas used by tribes in their aboriginal territories. Because salmon rely on a full range of conditions for survival—some of which occur in land and some in water, but all of which are necessary in the complete life-cycle of the fish—anything less than an implied servitude defined by biological necessity will fail to protect the purpose of the reserved property right to fish.

C. An Implied Right as a Necessary Incident of Sovereignty

In addition to implying a negative conservation easement as a necessary corollary to the tribal property right of fishing, another approach draws on jurisprudence which infers property rights necessary to fulfill a government's sovereign interests (as distinguished from its property interests). These judicially implied property rights, which generally take the form of servitudes,[168] emanate from the paramount sovereign interests of

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tribal fisheries, the trial court still found, and the Washington Supreme Court affirmed, a reserved water right to an "instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions." *Dept. of Ecology*, 850 P.2d at 1310; *Amended Opinion*, No. 77-2-01484-5, slip op. at 10-11. Such a "diminished" water right carries a priority date of "time immemorial" and therefore takes priority over other vested water rights in low water years. *Dept. of Ecology*, 850 P.2d at 1310; *Amended Opinion*, slip op. at 5.

165. *Treaty Reserved Rights Opinion*, No. 77-2-01484-5, slip op. at 9. *See also* Nez Perce Brief, *supra* note 58, at 121 (asserting government position, on behalf of Nez Perce Tribe in Snake River Basin water adjudication that, "[w]here the fish that are the subject of the fishing right move beyond the Tribe's fishing sites, the Tribe's right to water to support the fishery follows").

166. NATIONAL MARINE FISHERIES SERVICE, SNAKE RIVER SALMON RECOVERY PLAN, SUMMARY 9-10 (May 1994) [hereinafter SUMMARY].

167. *See supra* notes 159-62 and accompanying text.

168. *See infra* notes 170-71 and accompanying text.

government.[169] Examples include the federal navigational servitude which blankets navigable waterways to ensure their continued use as transportation routes,[170] and state-held "public trust easements" in lands critical to public welfare, such as submersible lands, tidelands, and beaches.[171] Sovereign servitudes secure public rights that are antecedent to private ownership[172] and often inalienable.[173] Due to the critical role of fishing in tribal life, and the tribes' paramount sovereign interest in continuing their ancient fishing culture, this body of law suggests an independent basis for finding an implied servitude protecting natural production areas vital to supporting treaty fisheries.

The landmark case which launched the field of public trust law in the United States and most clearly defined the genre of implied sovereign

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169. *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452-54 (1892) (holding that submersible lands on the shore of Lake Michigan are "of immense value to the people of the state of Illinois" and are encumbered by a public "trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties"); *see also* Marks v. Whitney, 491 P.2d 374, 378 (Cal. 1971) (en banc) (finding tidelands encumbered with public easement of "great public importance, particularly in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property").

170. RODGERS, *supra* note 27, at Part 4.14 ("[T]he United States, or the public through the United States, 'owns' or has a property right in the water (and all the values associated with it) that cannot be secured by private parties."); Pisarski, *supra* note 27, at 315-16 ("The nature of the interest that the federal government holds in connection with the navigational servitude is generally described, either explicitly or impliedly, as an easement. The nature of this property right falls short of fee title. . . . It is a dominant interest, and any other property interests are servient."); United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 704 (1987) (describing navigational servitude as "dominant servitude"); Boone v. United States, 944 F.2d 1489, 1494 n.9 (1985) ("the label 'servitude' implies a property interest."). Courts and commentators have grouped the federal navigational servitude with other public trust servitudes. *See, e.g., Boone, supra* at 1494 (the servitude "appears to be based in part on considerations of the common law doctrines of *jus publicum* and public trust"); RODGERS, *supra* (describing servitude as "a federal version of the public trust doctrine"); Pisarski, *supra* at 317 (navigational servitude joins other "common law customary servitudes of the public at large").

171. *See* Harrison C. Dunning, *The Public Trust: A Fundamental Doctrine of American Property Law*, 19 ENVTL. L. 515, 516-17 (1989) (public trust doctrine amounts to public property rights in the form of easements that burden private ownership of particular resources); *Marks*, 491 P.2d at 380 (referring to "public trust servitude" and "public trust easements" which encumber privately owned tidelands); *see also* United States v. Winans, 198 U.S. 371, 381 (1905) (upholding tribal right of access to fishing sites as a "servitude" encumbering private lands). Such servitudes may take a negative form of requiring protection of public trust assets, or an affirmative form of requiring public access to such assets. *See* discussion in Lazarous, *supra* note 27, at 650-54.

172. *See* Lazarous, *supra* note 27, at 648-49 (public trust doctrine reflects the "assertion of public rights that preexist any private property rights in the affected resource [and], therefore, cannot be deemed a taking of private property.").

173. *See id.* at 655 ("Courts also emphasize that all conveyances of trust resources to private parties are subject to the sovereign's retained supervisory authority; private property rights in the resource are 'impressed' with the public trust, fee simple absolute notwithstanding."); *Illinois Central*, 146 U.S. at 455-56 (finding state grant of submersible lands to private interest revocable, explaining, "The trust with which [those lands] are held . . . is governmental and cannot be alienated, except . . . in the improvement of the [public interest] or when parcels can be disposed of without detriment to the public interest in the land and waters remaining.").

servitudes was *Illinois Central Railroad v. Illinois*, decided in 1892.[174] The Supreme Court held in that case that submersible lands on the waterfront of Lake Michigan were encumbered by a public trust which survived the alienation of the land into the private sector.[175] Though the State legislature had conveyed much of Chicago's harbor to the Illinois Central Railroad, the Court held that "[a]ny grant of [this] kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time."[176]

The implied trust ownership, or public servitude on critical lands, traces back to ancient doctrinal theory which preexisted the United States and was manifest in most European nations in the Middle Ages.[177] Much like the fundamental principles of sovereign trusteeship over wildlife, this doctrine is rooted in basic notions of governmental necessity, and the inferred property rights arise as incidents of sovereignty. The Supreme Court in *Illinois Central* found that the submersible lands on the shores of Lake Michigan were critical to the public welfare of the state, and therefore could not be put beyond the State's control, even through sale to private parties.[178] As it reasoned:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.
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> The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose . . . cannot be defended.[179]

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174. *Illinois Central*, 146 U.S. at 455-56.
175. *Id.* at 454-55.
176. *Id.* at 455.
177. *See* Lazarous, *supra* note 27, at 633-34.
178. *See Illinois Central*, 146 U.S. at 453-56.
179. *Id.* at 453-54. The Court added:

> [T]he abdication of the general control of the State over lands under navigable waters of an entire harbor or bay, or of a sea or lake . . . is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.
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> . . . .
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> . . . [S]uch property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated.

As the Supreme Court in *Illinois Central* made clear, only lands critical to maintaining a natural resource infrastructure necessary to public welfare will support a sovereign servitude that can override subsequently acquired private property rights. At the time of *Illinois Central*, fishing, navigation, and commerce were paramount public needs.[180] To this day, some courts still confine the public trust doctrine to those traditional needs.[181] Other courts have greatly expanded the focus of the doctrine to meet emerging societal needs brought on by unforeseeable pressures of industrial society.[182] Accordingly, some courts find a servitude in land or water where necessary to provide for environmental protection, wildlife habitat, public recreation, aesthetics, or other public needs.[183]

While courts must craft a unique set of common law principles to define tribal rights,[184] public trust jurisprudence serves as a guidepost in defining

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Id. at 452-53, 455. For a recent analysis applying the trust doctrine to wildlife regulations, see Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things that go Bump in the Night*, 85 IOWA L. REV. 849 (2000).

180. *See Illinois Central*, 146 U.S. at 452.

181. *See discussion* at SINGER, *supra* note 143, at 266.

182. *See, e.g.* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972):

> We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. *The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions* and need of the public it was created to benefit.

(Emphasis added). *See also* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) ("Archaic judicial responses are not an answer to a modern social problem. Rather, we perceive the public trust doctrine not to be fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit.") (internal quotations omitted).

183. Lazarous, *supra* note 27, at 640-41, 649; *supra* note 37. Linking public recreational interests to contemporary notions of sovereign necessity, the *Matthews* court held: "It has been said that [h]ealth, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state. Extension of the public trust doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare." *Matthews*, 471 A.2d at 363 (internal quotations omitted). And in recognizing a public trust easement across certain tidelands in California, the Supreme Court of California noted:

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another . . . [t]here is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments . . . which favorably affect the scenery and climate of the area.

Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (en banc).

184. It has often been said that tribal rights are *sui generis*. *See* Seldovia Native Ass'n v. Lujan, 904

appropriate protection for sovereign interests generally. Though much of public trust law applies directly to states and not tribes, it nevertheless provides forceful analogous reasoning for interpreting the reserved rights doctrine in Indian law as implying necessary incidents of sovereignty in addition to those corollary rights necessary to the enjoyment of tribal property.[185] Just as in public trust jurisprudence, where courts recognize vital public environmental rights in the form of reserved sovereign servitudes which underlie subsequently acquired private rights, so might courts construe the reserved rights doctrine in Indian law as protecting those vital incidents of tribal sovereignty that are not inconsistent with the tribes' domestic dependent status.

The approach of public trust jurisprudence would support an implied servitude to protect tribal fishing and salmon capital as a paramount sovereign interest. Courts have recognized fishing as a traditional and enduring public trust interest commanding substantial protection in the majority society,[186] and its critical role to tribal life arguably far exceeds its contemporary importance to the non-Indian population. At the time of the treaties, Indian fishing represented the exclusive use of the salmon resource in the Pacific Northwest;[187] a more complete dependence by humans on a species could hardly be envisioned. If fish returns diminished, Indian people experienced threats of starvation.[188] As the Court in *United States v. Winans* noted, the fishing right was "not much less necessary to the existence of the Indians than the atmosphere they breathed."[189] With the industrialization of the region, the traditional Indian dependence on salmon remained steadfast.[190]

The contemporary fishing interest of tribes is without substitute.[191] Fish is still used for subsistence and economic and cultural purposes by tribes throughout the Columbia River Basin.[192] Salmon continue to provide an irreplaceable foundation for the spiritual and cultural life of Northwest Indian

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F.2d 1335, 1350 (9th Cir. 1990) (Indian affairs are *sui generis*); Native Village of Noatak v. Hoffman, 896 F.2d 1157, 1164 (9th Cir. 1990) (same); Morton v. Mancari, 417 U.S. 535, 554 (1974) (same).

185. *See supra* Section II.B.

186. *See supra* notes 180-81.

187. *See supra* notes 123-24 and accompanying text.

188. *See* Nez Perce Brief, *supra* note 58, at 39 (citing expert report noting that "any substantial drop in fish production meant starvation and death for the Nez Perce").

189. United States v. Winans, 198 U.S. 371, 381 (1905).

190. Sohappy v. Smith, 302 F. Supp. 899, 905 (D. Or. 1969) (fishing "still provides an important part of [tribal] subsistence and livelihood"); United States v. Washington, 384 F. Supp. 312, 340 (W.D. Wash. 1974) (noting that the right to fish "is the single most highly cherished interest and concern of the present members of plaintiff tribes"); *id.* at 357-58 (noting present subsistence, cultural and economic role of fishing to tribes); Nez Perce Brief, *supra* note 58, at 31-39 (describing vital contemporary cultural significance of fishing to Nez Perce tribal members); TRIBAL RECOVERY PLAN, *supra* note 56, at 2-1, 2-4.

191. Nez Perce Brief, *supra* note 58, at 34.

192. *Supra* note 190 and sources cited therein.

people.[193] Tribal leaders emphasize that jeopardy to the tribal fishing right imperils the native life which has endured in the region for millennia.[194]

The tribal right to salmon represents an irreplaceable incident of sovereignty for treaty tribes. As courts have recognized, tribes would not have ceded the vast majority of their lands without the security of continuing their fishing lifestyle throughout the ceded territory.[195] Management and restoration of tribal fisheries on and off the reservation constitutes a primary sovereign activity of the Columbia River tribes.[196] In light of the irreplaceable value of salmon to Indians, and the fact that tribes have sustained their reliance on salmon for millennia, the native fishing interest is as critical, if not more critical, to tribal sovereignty than many recognized and protected public trust interests are to the sovereign functioning of majority society.

Accordingly, there is a sound basis for protecting the tribal fishing interest in a manner similar to the protection other sovereigns enjoy for interests critical to their public welfare under the public trust doctrine. Naturally, however, because tribes have characteristics which differ from the federal and state governments, the doctrinal approach must make adjustments for the unique form of tribal sovereignty. Courts cannot uphold rights inconsistent with the tribes' "domestic dependent status."[197] Principles of public trust jurisprudence which allow revocation of a grant of critical lands[198] may not fit the Indian context, as doing so would essentially unravel a property transaction between nations. Such a power of revocation may well be limited to contexts in which a sovereign deeded land to its own citizens, as in *Illinois Central Railroad v. Illinois*.[199]

But the fact that a complete power of revocation is likely incongruous with the "domestic dependent nation" status of tribes does not leave the tribes lacking any control over lands and waters critical to their sovereign fishing interest. As the Court in *Illinois Central* emphasized in the context of state action, "[s]o with . . . property of a special character, like lands under navigable waters, *they cannot be placed entirely beyond the direction and control of the State.*"[200] Applying the Supreme Court's rationale by analogy to tribes, it is unthinkable that tribes, as sovereigns, would relinquish all control over lands critical to supporting their most vital sovereign interest.

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193. Nez Perce Brief, *supra* note 58, at 33-39; TRIBAL RECOVERY PLAN, *supra* note 56, at 2-4.

194. *See* TRIBAL RECOVERY PLAN, *supra* note 56, at 2-4 (describing central importance of salmon to native culture).

195. *See supra* notes 103-06 and accompanying text.

196. *See* TRIBAL RECOVERY PLAN, *supra* note 56, at 2-1 to 2-3 (describing tribal programs).

197. *See supra* note 48.

198. *See supra* notes 175-76.

199. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892) (discussed at *supra* notes 174-76).

200. *Id.* at 454 (emphasis added).

While the tribes may not enjoy the power of revocation that states have, the principles of public trust jurisprudence nevertheless point to a property right retained by tribes to secure their fishing interest in a manner consistent with their domestic dependent nation status. An implied sovereign servitude taking the form of a negative easement enforceable in the courts of the majority society effectively substitutes for the power of revocation announced in *Illinois Central*. Such a property right finds a basis in the reserved rights doctrine recognized in *United States v. Winans*[201] and is compatible with the tribes' sovereign status within the constitutional framework of the United States.[202]

If indeed the fishing interest is protected by an implied sovereign servitude, the next step is identifying the lands subject to protection. Though the question is addressed in full in Section III, it is important to recognize that most courts confine public trust protection primarily to water resources and submersible and adjacent lands.[203] Full protection of the tribal fishing right requires extension of the implied servitude to encompass all natural production areas which are critical to maintaining the resource as a whole. While waterways and adjacent lands may comprise the bulk of such areas, courts should also recognize the essential nature of conditions on uplands that are ecologically connected to the immediate habitat used by salmon.[204] Courts have recognized that the imperiled salmon require environmental support throughout the entire life cycle,[205] including upland conditions critical to salmon production areas.[206] Moreover, there is an emerging judicial recognition that the public trust doctrine must expand geographically where necessary to protect areas and conditions critical to the sovereign interest.[207]

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201. United States v. Winans, 198 U.S. 371 (1905). *See* discussion of reserved rights at *supra* notes 41-47 and accompanying text.

202. *See* discussion *supra* note 48 and accompanying text.

203. Lazarous, *supra* note 27, at 647-49 (but also noting geographic expansion of public trust doctrine beyond these areas).

204. A more complete discussion of the geographic "footprint" of the native servitude follows *infra* Section III.A.

205. *See, e.g.*, Idaho Dept. of Fish & Game v. Nat'l Marine Fisheries Serv., 850 F. Supp. 886, 889 n.4 (D. Or. 1994), *vacated and remanded on other grounds*, 56 F.3d 1071 (9th Cir. 1995); Northwest Res. Info. Ctr., Inc. v. Northwest Power Planning Council, 35 F.3d 1371, 1376 (9th Cir. 1994); Pacific Rivers Council v. Thomas, 30 F.2d 1050, 1055 (9th Cir. 1994).

206. *See Pacific Rivers Council*, 30 F.2d at 1055 (subjecting forest land management plans to Endangered Species Act (ESA) § 7 consultation to analyze effect of logging, grazing, and road-building activities on listed salmon).

207. Lazarous, *supra* note 27, at 647-50. A notable case demonstrating this flexibility in the public trust area is *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984), in which the court extended the public trust servitude from the area below the mean high water mark to dry sand areas owned both by municipalities and private entities. Adopting a practical approach, the court noted:

> Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the [privately owned] upland beach. *Without some means of access the public right to use the foreshore would be meaningless.*

Courts have latitude in protecting salmon habitat, even if it means exceeding the traditional boundaries of public trust jurisprudence. While reference to public trust jurisprudence is helpful in creating a foundation for the native servitude, courts must fashion the native servitude to fit the unique nature of tribal sovereigns.[208] There is a compelling difference between the native servitude and traditional public trust easements that justifies a more generous geographic reach in the Indian context. In the case of state sovereigns, the government has the regulatory means of achieving protection for public welfare within its boundaries. States may simply condemn critical areas and pay the owners compensation. Unlike the state sovereigns, however, tribes lack direct means of protecting natural production areas outside of their reservations other than by enforcing a native servitude in the courts. The tribes' domestic dependent status precludes most extraterritorial regulatory enforcement.[209]

In sum, public trust jurisprudence suggests a basis for implying a native conservation servitude to protect natural production areas. Those areas form a vital part of salmon capital. While the tribes were forced to relinquish sovereign police power as a result of the adjusted multi-sovereign Constitutional framework in which they found themselves, the enduring principles of *Illinois Central* weigh against finding a full relinquishment of all control over conditions critical to maintaining the core sovereign interest of salmon fishing. The retained measure of control may find recognition in the form of an implied servitude enforceable through property law.

III. SCOPE OF THE NATIVE CONSERVATION EASEMENT

The discussion above suggests a negative conservation easement arising from either broad construction of express language in the treaties, by implication as a necessary corollary to the reserved fishing property right, or as a necessary incident of sovereignty. It is important to consider the geographic reach of such an easement, whichever way it arises. This inquiry is separate from asking what degree of protection a servitude affords in terms

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> To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.

Id. at 364 (emphasis added).

208. Courts have tremendous flexibility in shaping common law to meet emerging societal needs. *See In re* Hood River, 227 P. 1065, 1086 (Or. 1924) ("The very essence of the common law is flexibility and adaptability.").

209. *See supra* note 48 and accompanying text. Moreover, no federal environmental law provides effective regulation to ensure healthy returns of fish. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Section II.B.2 (describing failure of federal statutory law to protect fish).

of sustaining certain levels of fish.[210] This Section considers the scope of the easement as well as the effect of changed conditions on treaty rights.

A. Geographic Reach of the Servitude

In considering the geographic scope of the negative conservation easement with respect to the Columbia River Basin treaties, it is important to remember that the easement is actually only one strand of a broad native sovereign servitude that arguably blankets the full territorial extent of ceded lands. The pre-treaty native sovereignty, from which all reserved native rights ultimately derive, extended across all ceded lands. The Supreme Court noted in *United States v. Winans* that Indian reserved rights "imposed a servitude upon every piece of land as though described [in the treaty]," and "fixes in the land such easements as enables the [fishing] right to be exercised."[211] As such, perhaps the servitude is best viewed as a broad source of the retained native property interest; the easements necessary to carry out the fishing right derive from the broad servitude but are geographically more limited.

It is also important to note that, while reserved rights stem from the aboriginal sovereignty exercised by tribes over their individual territories, circumscribing any one tribe's servitude rights to the geographic area in which that tribe (or its predecessor entities) exercised control may be an overly simplistic approach. As the Supreme Court recognized in *Seufert Brothers Co. v. United States*,[212] a tribe's fishing right can extend beyond the area in which the tribe traditionally exercised aboriginal sovereignty. In upholding the Yakama's right of access to locations in territory ceded by other tribes, the Court recognized that pre-treaty tribal entities and groups often shared mutual fishing rights and privileges along the rivers beyond their own individual territories.[213] As the Court noted:

> Indians [of the Middle Oregon Tribes and the Yakama Tribe] . . . had been accustomed to cross to the other side to fish . . . neither [tribe] claimed exclusive control of the fishing places on either side of the river or the necessary use of the river banks, but used both in

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210. For a discussion of that issue, see *infra* Section IV.

211. United States v. Winans, 198 U.S. 371, 381, 384 (1905).

212. Seufert Brothers Co. v. United States, 249 U.S. 194 (1919) (citations omitted).

213. *Id.* at 197-99. In that case, the Yakama Nation had ceded lands located north of the Columbia River in the (then) Territory of Washington, yet sought access to fishing sites in Oregon, south of the Columbia River in an area ceded by the Walla-Walla and Wasco (Middle Oregon) tribes. *Id.* at 195-96.

> common. One Indian witness . . . 'likened the river to a great table where all the Indians came to partake.'[214]

Recognizing that aboriginal usufructory rights could extend beyond a tribe's territory, the Court also pointed out that the federal government, by undertaking a common plan to negotiate the treaties of the Northwest, was capable of upholding the fishing servitude across the full territory collectively ceded by all of the tribes.[215] In light of the significant mutuality among tribes in sharing the benefits of reserved servitudes across each other's ceded lands,[216] it may be most appropriate to approach the negative conservation easement by defining the reserved right in collective terms as a pan-sovereign concept that transcends specific aboriginal territorial boundaries.

Though, as a source of property interest, the unified sovereign servitude freights all ceded lands, not all lands experience the same burden. The burden is a function of the relationship of the land to the core sovereign interest of fishing. Conceivably, some lands offer very little value to that interest, while other parcels are of critical, irreplaceable, value. It is necessary to analyze separately the geographic footprint of each strand of the property right.

The access easement encumbers those lands necessary to exercise the right of fishing; this includes both the fishing sites themselves and routes over lands necessary to access the sites.[217] A second strand, described by Professor

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214. *Id.* at 197 (quoting district court opinion).

215. As the Court noted, eleven treaties were negotiated with the Indian tribes of the northwest between December 26, 1854 and July 16, 1855. *Id.* at 196. All contained substantially similar fishing clauses. *See supra* note 89 and accompanying text. The Court explained:

> These treaties were negotiated in a group for the purpose of freeing a great territory from Indian claims, preparatory to opening it to settlers, and it is obvious that with the treaty with the tribes inhabiting Middle Oregon in effect, the United States was in a position to fulfill any agreement which it might make to secure fishing rights—in, or on either bank of, the Columbia River in the part of it now under consideration—and the treaty was with the Government, not with Indians, former occupants of relinquished lands.

Seufert Brothers, 249 U.S. at 197.

216. It should be noted, however, that although the access easements of one tribe might extend into the aboriginal territory of another, the various access easements to usual and accustomed fishing sites are not freely interchangeable among the various tribes. They must be established according to the historical practice of the particular tribes seeking to exercise them. *See Seufert Brothers*, 249 U.S. at 199 (noting that the servitude allowing access "is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person . . . must have known of them."). Some fishing sites, such as Celilo Falls on the Columbia River (now flooded by the Dalles Dam) had shared use among many tribes. *See* Roberta Ulrich, *Indians Get Approval to Fish on Willamette*, OREGONIAN, May 6, 1994, at A1.

217. *See* United States v. Winans, 198 U.S. 371, 381 (1905) (finding that treaties "imposed a servitude upon every piece of land" for the purpose of exercising a right of taking fish at all usual and accustomed places and that "the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned [in the treaty]"). The access

Blumm as a *profit a prendre*,[218] encumbers riparian parcels that are usual and accustomed areas for fishing sites.[219] While the profit includes an element of access,[220] it has a corollary area of influence as well, because it imposes upon the landowner a duty to refrain from taking action which would interfere with enjoyment of the profit.[221] This duty to refrain from harming salmon habitat areas extends the geographic scope of the profit beyond that of the pure access easement, but it is still necessarily limited to those riparian parcels where fishing takes place.[222] The third strand of the servitude, the native conservation easement,[223] logically reaches to the salmon's natural production areas which form a critical component of the natural salmon capital.[224]

The conservation easement is bounded geographically by the collective aboriginal territory. While actual natural production areas extend through parts of the ocean and Canadian waters—far beyond the lands ceded by tribes[225]—the tribal servitude can only reach as far as aboriginal sovereignty once extended.[226] Moreover, even within the full aboriginal territory, the servitude only protects those areas critical to supporting harvestable populations of salmon.[227] This does not include every square mile of land over

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easements are not active on every piece of land, only those routes that "enable the [fishing] right to be exercised." *Id.* at 384. Moreover, the access easements must be clearly established by "habitual and customary" use. *See supra* note 216.

218. Blumm, *Piscary Profit*, *supra* note 35, at 445.

219. *See infra* note 222.

220. Profits include the right of entry onto another's land. *See id.*

221. *See* Blumm, *Piscary Profit*, *supra* note 35, at 445, 492, 499.

222. The profit is limited to areas where fish may be taken. *See* 28A C.J.S. *Easements* § 9 (1996) (defining profit as a "right to take a part of the soil or product of the land of another . . . [including] the right to hunt and fish on another's land"); 25 AM. JUR. 2d *Easements and Licenses in Real Property* § 4 (1996) ("[A] profit a prendre is a liberty in one person to enter another's soil and take from it the fruits not yet carried away."). In this sense, it is distinguishable from a pure access easement, which does not incorporate the right to take the fruits of the land. *See id.* ("A profit a prendre is therefore distinguishable from an easement, since one of the features of an easement is the absence of all right to participate in the profits of the soil charged with it. It is similar to an easement, however, in that it is an interest in land."); C.J.S. *Easements*, *supra* ("The [profit] is in the nature of an easement . . . but it is more than an easement. It is an interest or an estate in the land itself as distinguished from a mere personal obligation of the owner of the reality."). Any non-riparian parcels that provide necessary access to fishing sites are encumbered by an access easement alone, rather than a profit.

223. *See supra* Section II (suggesting easement).

224. *See* Wood, *Wildlife Capital Part I*, *supra* note 1, at Section III.B (defining salmon "capital"). Accordingly, there is a limited sphere of overlap between the profit and conservation easement.

225. *See* Charles F. Wilkinson & Daniel Keith Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 KAN. L. REV. 17, 24-26 (1983) (describing journey of chinook salmon).

226. *See* discussion *supra* Section I.B. (linking servitude to aboriginal sovereignty).

227. The crucial issue of how much salmon these lands should support is discussed at *infra* Section IV, which addresses the question in terms of natural capital as a whole, including both the wildlife population component and the natural production area component.

which tribes historically exercised control,[228] but it must include all of the areas directly supporting each phase of the salmon's life cycle, including spawning grounds, rearing areas, and migratory routes.[229] While rivers, associated shorelands, and estuaries largely comprise these areas, the servitude should also encompass lands which offer vital secondary support to the salmon resource; the ecology of a watershed incorporates various environmental functions that take place far from the site of a river.[230]

Although the concept of natural production areas can seem, at first impression, attenuated and vague in terms of the actual geography it encompasses, scientists are practiced at identifying it. The Endangered Species Act (ESA) has already triggered a full-scale identification of habitat necessary for salmon survival. Section 4 of the Act requires the National Marine Fisheries Service (NMFS) to identify "critical habitat" for the listed salmon species.[231] The term "critical habitat" as defined in the act centers on those physical or biological features "essential to the conservation of" the species.[232] The process necessarily entails identifying areas which influence salmon reproduction and survival—a process similar to one of demarcating natural production areas necessary to support treaty rights.

The two processes are not absolutely coincident, however, in terms of the geographic reach of habitat they suppose. The critical habitat process in the ESA is geared towards identifying lands essential to "the conservation of" listed species,[233] a threshold which, at best, may be adequate to prevent extinction, but inadequate to support harvestable populations of fish.[234]

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228. As the Court noted in *United States v. Winans*, the treaty "only fixes in the land such easements as enables the [fishing] right to be exercised." United States v. Winans, 198 U.S. 371, 384 (1905).

229. *See* SUMMARY, *supra* note 166, at 9-11 (describing biological needs of salmon).

230. *See* Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1053-57 (9th Cir. 1994) (subjecting forest land management plans to ESA § 7 consultation to analyze effect of logging, grazing, and road-building activities on listed salmon); *see also* Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons From the Columbia Basin*, 74 WASH. L. REV. 519, 577-79 (1999) (noting that the *Pacific Rivers* decision "brought section 7 consultation to public land management plans throughout the portion of the Columbia Basin still accessible to salmon").

231. Endangered Species Act, 16 U.S.C. § 1533(a)(3)(A) (1994). The Service has identified critical habitat for several species of salmon in the Columbia Basin. *See* 50 C.F.R. § 226.205 (1999) (designating critical habitat for Snake River sockeye salmon, Snake River fall chinook salmon, and Snake River spring/summer chinook salmon).

232. 16 U.S.C. § 1532.

233. *See id.*

234. A similar concern exists in the context of developing recovery plans under the ESA. *See* Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*. 25 ENVTL L. 733, 784-85 (1995) (hereinafter, Wood, *Trust III*) (noting that "[the recovery] plan's goals for species recovery will largely determine whether the populations will hover just above the extinction threshold or be robust enough to support resumed tribal harvest," and observing that the ESA generally calibrates recovery levels to allow delisting of the species).

Moreover, the ESA allows NMFS to exclude some areas from the critical habitat designation if it determines, after considering economic as well as scientific data, that "the benefits of such exclusion outweigh the benefits of [inclusion]."[235] Nevertheless, while the ESA's critical habitat provision and the native conservation easement invoke different standards, the scientific endeavor is similar in each.

B. Changed Conditions

Assertion of the native conservation servitude calls into question its viability in light of changed conditions since treaty times. The Columbia River treaties were negotiated against an aboriginal environmental context which supported vibrant and functional ecosystems for salmon. In the century and a half since that time, environmental destruction has ravaged the Pacific Northwest to make way for industrial, agricultural, and municipal land uses. In very few places is the aboriginal terrain even apparent. As NMFS observed in the draft recovery plan for the listed Snake River salmon: "Few examples of naturally functioning aquatic systems (watersheds) now remain in the Pacific Northwest."[236] The radical change in conditions prompts the question of whether a treaty servitude can maintain its force in the modern context.

The very nature of the treaty right suggests that changes in land use should not extinguish the native servitude. The treaty clause from which the servitude derives was negotiated with the intention of preserving tribal fishing "in perpetuity."[237] Judges have emphasized that the basic treaty right should be protected against penalties resulting from the "passage of time."[238] And indeed, on the tribal side, though fishing techniques reflect modifications to capitalize on more efficient technology, the basic practice and ceremonial

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235. 16 U.S.C. § 1533(b)(2). The agency may not exclude areas, however, if failure to designate them as critical habitat "will result in the extinction of the species concerned." *Id.*

236. Wood, *Trust III*, *supra* note 234, at 767 n.165 (citing plan).

237. United States v. Washington (Phase II), 506 F. Supp. 187, 203 (W.D. Wash. 1980); *see also* United States v. Washington, 384 F. Supp. 312, 381 (W.D. Wash. 1974)("At the treaty council the United States negotiators promised, and the Indians understood, that [they] would *forever be able to continue* the same off-reservation food gathering and fishing practices as to time, place, method, species and extent as they had or were exercising.") (emphasis added).

238. *See United States v. Washington*, 384 F. Supp. at 401 ("The passage of time and the changed conditions affecting the water courses and the fishery resources . . . have not eroded and cannot erode the right secured by the treaties."); United States v. Washington, 694 F.2d 1374, 1390 n.2, *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc) (Rienhardt, J., concurring) ("[T]he passage of time and shifts in the political balance will inevitably alter social priorities. The fishing rights assured by the treaty must be protected against such fluctuations."); United States v. Michigan, 471 F.Supp. 192, 280 (W.D. Mich. 1979) ("The mere passage of time has not eroded, and cannot erode the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold."). *But see infra* note 247 (discussing two opinions from courts in Idaho that find treaty rights diminished by changed conditions).

rituals remain much as they were in treaty times.[239] The "changed conditions" of the majority society in no way reflect a tribal desire to abandon the fishing culture that prevailed in 1855.[240]

In general, courts will not allow the effect of changed circumstances to undermine the force of an easement.[241] Typically, easements are subject to judicial termination only upon a finding of abandonment or misuse, or upon agreement by the parties.[242] As a general class of restriction, servitudes share the feature of "permanence—their ability to survive changes in ownership without renegotiation of the arrangement."[243] Scholars readily acknowledge that such restrictions can "freeze" particular land uses and impair the commercial marketability of parcels,[244] but their value to parties holding the benefit of the servitude lies in their endurance.[245]

Of course a court may, at the remedy stage of a treaty rights proceeding, use its equitable powers to mitigate the effect of a treaty-based conservation servitude in particular instances to avoid unduly harsh results caused by a change in conditions.[246] But equitable principles should not sweep so broadly as to undermine the servitude itself. Much of what may currently be labeled as "changed conditions" is the manifestation of a continuing pattern of treaty rights violations which have devastated the salmon fishery. Courts should not

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239. For example, the tribal peoples practice an age-old salmon ceremony to mark the return of the fish in the spring. *See* Joan Laatz, *Awakening the Spirits*, OREGONIAN, May 2, 1994, at A1. In places not inundated by dams, tribes also continue a traditional fishery using wooden platforms from which to net the fish. Bill Monroe, *A Night on the River*, OREGONIAN, May 13, 1994, at A1. But in many areas, tribal fishing has necessarily adapted to the slack water environment caused by huge pools behind dams, a circumstance which requires boats and nets. *See* Alphonse Halfmoon, *Chairman's Message*, COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, 1997 ANNUAL REPORT 2 (1997) (on file with author) (explaining changes in fishing practices necessitated by dams on the river and expressing resentment at loss of traditional ways in these circumstances).

240. *Id.*

241. French, *Modern Law*, *supra* note 21, at 1269. Changed conditions may, however, justify non-enforcement or termination of covenants or equitable servitudes. *See* Weaver, *supra* note 55, at 108 & n.23; French, *Modern Law*, *supra* note 21, at 1269. Even so, however, a court must find that enforcement of the restriction would provide no substantial benefit to the plaintiff; it is not enough that enforcement of the restriction would be inequitable to the defendant. *See id.* at 1281. For discussion distinguishing easements from covenants and equitable servitudes, see *supra* note 40.

Of course, if changed circumstances create an unreasonable additional burden on a servient estate encumbered by an easement, courts hold that the "servient owner is entitled to impose reasonable restraints [on the exercise of the easement] to avoid a greater burden on the servient owner's estate than that originally contemplated . . . so long as such restraints do not unreasonably interfere with the dominant owner's use." Green v. Lupo, 647 P.2d 51, 54 (Wash. App. 1982).

242. French, *Modern Law*, *supra* note 21, at 1269.

243. French, *Design Proposal*, *supra* note 22, at 1215.

244. *Id.*

245. *See id.*

246. *See* United States v. Washington, 135 F.3d 618, 638 (9th Cir. 1998).

redefine treaty rights to harmonize with their systemic violations.[247] As the Ninth Circuit emphasized in upholding tribal rights to harvest shellfish on private lands in the Puget Sound of Washington: "[T]he [c]ourt 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."[248] Using judicial powers of equity during the relief stage of proceedings to avoid truly draconian results is legally distinct from invoking the changed conditions doctrine as a basis for wholesale invalidation of a treaty right.

Upholding the native servitude in the face of changed conditions will undoubtedly impair private property rights that were previously unaffected. Moreover, environmental exigencies arising from the broad destructive land uses over the past several decades will inevitably lead to some shifts in the salmon's critical "natural production areas." As the environmental baseline deteriorates, new parcels may emerge as critical habitat areas—and, consequently, the focus of a native conservation servitude. Many courts interpret sovereign servitudes as sufficiently elastic to respond to new environmental conditions.[249] While the shifting nature of public needs is disquieting to private landowners whose activities are newly subject to

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247. Strangely, however, this seemed to be the approach of the district court in *Nez Perce Tribe v. Idaho Power Co.* Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 814 (D. Idaho 1994). In rejecting a treaty-based claim for damages against Idaho Power based on that company's destruction of salmon habitat, the court stated that treaty rights were subject to changing outside circumstances which included exploitation of land over the course of 138 years since the treaties were entered into. *Id.* at 814. The court implied that the present situation of diminished fish runs depletes the treaties of any force in securing environmental conditions for fish restoration. *See id.* ("Indian treaties must be interpreted in light of new, and often changing, circumstances including conditions which limit the available quantity of fish, [and thus tribes are not entitled to damages] for the depletion or destruction of fish and game caused by development."). The court's approach seems to be one of interpreting the treaties as providing whatever current land use may afford, and nothing beyond. More recently, an Idaho state trial court relied on the flawed *Nez Perce Power* reasoning to support a decision rejecting an instream water right for fisheries. *See In re* Snake River Basin Adjudication, Case No. 39576, Order on Motions to Strike, Motion to Supplement the Record and Motions for Summary Judgment, slip op. at 37 (Nov. 10, 1999) (on file with author) (finding that "[tribal] fishing rights are subject to changing circumstances incurred by settlement and development, which is what has occurred in this case"). Both Idaho decisions have been subject to sharp scholarly criticism. *See* Blumm, *Piscary Profit*, *supra* note 35, at 481-89; Blumm et al., *Treaty Water Rights*, *supra* note 34, at 460 (questioning whether the Idaho state trial court in the Snake River Adjudication accorded justice to Nez Perce water rights, noting that the opinion resembled more of "an advocate's brief than a dispassionate judicial opinion").

248. *Washington*, 135 F.3d at 638 (citing United States v. Washington, 873 F. Supp. 1422, 1429 (W.D. Wash. 1994)); *see also id.* (criticizing the district court for using equitable principles to "assist in . . . *interpreting* the Treaty" while acknowledging appropriate use of equity principles in "*implementing* its Treaty interpretation") (emphasis in original).

249. *See supra* notes 182-83 and accompanying text.

restriction, such a contingency has long been recognized as an inherent part of property ownership.[250]

IV. QUANTIFYING THE NATIVE SOVEREIGN OWNERSHIP RIGHT TO WILDLIFE CAPITAL AND YIELD

This Article and its companion article together suggest a native treaty right to protect wildlife capital, including both robust population returns and natural production areas which provide habitat support for species. In the Columbia River Basin, protecting the capital component of the salmon fishery is absolutely necessary in order for tribes to realize their full expectation of yield from the resource. While courts have defined the tribal yield interest as a 50% equitable share of actual harvestable returns,[251] this interest is nearly meaningless if not related to salmon capital.[252] In historic times a 50% yield interest could have meant ample fish for tribes, but in the modern extinction era the same yield interest may translate into no fish at all.[253]

The tribal property right to protect salmon capital takes the form of a conservation servitude extending across critical habitat areas,[254] and a continuing property interest in salmon populations in the form of a sovereign trusteeship.[255] There remains, however, a significant question as to the extent of the right. There are at least two competing approaches to the quantification question, one premised on restoring "natural capital" and one focused on meeting tribal "moderate living needs." The discussion below considers both

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250. As one commentator notes:

> [A]n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. *The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago.* The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion.

RICHARD R. POWELL, THE LAW OF REAL PROPERTY, vol. 5A, § 745, at 493-94 (1992), *quoted in* State v. Shack, 277 A.2d 369, 373 (N.J. 1971) (emphasis added). Of course, fairness to property owners is a central concern in constitutional takings jurisprudence, but such a discussion is far beyond the scope of this Article.

251. *See supra* note 4 and accompanying text.

252. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Sections II.B.3, III.B.

253. *See* Puget Sound Gillnetters Ass'n v. District Court of Washington, 573 F.2d 1123, 1136 (9th Cir. 1978) (Kennedy, J., concurring) (noting treaty rights are "whittled down year by year as the state asserts a need to exercise its regulatory authority"). The Columbia River tribes have closed their four major fisheries, leaving them with only a fall chinook commercial fishery. *See Hearings Before the Columbia River Fisheries Task Force, supra* note 57, at 5.

254. *See supra* Sections I-III.

255. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Section IV.

approaches as well as a predictable concern that either one may establish a "wilderness servitude" across the Pacific Northwest.

A. A Right to "Natural" Capital and Yield

In approaching the quantification question in the context of Columbia River Basin treaty rights, it is instructive to think of a continuum of salmon capital diminishing steadily from historic times to modern times. At one end of the continuum is "natural capital," which represents the pre-treaty aboriginal condition of the resource. Through careful management practices and self-discipline, tribes had sustained that level of capital for millennia.[256] At the other end of the continuum is the modern condition of the resource, which can be termed "depleted capital." Situating the tribal right to capital on this time continuum may best express quantification values.

The precedent most applicable to this issue derives from cases in which courts have quantified the instream habitat water rights associated with treaty fisheries. As noted earlier, those cases recognized, in effect, a servitude in water to protect the natural production areas of salmon.[257] Without exception, all courts considering the matter have assigned a priority date of "time immemorial" to the tribal water right,[258] thereby situating the right at the end of the continuum expressing natural capital. In so doing, courts have rejected an alternative which would assign a priority date as of the year the treaty was entered into.[259] As the Ninth Circuit in *United States v. Adair* reasoned:

> [The Tribe's] water rights necessarily carry a priority date of time immemorial. The rights were not created by the 1864 Treaty, rather the treaty confirmed the continued existence of these rights . . . . *[W]here, as here, a tribe shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.*
>
> . . . .
>
> In the present case, the Klamath Tribe . . . has depended upon the waters in question to support its hunting and fishing activities for over 1,000 years. It would be inconsistent with the principles

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256. *See supra* notes 57-63 and accompanying text.

257. *See supra* notes 149-65 and accompanying text.

258. *See* United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1981); Bd. of Control of Flathead Irrigation Dist. v. United States, 832 F.2d 1127, 1131-32 (9th Cir. 1987); Dept. of Ecology v. Acquavella, No. 77-2-01484-5, slip op. at 15, *Memorandum Opinion: Treaty Reserved Rights at Usual and Accustomed Fishing Places* 15 (Wash. Super. Ct. Sept. 1, 1994).

259. *Adair*, 723 F.2d at 1414.

> we follow in today's decision to hold that the priority of the Tribe's water rights is any less ancient than the "immemorial" use that has been made of them.[260]

The *Adair* case does not directly control the issue of quantifying salmon capital, because that case involved water rights which, by the nature of prior appropriation, carry priority dates.[261] Nevertheless, the method of defining the right to natural capital by referencing its condition as of a certain date makes sense. Moreover, the court's finding that the tribal right to water preexisted the treaties, and therefore must be defined according to its aboriginal condition, seems to hold equal force with respect to the full span of salmon capital, which includes water. By entering into treaties with tribes the federal government *gained* a property right to the ceded lands,[262] but the tribes secured their *preexisting* rights[263] to harvest an amount of fish produced from the capital over which they had aboriginal "command."[264] It would be incongruous to quantify the full capital right in a manner that differs from the court's approach to quantifying the fishery water right, which is a necessary component of the broader capital right.[265]

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260. *Id.* at 1414 & n.22 (emphasis added); *see also Flathead*, 832 F.2d at 1131 ("[W]hen the Tribe exercised aboriginal title and rights to fish on the lands and waters in question before the reservation was created, the priority date of the reserved water right for fishery purposes is time immemorial. . . . The priority date of time immemorial obviously predates all competing rights asserted by the . . . irrigators in this case.").

261. *See Adair*, 723 F.2d at 1414 (noting that "one of the fundamental principles of prior appropriations law [is] that priority for a particular water right dates from the time of first use.").

262. United States v. Winans, 198 U.S. 371, 381 (1905) ("The treaty was not a grant of rights *to* the Indians, but a grant of rights *from* them—a reservation of those not granted.") (emphasis added).

263. *See supra* note 258 and accompanying text (quoting *Adair* opinion) (emphasis added).

264. Winters v. United States, 207 U.S. 564, 576 (1908) (noting that prior to the treaty, "[t]he Indians had command of all the lands and the waters—command of all their beneficial use").

265. It should be noted, however, that the *Adair* court declined to hold that the aboriginal water right necessarily required restoration of a treaty-time flow of water on former reservation lands to support a traditional hunting and fishing lifestyle. *See Adair*, 723 F.2d at 1414. Relying on the Supreme Court's ruling in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, the court made clear that the tribes' harvest rights are limited to those necessary to support a "moderate living." *Id.* at 1414-15. *See infra* notes 272-73 and accompanying text (discussing *Washington Passenger Fishing Vessel*). In that case, the Supreme Court devised a "moderate living" standard to limit the relief that the tribes could gain under the Court's treaty interpretation allowing up to 50% of the harvest share of fish. *See id.* Based on the Supreme Court's use of the moderate living standard, the *Adair* court noted: "Implicit in this 'moderate living' standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty . . . *unless*, of course, no lesser level will supply them with a moderate living." *Adair*, *supra* at 1415 (emphasis added). The most sensible interpretation of this language is that the court invoked the moderate living standard as an equitable tool to limit the ultimate remedy afforded the tribes, not as a parameter defining the water rights to which the tribes are entitled. As the court implicitly acknowledged in the statement quoted above, tribes would be entitled to water rights allowing treaty levels of fish exploitation in cases where the actual tribal needs were so great that the "moderate living" standard did not operate as a downward adjustment from the 50% allocation devised by the Supreme Court. Use of the moderate living standard to limit the tribes' yield

Accordingly, as a doctrinal starting point, the fullest measure of the tribal interest should calibrate to the "natural capital" which prevailed in aboriginal times.[266] In theory, however, several adjustments and deductions come into play in determining the extent of the native capital right. First, the model must account for extraterritorial circumstances arising outside of the United States which contribute to salmon losses. If, hypothetically, the Fraser River runs of salmon drop due to destructive human practices in Canada, courts would likely not hold the United States or any individual state liable to tribes for such loss in capital. Second, a time may come when the tribe's own practices destroy salmon capital: such actions may amount to a voluntary relinquishment of part of the capital right, causing a downward adjustment of the yield entitlement. Third, Congress may expressly extinguish part of the tribes' capital right. Should Congress clearly recognize the tribal loss of fishing rights at particular sites and appropriate money as compensation to tribes, such action may amount to an abrogation of part of the treaty right to those fisheries[267] and a consequential deduction from the "natural capital" to which tribes remain entitled.

Translating the natural capital right into a yield right entails further limitations. As previously explained in Part I of this work, the natural capital internalizes a "natural encumbrance," which is the inherent population fluctuation on an annual basis as a result of entirely natural conditions.[268] Therefore, where natural factors (such as floods, fires, adverse ocean conditions, or various other stochastic events) depress the available capital in a given year and consequently diminish the available harvest, the tribal yield

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rights, rather than as an inherent fixed limit on the tribal capital right, is compatible with the approach offered by this Article. *See infra* notes 274-90 and accompanying text.

266. This characterization of the tribal interest seemingly reflects that adopted by the Columbia River Tribes in their salmon restoration plan, which calls for restoring "historic anadromous fish abundance" within 200 years. TRIBAL RECOVERY PLAN, *supra* note 56, at 5B-3. As a practical matter, the salmon populations at the time of the treaties approximate aboriginal conditions prior to that time, since the Indian use of salmon was exclusive in 1855 and was part of a pattern of harvest stability which had endured for millennia. *See supra* notes 58, 122-24 and accompanying text.

267. *See infra* notes 428-30. The standard for finding abrogation in the Pacific fisheries context should be very strict. *E.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1978) (expressing "extrem[e] reluctan[ce] to find congressional abrogation of treaty rights" absent explicit statutory language). As Judge Boldt noted in his landmark opinion upholding treaty fishing rights in the Puget Sound area: "Congress has never exercised its prerogative to either limit or abolish Indian treaty right fishing. In recent years it declined to do the latter by three times failing to enact proposed legislation for the termination of Indian treaty fishing rights." United States v. Washington, 384 F.Supp. 312, 338 (W.D. Wash. 1974).

For treatment, see DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW, CASES AND MATERIALS 326-33 (3d ed. 1993). Congressional abrogation of the treaty salmon capital right may also invoke separate issues of federal public trust responsibility towards the fishery resource. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Section IV.B.2.a.i.

268. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Section III.B.

expectation automatically adjusts downward, as does the non-Indian (state) expectation.[269] Accordingly, neither sovereign class insures the other against natural fluctuations. Natural losses in capital are born equally through equivalent reductions in yield.

Another important limitation on yield derives from the Supreme Court's decision in *Washington v. Washington State Passenger Fishing Vessel Ass'n* interpreting the treaty harvest right. There, the Court interpreted the treaty language "in common with" to mean that the tribes could take up to 50% of the harvestable fish in the rivers.[270] Against the backdrop of a full capital right, this would mean that the tribes have a right to harvest 50% of the "natural yield" resulting from "natural capital."[271] However, in the same opinion, the Court established a firm equitable ceiling on this right, stating that the tribe's yield of 50% of the harvestable fish could be reduced if the tribes' "moderate" living needs could be satisfied with less.[272] The Court announced the standard out of concern that the tribes would enjoy a windfall under the fifty-fifty allocation if some other equity-based ceiling were not placed on the tribal share. The Court stated:

> Indian treaty rights to a natural resource that was once thoroughly and exclusively exploited by the Indians *secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.* Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter . . . will be modified in response to changing

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269. This automatic adjustment occurs because the tribal and state shares of yield are assigned as proportionate 50% interests in the harvestable portion of *actual* returning runs rather than theoretically optimal populations. *Washington Passenger Fishing Vessel*, 443 U.S. at 685 (defining right to "take a fair share of the *available* fish") (emphasis added); *see also id.* at 670 n.15 (defining "harvestable" amount of fish); United States v. Washington, 384 F. Supp. 312, 386 (W.D. Wash. 1974) ("Salmon run sizes fluctuate from year to year, and it is generally necessary for the conservation of a particular salmon run that the regulation of the harvest on that run take into account the run's size."). Fish managers assign fishing quotas after calculating escapement needs which are based not only on actual returning numbers, but also incorporate projected mortality from natural causes and dams. *See* discussion at Sohappy v. Smith, 302 F. Supp. 899, 910 (D. Or. 1969). *See also* Wood, *Wildlife Capital Part I*, *supra* note 1, at 47-48 nn.226-28 and accompanying text. Therefore, the tribal and non-tribal 50% shares of the *harvestable* fish result in an automatically lower yield in terms of actual fish taken when natural factors depress a given run.

270. *Washington Passenger Fishing Vessel Ass'n*, 443 U.S. at 686-87.

271. Prior to white settlement, historic run sizes consistently ranged between ten and sixteen million fish per year, and annul tribal harvest of those runs (the "yield") averaged five million fish. *See supra* notes 9, 58.

272. *Washington Passenger Fishing Vessel*, 443 U.S. at 685. "[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 non-treaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount." *Id. See also supra* note 273 and accompanying text.

> circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run . . . would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.[273]

Of course, as a practical matter, because the salmon fishery is currently so diminished, a ceiling on the Indian yield to prevent a windfall is presently irrelevant.[274] Fifty percent of the current harvestable returns does not meet even minimal tribal needs.[275] But a time may come when rebuilding stocks towards natural capital levels may result in yields exceeding the present moderate living needs of the tribes. At such a point in time, the tribes' yield right may confront the equitable ceiling imposed by the moderate living standard. Such a situation is inherently subject to change, of course, because tribal living needs fluctuate according to population and economic necessity. During any period when tribal yield is capped by the moderate living standard, some courts may find it troubling to enforce measures geared towards further rebuilding of salmon capital; they may be reluctant to force non-tribal sectors to accept continuing costs of rebuilding capital if the tribes may not enjoy the fruits of such efforts due to the moderate living cap.[276] Yet to accept the moderate living cap as an inherent limitation on the natural capital right seems imprudent, because the moderate living cap fluctuates according to tribal circumstances.[277]

Confronted with these concerns, the most sensible conceptual approach to quantifying the treaty right may be to view the moderate living standard as an equitable remedial limit on the yield tribes may seek, and the capital right as a background right which may shift between an active and dormant state without damage to its core value as a property right. When tribal yield reaches the moderate living cap, the unfulfilled portion of the natural capital right may recede into a state of dormancy if courts wish to suspend further rebuilding measures at the time. Yet when tribal moderate living needs increase, thereby exposing an unfulfilled increment of the tribal yield right, the dormant capital

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273. *Washington Passenger Fishing Vessel*, 443 U.S. at 686-87 (emphasis added).

274. *See* Blumm, *Piscary Profit*, *supra* note 35, at 490-91 ("The truth is that widespread habitat degradation has been a dominant factor in producing a status quo in which the tribes 'dip their nets and come up empty,' a condition the Supreme Court proscribed nearly two decades ago.").

275. *See* Wood, *Wildlife Capital Part I*, *supra* note 1, at 2-3 nn.2-4 and accompanying text.

276. On the other hand, some courts may continue to enforce rebuilding efforts even if they produce yields in excess of those necessary to satisfy tribal moderate living needs, on the premise that tribal needs may increase in the future. They may also recognize that, to succeed at all, restoration efforts must occur over an extended time frame within a stable regulatory regime.

277. *See infra* notes 287-88 and accompanying text.

right may activate to force further salmon restoration efforts.[278] In short, while the moderate living cap adds a confusing element to the capital quantification analysis, it should be thought of as an equitable limit that the court may invoke at the remedy stage rather than the defining concept which quantifies the tribal capital right.

B. The Moderate Living Standard

Of course, it is possible to fashion an alternative approach using the moderate living standard to *define* the tribal capital right rather than as an equitable cap on the yield tribes may enjoy at the remedy stage of litigation. Indeed, the district court in *United States v. Washington (Phase II)* invoked the moderate living standard as the doctrinal beacon to define the scope of the tribe's right to environmental protection of the fish.[279] According to the district court, "[t]he correlative duty imposed upon the State (as well as the United States and third parties) is to refrain from degrading the fish habitat to an extent that would deprive the tribes of their *moderate living needs*."[280] The court rejected an alternative standard of "no significant deterioration" offered by the United States, a standard which would preclude any appreciable reduction in the environmental quality of fish habitat.[281]

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278. Of course, the legal distinctions between an active and a dormant capital right are limited by the physical realities of salmon restoration. Measures such as habitat restoration and dam breaching can be accomplished only over the long term and with significant commitments of resources. Courts cannot simply suspend some extensive restoration measures. Nevertheless, the active versus dormant distinction may serve to guide courts in fashioning practical remedies which still preserve the fundamental nature of the property right.

279. United States v. Washington (Phase II), 506 F. Supp. 187, 208 (W.D. Wash. 1980). *See also* Blumm, *Piscary Profit, supra* note 35, at 415. For background and subsequent procedural history of the *Washington Phase II* litigation, see *supra* notes 29-39 and accompanying text.

280. *Washington (Phase II)*, 506 F. Supp. at 208 (emphasis added). The court linked the scope of the servitude to the "moderate living" standard earlier enunciated by the Supreme Court in *Washington Passenger Fishing Vessel*:

> The treaties reserve to the tribes a sufficient quantity of fish to satisfy their moderate living needs, subject to a ceiling of 50 percent of the harvestable run . . . (citing *Washington Passenger Fishing Vessel*). That is the minimal need which gives rise to an implied right to environmental protection of the fish habitat.

Id. at 207 (citation omitted).

281. *Washington (Phase II)*, 506 F. Supp. at 207-08. The United States borrowed this standard from federal environmental statutes. *Id.* at 208. In rejecting the standard, Judge Orrick reasoned, "[T]he scope of the State's environmental duty must be ascertained by examining the treaty-secured fishing right rather than by selecting a desirable standard that has been imposed by Congress in a different context." *Id.*

In the different context of analyzing the piscary profit implicit in the treaty fishing right, Professor Blumm recommends a standard prohibiting "unreasonable interference" with habitat, and relies on judicial and administrative determinations to outline the parameters of the standard. *See* discussion at Blumm, *Piscary Profit, supra* note 35, at 491-500.

In certain respects the moderate living standard may make the most sense in defining the scope of the treaty right to environmental protection. It seemingly effectuates the central purpose of the treaties, which was to assure a viable separatism.[282] Moreover, the standard may not so readily trigger a knee-jerk fear of a "wilderness servitude" as would a standard premised on full treaty rights to "natural capital."[283]

But one primary obstacle to this interpretation is that it deviates markedly from the Supreme Court's use of the standard. The Court devised the standard as an equitable measure to invoke at the relief stage in allocating *yield*, not to define a right to salmon capital. Moreover, the Court used the standard to *reduce* the tribal share of fish, not to guarantee a certain amount.[284] In that sense, the district court in *Washington Phase II* used the standard in a manner nearly opposite to Supreme Court guidance.[285] Certainly the moderate living standard is so firmly etched in *Washington Commercial Passenger Fishing Vessel* that it will always remain an equitable limit on the tribal yield right, and it will regain practical significance when runs reach abundant levels. But such equitable application of the standard is far different from using it to define the basic tribal right to environmental protection for the fish, or, stated another way, to quantify the tribal right to salmon capital.[286]

Three concerns render the "moderate living" standard problematic as a doctrinal centerpiece defining the basic treaty right. First, it is predictable that tribal needs will fluctuate over time. While these fluctuations are easily dealt with in calculating short-term harvest quotas, it would be difficult to

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282. *See supra* notes 104-06 and accompanying text.

283. *See* discussion at Blumm, *Piscary Profit*, *supra* note 35, at 490 (noting "judicial unwillingness to express the scope of the treaty fishing right in a manner that might require a restoration of conditions that existed at treaty time"); *see also infra* Section IV.C.

284. "It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation." Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979). In a footnote, the Court reiterated the rule: "Because the 50% figure is only a ceiling, it is not correct to characterize our holding 'as guaranteeing the Indians a specified percentage' of the fish." *Id.* at 686 n.27. *See also supra* notes 272-73 and accompanying text.

285. As Professor Blumm aptly describes Judge Orrick's interpretation of the Supreme Court's holding: "Although the Court had suggested that the tribes' harvest share entitled them to no more than a moderate living, Judge Orrick interpreted the treaties to promise them no less." Blumm, *Piscary Profit*, *supra* note 35, at 416. Concededly, however, the Supreme Court's ruling contains internally inconsistent language. While in one breath stating that the 50% figure imposes a maximum allocation, in the next the Court states that the treaty "secures *so much as* but not more than" is necessary to provide the Indians with a moderate living, language which seemingly suggests the moderate living standard as a minimum guaranteed right which may require a greater share than 50%. *Washington Passenger Fishing Vessel*, 443 U.S. at 685 (emphasis added). Nevertheless, the Court clearly dismisses this internal ambiguity in the next sentence of the opinion by stating, "Accordingly, while *the maximum possible allocation to the Indians is fixed at 50%*, the minimum is not; the latter will . . . be modified in response to changing circumstances [reflecting moderate living needs]." *Id.* (emphasis added).

286. *See supra* notes 272-76 and accompanying text.

incorporate such variables into a long-term, enduring strategy for rebuilding salmon capital. Any recovery plan must set its sights at least a century into the future.[287] Tying the tribal right to a steadfast principle which maximizes salmon capital is more likely to achieve long-term stability than a principle calibrated to changing tribal social and economic conditions. Courts can deal with any "windfall" in the availability of salmon at the remedy stage when the question of appropriate yield is before the court.[288]

Second, using the moderate living standard to define tribal sovereign rights to natural capital creates a potential inconsistency with traditional wildlife trust doctrine. The salmon is a species used by multiple sovereigns at the tribal, state, and international level.[289] As suggested in the first Part of this work, these sovereigns each have a trust interest in the resource, and, as co-tenant sovereigns, each has a duty to refrain from wasting the resource or depleting its capital.[290] For purposes of assessing inter-sovereign duties of protection, it is vital to have a uniform standard defining protectable capital. The moderate living standard is calibrated to fluctuating tribal needs, and certainly does not provide an adequate basis for defining protectable capital with respect to the full array of multiple sovereign interests. The "natural capital" standard, on the other hand, provides a uniformly applicable standard geared towards the full value of the asset at the time the various sovereigns formalized their respective property interests in it. To accommodate individual sovereign circumstances, courts can adjust the yield, but not capital, rights according to various equitable circumstances, such as moderate living needs.

Finally, an approach construing the treaty right to assure fulfillment of moderate living needs may distort the effect of the natural encumbrance. It is already settled in the area of harvest management that sovereign classes share the burden of the natural encumbrance according to their equitable interest in the resource.[291] If harvestable returns drop unexpectedly in a given year, the Indian and non-Indian sovereign classes each share 50% of the loss. Yet a rule entitling tribes to that amount of fish capital sufficient to render a constant yield based on moderate living needs seems to inject an element of artificial stability in the concept of natural capital. In any given year, returning runs

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287. The recovery plan developed by the four Columbia River Treaty tribes, for example, sets recovery goals for two centuries forward. *See* TRIBAL RECOVERY PLAN, *supra* note 56, at 5B-3.

288. As noted earlier, of course, courts may also choose to halt rebuilding measures when the tribes' moderate living needs are met with the available yield. *See supra* note 276 and accompanying text. Where this occurs, the moderate living standard effectively operates as a practical, if not definitional, limit on the tribal capital right.

289. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Section V.A.

290. *See id.* at Section V.B.

291. *See supra* note 269.

may diminish due to natural stochastic events, and tribal moderate living needs may not be met with a 50% allocation of the available harvest quota. In that event, a harvest allocation model premised on meeting tribal moderate living needs may force a decrease in the non-Indian yield to compensate for Indian losses. This in effect would establish an insurance program which distributes the natural encumbrance unequally. While as a policy matter this has advantages for tribes, it seemingly cuts against the grain of established salmon harvest principles.

C. *Distinguishing the Right From the Remedy: Responding to Images of a "Wilderness Servitude"*

For the reasons above, quantifying the tribal capital right as a right to "natural capital" rather than according to the moderate living standard is most consistent with treaty principles and case law. Understandably, however, the prospect of restoring natural salmon capital triggers fear in some of returning the Pacific Northwest to a virtually primitive way of life. Courts have been troubled by what they view as a potential tribal "wilderness servitude."[292] Unfortunately, the image of a "wilderness servitude" in turn creates a strong temptation to define the fundamental tribal right only according to what is most practical and palatable to the majority society. The temptation is seemingly boundless and, over time, would remove much of the predictability and certainty that gives property law its force. A primary value of servitudes is to protect the original bargains of landowners against changes in ownership and societal conditions.[293]

That is certainly not to say that courts should exert their judicial authority in ways that would bring a halt to modern society, or imperil human needs. There is a clear distinction between interpreting a property right and developing a judicial remedy to enforce the right. The judicial powers of equity assume a flexibility that, fundamentally, allows courts to avoid draconian results. It is entirely proper for a court to consider practical and equitable circumstances in the remedy stage of a proceeding, but premature

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292. *See, e.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1984); United States v. Washington, 694 F.2d 1374, 1381, *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc) (rejecting "comprehensive environmental servitude" for its "open-ended and unforeseeable consequences"); *see also* Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 813-14 (D. Idaho 1994) (concluding that treaties are subject to changing circumstances and lack environmental protection for fisheries). For further discussion of the "wilderness servitude" concern, see Blumm, *Piscary Profit*, *supra* note 35, at 473, 490, 499.

293. *See* French, *Design Proposal*, *supra* note 22, at 1214-15 ("The value of [servitudes] lies mainly in their permanence—their ability to survive changes in ownership without renegotiation of the arrangement."); *see also supra* Section III.B (discussing general inapplicability of changed conditions doctrine to enforcement of easements).

consideration of such factors when defining a treaty right is improper and will cause doctrinal distortions.[294]

Accordingly, courts should evaluate the native conservation servitude in a context sheltered from the political and economic factors that frame the public's debate about salmon recovery.[295] But even this untainted approach does not compel a "wilderness servitude." Such a term implies that all land encumbered by preexisting native conservation rights must remain in a wholly primitive, or wilderness-like, state. Quite to the contrary, the negative easement is strictly tailored to its purpose of assuring salmon survival. It is an over-generalization to state that all encumbered lands must be devoid of any human impact—a scenario implied by the term "wilderness servitude." Easements do not amount to full possessory interests.[296] Uses compatible with the sovereign interest may continue on the affected land.[297] Moreover, courts will not enjoin damage to fish habitat unless basic elements of proximate causation are met.[298] As emerging watershed conservation programs throughout the Basin demonstrate, a full panoply of human activities are compatible with salmon restoration.[299]

It is true that, in certain instances, dam removal or modification may be a prerequisite to salmon restoration.[300] But salmon restoration does not require

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294. *See* United States v. Washington, 135 F.3d 618, 638 (9th Cir. 1998) (use of equitable principles to interpret a treaty is impermissible, but use of equity in fashioning relief is appropriate).

295. Courts have recognized the duty to protect Indian property rights, even when doing so conflicts with the interests of powerful sectors of the majority society. *See, e.g.*, Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256-57 (D. D.C. 1972) (enforcing Secretary of Interior's fiduciary duty to protect tribal water rights from conflicting non-Indian claims, "troublesome as the repercussions of his actions might be").

296. *See* Weaver, *supra* note 55, at 106 & n.9: "An *easement* is a right to use the realty of another for a special or designated purpose. An easement is a real property right, but it is not regarded as an estate in real property."

297. *See* Blumm, *Piscary Profit*, *supra* note 35, at 491-92 (noting that private property owners encumbered by treaty profit must simply refrain from unreasonable interference with fish habitat and treaty fishing).

298. *See* United States v. Washington (Phase II), 506 F. Supp. 187, 208 (W.D. Wash. 1980) (holding that the United States, suing on behalf of tribes, "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").

299. For a discussion of watershed restoration programs, *see* JOSEPH CONE, A COMMON FATE 304-06 (1994).

300. *See* Blumm & Corbin, *supra* note 230, at 603 (noting the National Marine Fisheries Service (NMFS) study and other studies which conclude that "breaching the [lower Snake River] dams offers the best chance of restoring the imperiled Snake River salmon runs"); Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems*, 40 ARIZ. L. REV. 197, 215-16 nn.128-31 (1998) [hereinafter Wood, *Endangered Rivers*] (discussing selective dam removal and modification as a salmon recovery measure in Columbia River Basin); Michael C. Blumm et al., *Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows*, 28 ENVTL.

dismantling the entire Pacific Northwest hydrosystem. For example, breaching just the four Snake River dams would, according to one leading report, produce an 80-100% probability of recovering the endangered fall chinook.[301] While perhaps viewed as a drastic solution to salmon decline just a few years ago, the proposal has gained considerable attention in the press and among policy-makers.[302] At the national level, former Secretary of Interior Bruce Babbitt strongly advocated dam breaching to promote fish restoration.[303] Oregon's Governor John Kitzhaber endorses it as well.[304] Close examination of the public costs and benefits associated with dams reveals that some projects were ill-considered from an economic perspective.[305]

Almost certainly, however, there will be specific instances where strict enforcement of the native conservation servitude would be either impractical or draconian. In that event, the equitable authority of courts to temper remedies should take hold.[306] But though it is vital to maintain the flexibility

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L. 997, 1012-23 (1998) [hereinafter, Blumm, *Saving Snake River*]. The Columbia River treaty tribes advocate breaching the Snake River dams as a primary measure to restore imperiled Snake River salmon. *See Umatilla Tribes Seek Breach of Snake Dams*, ENVTL. NEWS NETWORK DAILY NEWS, Aug. 5, 1998, *available at* http://www.enn.com/news/wire-stories/1998/08/080598/breach05.asp; Tara King, *Tribe in Favor of Breaching Dams; Executive Committee OKs Resolution Calling for Removal of Four Snake River Dams*, LEWISTON TRIBUNE, Feb. 25, 1999, *available at* http://www.lmtribune.com/02251999/northwes/407173.htm; *Dam Breaching Needed to Honor Treaty*, ALBANY DEMOCRAT-HERALD, Mar. 20, 2000, at 2A, *available at* http://mvonline.com/dhonline/dh0527-23.html.

301. *See* Blumm, *Saving Snake River*, *supra* note 300, at 1020-24 (describing conclusions of the "PATH report" produced by an inter-agency working group of 25 scientists created by NMFS). *See also* Wood, *Endangered Rivers*, *supra* note 300, at 141 and accompanying text (noting other studies concluding that breaching the four Snake River dams is expected to yield an 80-100% probability of restoring some imperiled Snake River salmon species to 1960s, pre-dam, levels within twenty-four years).

302. *See* Wood, *Endangered Rivers*, *supra* note 300 at 217, 270-71 nn.136-41, 512 and accompanying text; Blumm, *Saving Snake River*, *supra* note 300, at 1053-54 (calling for breaching lower Snake dams and lowering John Day Reservoir as "the only viable salmon restoration plan for the Snake River in the twenty-first century"); Bruce Babbitt, *A River Runs Against It*, OPEN SPACES 8, Fall 1998, at 12-13 (Interior Secretary Bruce Babbitt criticizing Snake River dams and noting "the fisheries biologists are moving toward a consensus assessment—marginal mitigation projects are not enough [to save salmon]."); *see also* Kim Murphy, *Talk of Demolishing Dams Yields Torrent of Debate*, L.A. TIMES, June 21, 1998, *available at* 1998 WL 2439305; Paul Nussbaum, *To Save the Salmon, An Idea To Kill the Northwest Dams*, PHILA. INQUIRER, Sept. 21, 1998, at A1, A6; Bruce Barcott, *Blow Up*, OUTSIDE, Feb. 1999, at 70; Jim Yuskavitch, *Breaching, Drawdowns, and the Art of Salmon Recovery*, TROUT, Summer, 1998, at 12, 14-16; Patrick Joseph, *The Battle of the Dams*, SMITHSONIAN, 1999, at 48.

303. Babbitt, *supra* note 302, at 9-13. As Secretary Babbitt notes, there are some 75,000 dams in the nation blocking 600,000 miles of free-flowing rivers, or 17% of the river mileage in the nation. *See id.* at 9, 13.

304. Lance Robertson, *Governor Supports Breaching Four Dams*, EUGENE REGISTER GUARD, Feb. 19, 2000, at IA.

305. *See* Babbitt, *supra* note 302, at 19-20 (criticizing the nation's dam-building frenzy as "beyond all logic, overstating benefits, ignoring the damages to fisheries and ecosystems, and understating the financial costs"); Wood, *Endangered Rivers*, *supra* note 300, at 208-11.

306. *See* United States v. Washington, 384 F. Supp. 312, 413 (W.D. Wash. 1974) (recognizing, in fashioning injunctive relief against treaty rights violations, judicial authority to make "allowance for special

of courts to respond to unique and exigent circumstances, it is also essential not to allow principles of equity to undercut the tribal property right and deplete it of any practical effect. There is a danger that judges may view any change to the industrial status quo as a "draconian" or a radical effect of the treaty right. It is important to bear in mind that salmon restoration is entirely consistent with the expressed intent of Congress as reflected in both the Endangered Species Act[307] and the Northwest Power Act.[308] Moreover, long-standing principles of public trust law impose an obligation on the federal and state governments to protect salmon.[309]

In sum, the baseline from which to assess tribal treaty rights to salmon capital should focus on the natural abundance of the species in aboriginal times, with appropriate adjustments and deductions as discussed above. As noted previously, if such treaty interpretation would lead to untenable results, courts can temper these consequences in the relief stage, while at least maintaining a purity of analysis in defining the basic treaty right.

V. ENFORCING THE TRIBAL PROPERTY RIGHT TO WILDLIFE CAPITAL

Prior sections explored the tribal treaty property right of rebuilding salmon capital to approximate historic levels. Because tribes lack sovereign authority over ceded areas,[310] their property rights must be enforced in federal court. The judiciary provides the only forum seemingly capable of saving the remarkable salmon species from extinction. Congress and agencies have proven themselves politically captive to private vested interests on the river, evident by the fact that firm statutory mandates to protect the fish have

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practical problems and circumstances which a court of equity must heed"). For discussion on the judicial authority to tailor remedies, see Zygmunt J. B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 543-45 (1982).

307. Endangered Species Act, 16 U.S.C. § 1531(b)(1994) (expressing purpose of Congress to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.").

308. Northwest Power Act, 16 U.S.C. § 839(6) (Supp. IV 1990), declaring as one of the Act's six purposes:

> [T]o protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the . . . power generating facilities on the Columbia River and its tributaries.

309. *See* Wood, *Wildlife Capital Part I, supra* note 1, at nn.271-73 and accompanying text.

310. *See supra* note 48 and accompanying text.

resulted in no substantial changes in river operations for over twenty years.[311] Without judicial intervention, the signature species of the Northwest will likely go extinct, and with it a native culture that has defined itself by the salmon's annual return for over 10,000 years.[312] As one court firmly stated in upholding treaty fishing rights: "[T]he enforcement of [treaty rights] is an important public interest, and it is vital that the courts honor those rights."[313]

Fashioning relief for this type of treaty violation, however, is extraordinarily complex. Across the species full migratory reach, scores of human actions deplete salmon capital. Moreover, the four categorical sources of salmon mortality (harvest, hatcheries, hydrosystem and habitat destruction) occur within a complicated statutory framework spanning multiple federal and state jurisdictions.[314] A meaningful remedy for treaty violations must respond to these many sources of salmon mortality and operate compatibly with the present statutory regime.

There is a grave danger that the sheer complexity and vast scope of a meaningful judicial remedy might dissuade judges from interpreting treaties in a way which imposes liability for environmental damage. If a judge rules that treaty rights support environmental protection of wildlife assets, the business of enforcing such a ruling may transform the court into a quasi-agency, affecting the lives and businesses of an entire regional population. Judges have long dreaded the role of "fishmaster"[315] and may be reluctant to act in a realm where multiple agencies have failed. The daunting nature of the remedy, therefore, may taint a court's treaty interpretation.

It is imperative to recognize, however, that the increasingly complex nature of our industrial society demands a changing role for courts. The nature of certain claims—particularly those involving environmental liability, toxic torts, and institutional reform—requires rulings that are prospective, touch entire sectors of society, and respond to a myriad of scientific and management challenges posed by various circumstances.[316] For example, providing compensation to the thousands of claimants harmed by toxic torts or defective

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311. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Section II.B.2.

312. *See supra* note 10 and accompanying text.

313. Muckleshoot v. Hall, 698 F. Supp. 1504, 1516 (W.D. Wash. 1988) (awarding tribes preliminary injunction against construction of marina that would interfere with treaty fishing in Washington's Puget Sound).

314. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Sections II.A, II.B.2.

315. *See* United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975) (Burns, J., concurring) ("[T]o affirm [the *Boldt* decision] also involves ratification of the role of the district judge as a 'perpetual fishmaster.'"); *see also* Blumm, *Piscary Profit, supra* note 35, at 456-57 (discussing the court's "fishmaster" role).

316. *See* Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 WIDENER L. SYMP. J. 235, 237 (1997) (noting that the relief sought in complex litigation "is often prospective and affects large numbers of people as would a regulation or legislative rule").

products requires an administrative system to notify victims, evaluate the scientific basis for individual claims, and process claims. Prison or school reform often involves court-supervised management of institutions, which entails operational complexity. All of these situations surpass the ability of individual judges alone to provide relief when acting in a traditional capacity. Increasingly, the nature of relief necessitates developing an elaborate, case-specific, administrative structure within the court.[317]

If the judiciary is reluctant to assume the challenge of fashioning meaningful relief to meet these changing societal demands, a default situation will result in which undue deference is accorded to agencies. Ultimately, judicial passivity will create an imbalance among the three branches of government, threatening the separation of powers underlying the constitutional democracy.[318] In the context of Indian fishing, it may cause de facto abrogation of treaty rights.

Increasingly courts are responding to the challenge of providing meaningful relief by forging new models of judicial operation. As described by Professor Margaret Farrell, these models require "flexibility, expertise, informality, investigative authority, administrative capacity, and time, [all of] which are qualities usually associated with administrative agencies."[319] They make use of court-appointed experts, special masters, settlement techniques, and innovations in case management.[320] Such models stimulate new ethical and legal concerns, and they are not without critics.[321] Nevertheless, it is likely that without new mechanisms to implement broad rulings, courts will refrain from adjudicating novel liability claims that address emerging areas of environmental harm. Ultimately, a workable remedy structure is critical to preserving the ability of courts to make fair liability rulings.

Fashioning an innovative judicial role in the Columbia River Basin salmon context may create ground-breaking precedent for other treaty wildlife

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317. *See id.* at 236-38 (noting the "extraordinary managerial challenges" posed by modern complex litigation); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982) (noting new "managerial" role of judges in supervising remedy implementation in public law litigation and expressing concern over departure from classic adversarial judicial model).

318. *C.f.*, LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT DODGES HARD ISSUES AND STUNTS THE DEVELOPMENT OF LAW 19 (forthcoming, NYU press) (noting judicial passivity results in a transfer of power from the courts to the executive branch).

319. Farrell, *supra* note 316, at 237. Professor Farrell also notes that, through appointment of special masters, courts create processes that "function like administrative agencies within the judiciary, appointed to carry out the new tools we give to courts." *Id.* at 238.

320. As Professor Farrell notes, modern technology has given rise not only to a new body of substantive claims to adjudicate, but also to "new legal procedures to process the claims it mass produces." *Id.* at 236.

321. *See, e.g.*, Resnik, *supra* note 317, at 424-25 (noting that techniques of modern judicial management may elevate speed over deliberation, impartiality, and fairness).

crises. As a setting for complex judicial relief, there is perhaps no parallel. Fortunately, the courts' past oversight of Columbia River harvest litigation provides judicial experience in overseeing complicated remedies. At various times judges have successfully served the role of "fishmaster" for various periods when state recalcitrance necessitated such judicial intervention.[322] The experience demonstrates that the complexity of creating a remedy in the treaty fishing rights context does not justify denying tribes warranted relief.[323]

In order to prevent vexing issues of relief from improperly clouding the basic task of defining the treaty right, courts should bifurcate treaty litigation into a "liability" stage and a "remedy" stage.[324] Indeed, this has been the approach in past treaty litigation.[325] The liability stage involves the court

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322. *See supra* note 315; *see also* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695-96 (1979) ("[T]he District Court may . . . assume direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued [and may] issue detailed remedial orders as a substitute for state supervision [and] displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court."); Puget Sound Gillnetters Ass'n v. District Court of Washington, 573 F.2d 1123, 1128-29, 1134 (9th Cir. 1978) (upholding district court's ability to engage in "direct management of the fishery . . . as the only instrument available to vindicate the treaty rights"); *see also* Blumm, *Piscary Profit*, *supra* note 35, at 456-57 (describing district court's role of managing fishery).

323. *See, e.g.*, Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969) (enforcing treaty fishing rights while acknowledging, "This court cannot prescribe in advance all of the details of appropriate and permissible regulation of the Indian fishery . . . [because] 'proper anadromous fishery management in a changing environment is not susceptible of rigid pre-determination.'") (citation omitted); United States v. Washington, 384 F. Supp. 312, 346 (W.D. Wash. 1974) (quoting same). *See also* Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1027 (1983) (action by Idaho to apportion Columbia River fishery) ("Although the computation [of allowable harvest] is complicated and somewhat technical, that fact does not prevent the issuance of an equitable decree."). As Justice O'Connor has summarized the Court's duty in the fishing rights context:

> The Master suggested that relief [for depletion of fish runs] is unworkable because of the difficulties of estimating the runs and apportioning them. The task is indeed a complicated one, as we recognized when we stated in [*Dept. of Game of Washington v. Puyallup Tribe*], "only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species." *Nevertheless, it is a task that we have recognized as possible, Washington v. Washington State Commercial Fishing Vessel Ass'n, and the difficulty of providing equitable relief has never provided an excuse for shirking the duty imposed on us by the Constitution.* The lower federal courts have proved able to grant appropriate relief, *e.g.*, Sohappy v. Smith; United States v. Washington, so we too should be able to overcome the difficulties.

Id. at 1037-38 (O'Connor, J., dissenting) (citations omitted) (emphasis added).

324. Rule 42(b) of the Federal Rules of Civil Procedure allows courts to bifurcate issues into separate trials "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." FED. R. CIV. P. 42(b). The issues most typically bifurcated for trial are those of liability and relief. G. Lee Garrett, Jr. & Anthony E. Diresta, *Strategies for Multi-Claim Litigation and Settlement Techniques*, 289 PLI/LIT 473, 509, 513 (1985).

325. In a recent adjudication of treaty rights to shellfish, for example, the district court of Washington first issued a decision interpreting the treaties to award 50% of the shellfish harvest to tribes, and then conducted a six-day "implementation trial" in which the court received evidence regarding proposed plans to implement the decision. *See* United States v. Washington, 135 F.3d 618, 628 (9th Cir.

acting in its traditional role of assessing the legal basis for claims, while the remedy stage demands an innovative judicial role to administer and enforce those claims affirmed in the liability stage.

A broad treaty-based remedy for environmental damage to fisheries would aim towards rebuilding salmon runs and restoring habitat—relief that is equitable in nature and within the purview of a federal district court. There is also, however, an important corollary role for damages. Though perhaps pursued in a different forum,[326] successful claims would yield funds that tribes may apply to restoration efforts.[327] Such funds may be critical at a time when Congress fails to appropriate sufficient money for salmon restoration through the normal legislative process.[328] Moreover, the threat of tribal claims for damages may serve as an important inducement for state and federal parties to agree to costly salmon rebuilding measures in negotiating an equitable remedy

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1998) (reviewing procedural history in the district court).

The district court of Washington also used a bifurcation approach in the *Washington (Phase II)* litigation, issuing a declaratory judgment that the tribes had a treaty right to environmental protection of their fisheries, but reserving questions of relief for a later stage. United States v. Washington (Phase II), 506 F. Supp. 187, 207 (W.D. Wash. 1980). The Ninth Circuit vacated the declaratory relief on appeal, but not on the basis of any infirmity resulting from the bifurcation *per se*; instead it found that the issuance of a declaratory judgment was "contrary to the exercise of sound judicial discretion," because there were insufficient facts of a concrete nature developed in the case to support a judicial articulation of the State's precise obligations "with respect to the myriad State actions that may affect the environment of the treaty area." United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc).

For another example of the bifurcation method as used in complex treaty litigation, see Mille Lacs Band of Chippewa Indians v. Minnesota, 952 F. Supp. 1362, 1366 (D. Minn. 1997). In *Mille Lacs*, the tribe sought a declaratory judgment defining its treaty rights and an injunction prohibiting state interference with those rights. *Id.* The court bifurcated the case into two phases: Phase I, intended to resolve general issues of treaty interpretation, and Phase II, intended to address the validity of particular measures to regulate the treaty harvest. *Id.*

326. Federal district courts lack authority to award monetary damages in excess of $10,000. 28 U.S.C. § 1346 (2000). *See* Cheyenne-Arapaho Tribes of Oklahoma v. United States, 33 Fed. Cl. 464, 469-70 (1995) (noting tribes seeking injunctive and monetary relief against United States for breach of trust were obliged to "split their challenge" into separate claims before the federal district court and the United States Court of Federal Claims). Procedural issues involved in bringing a claim for damages are beyond the scope of this Article.

327. Such damages could be applied towards funding the measures identified in the inter-tribal salmon recovery plan—measures which the tribes estimate could add as much as $325 million a year to existing salmon recovery efforts. Neil Modie, *Tribes Seek to Rescue Salmon: Indians Might also File Lawsuit*, SEATTLE POST-INTELLIGENCER, June 16, 1995, at B1.

328. In recent years bills have been introduced in Congress seeking to severely limit salmon recovery measures under the Endangered Species Act. *See* Wood, *Endangered Rivers*, *supra* note 300, at 242-43. Current recovery efforts are subject to a cost cap resulting from a negotiated agreement among federal agencies in response to threatened congressional funding cutbacks. *See id.*

in federal district court.[329] Accordingly, the discussion below addresses both equitable relief and damages.

A. Equitable Relief

In litigation involving treaty harvest, toxic torts, products liability, institutional reform, and antitrust claims, courts have called upon their broad inherent and statutory authority to create, in effect, designer processes to implement broad liability rulings.[330] Courts will need to do this as well in implementing rulings allocating treaty-based species conservation responsibilities among sovereigns. While such processes should be tailored to the particular exigencies of each particular case, the following discussion identifies several general features which could frame the remedy structure in the treaty conservation context.

1. Macro Relief on a Sovereign-to-Sovereign Level

Where a suit is brought by tribes against sovereigns for environmental damage, a judicial remedy operates on a macro, sovereign-to-sovereign level.[331] Salmon is a resource shared among multiple federal, tribal, and state sovereigns, and rebuilding salmon capital must occur, if at all, across the salmon's full habitat reach.[332] Though perhaps thousands of individuals and entities contribute through their own separate actions to the destruction of the salmon resource, it would be impractical, expensive, and infeasible to bring all such actors into treaty rights litigation. Nor is it feasible to create a remedy structure addressing individual actions. Each sovereign has the ability to translate its own responsibilities into restrictions that operate on the individual level to its own citizens.[333] Therefore, to promote judicial economy, a remedy

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329. The Columbia River Basin treaty tribes estimate that past fish losses caused by the four lower Snake River dams alone amount to 243 million pounds of salmon, compensation for which would cost $12 billion. Editorial, *Dams Must Go: Save Taxpayers' Money*, QUAD-CITY TIMES (DAVENPORT, IOWA), May 24, 2000, at 1A.

330. *See* Farrell, *supra* note 316, at 236-38, 260-61; *see also* Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 403-10 (1991) (describing co-management regimes between tribes and states to implement treaty harvest rulings in Northwest and Great Lakes regions).

331. Though beyond the scope of this Article, a multi-sovereign suit forcing other sovereigns to accept conservation responsibilities may give rise to issues of sovereign immunity. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (upholding sovereign immunity of state against suit by tribe).

332. Recognizing this, the Columbia River treaty tribes have issued a recovery plan for salmon that addresses rebuilding populations on a multi-sovereign macro level. *See* TRIBAL RECOVERY PLAN, *supra* note 56, at 4-17 (offering "comprehensive approach that utilizes the authorities of the three sovereigns (federal, state and tribal governments) that have an interest in anadromous fish").

333. Indeed, this is the approach of harvest management. States and tribes develop individual

should operate at the sovereign level with each government representing its affected citizens and responsible for implementing the broad conservation responsibilities ordered by the court.

A macro remedy structure may draw upon the processes already in place among sovereigns to manage salmon capital.[334] Each sovereign has discrete management authority within its jurisdiction, exercised primarily through statutory mandates.[335] For example, both the Endangered Species Act and the Northwest Power Act contain procedural mechanisms for promoting salmon recovery.[336] The Basin-wide salmon recovery plans called for by both statutes can serve as procedural templates for implementing judicially defined treaty obligations.[337] Drawing upon existing statutory mechanisms for enforcement not only makes judicially determined treaty rights procedurally compatible with statutory processes, but also offers critical time savings in carrying out court-established treaty obligations.

It is, however, vital to distinguish the use of statutory processes in this procedural fashion, from the use of substantive standards contained within the statutes as guidance for defining treaty rights. General statutes such as the Endangered Species Act do not contain substantive standards tailored toward protection of tribal interests, and equating treaty rights with statutory standards

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fishing restrictions based on their own sovereign harvest quotas. *See infra* note 381. Judicial rulings on harvest allocation between sovereigns typically do not reach to allocation issues within each sovereign class. *See* Sohappy v. Oregon, Civ. No. 68-513, 68-409, slip. op. at 3 (D. Or. May 8, 1974) ("This court does not have the right or the duty to tell the states how they should allocate the non-Indian share of the harvest among the competing non-Indian commercial and sport interests; nor is it our duty, in this proceeding, to determine how the fish should be allocated among the groups of treaty Indians.").

334. In this vein, the Columbia River treaty tribes have spearheaded an initiative known as the "Three Sovereigns Process," which brings together the federal, tribal, and state sovereigns to coordinate their various plans for salmon restoration. The goal of the process is to produce a single, unified, coordinated recovery plan for salmon which would be implemented under the authority of each sovereign within its jurisdiction. For discussion, see COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, 1997 ANNUAL REPORT 9 (1997).

335. *See* Wilkinson & Conner, *supra* note 225, at 44-45 (describing management authority as "fragmented among multiple jurisdictions at the state, federal, tribal, and international levels"); *see also* United States v. Oregon, 657 F.2d 1009, 1015 (9th Cir. 1981).

336. The Northwest Power Act charges the Northwest Power Planning Council with developing a broad, regional program of hydrosystem operations that will "protect, mitigate, and enhance" the Basin's declining fish and wildlife resources. 16 U.S.C. § 839b(h)(1)(A)(1994). The Act directs the Bonneville Power Administration (BPA), the federal agency which markets the electric power generated by the Columbia River, to act in a manner "consistent" with the Council's program. 16 U.S.C. § 839b(h)(10)(A). The Endangered Species Act prohibits federal agencies from taking actions which are likely to jeopardize the continued existence of listed species such as the salmon, and it also forces NMFS to develop and implement a recovery plan for the species. 16 U.S.C. § 1536(a)(2), 1533(f).

337. This is the approach offered by the Columbia River treaty tribes in their recovery plan. *See* TRIBAL RECOVERY PLAN, *supra* note 56, at 4-17 ("In combination, the CRFMP, the Fish and Wildlife Program, the [Pacific Salmon Treaty] and [Federal Energy Regulatory Commission orders] as well as an ESA process that incorporates the other structures provide a framework for restoration.").

would seriously derogate treaty rights to a level of protection no greater than that of the non-Indian population.[338] Therefore, while the use of procedural devices in existing statutes to implement treaty rulings may be an expedient and effective way of enforcing treaty rights on the ground, the use of substantive statutory standards as substitutes for treaty rights would subvert the goal of treaty rights protection.

2. Negotiated Remedy Process

A second feature of broad treaty rights enforcement should be a court-structured negotiated remedy process to fashion a decree granting injunctive relief. This process brings the various sovereign parties together at the remedy stage and requires them to negotiate an appropriate, detailed plan for implementing the court's liability rulings.[339] The process takes place within

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338. *See* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, PART II.A.2 (1995) [hereinafter Wood, *Trust II*].

339. The use of Alternative Dispute Resolution (ADR) is gaining ground in resolving environmental conflicts and has spawned a distinct field of Environmental Conflict Resolution (ECR). For descriptive and evaluative discussion of the field, see DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION (1987); GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES (1986); L.S. BACOW & M. WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION (1984); Charlene Stukenborg, Note, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305 (1994). For a discussion of ECR in disputes involving endangered species recovery, see Julia M. Wondolleck et al., *A Conflict Management Perspective: Applying the Principles of Alternative Dispute Resolution*, ENDANGERED SPECIES RECOVERY: FINDING THE LESSONS, IMPROVING THE PROCESS 305 (Tim W. Clark ed., Island Press 1994); Melanie J. Rowland, *Bargaining For Life: Protecting Biodiversity Through Mediated Agreements*, 22 ENVTL. L. 503 (1992).

Congress has infused the development of ECR by passing the 1998 Environmental Policy and Conflict Resolution Act, P.L. 105-156, which created the U.S. Institute for Environmental Conflict Resolution. THE MORRIS K. UDALL FOUNDATION, U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION (brochure) (on file with author). The Institute is located in Tucson, Arizona, and operates under the aegis of the Morris K. Udall Foundation, an independent federal agency. *Id.* The Institute's professional staff provides dispute resolution services in environmental conflicts involving any federal agency. *Id.* The Institute reports its activities to the President's Council on Environmental Quality (CEQ). *Id.*

The general use of ADR as an alternative to the traditional litigation model is not without critics who express concern that it may undermine justice. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1075 (1984) (noting that settlements are often coerced and that "[l]ike plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised"). *See also* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 6 WIS. L. REV. 1359, 1359 (1985) (noting increased potential for racial and ethnic prejudice in informal ADR settings as opposed to formal adjudication processes).

The dangers of ADR are a product of the way in which the techniques are used and the extent to which they supplant the protections offered by the traditional litigation model. When used in conjunction with litigation, the various applications of ADR are multifold, ranging from negotiating a settlement prior to any liability finding, to achieving consensus on particular evidentiary or procedural issues in litigation, to negotiating a remedy. *See* Thomas W. Bergdall, *A Practitioner's Guide To Injunctive Civil Right Settlements and Consent Decrees*, 531 PLI/LIT 305, 317-23 (1995).

a procedural structure established and supervised by the court, and results in what is essentially a consent decree.[340]

Courts increasingly rely on party negotiation at the remedy stage of complex litigation,[341] because the broad scope of relief along with the intricacies of tailoring a remedy to a variety of circumstances surpasses the ability of judges to singularly fashion an injunction using traditional

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This Article suggests negotiation as a tool in developing a remedy to implement a broad liability finding—in essence, a remedial consent decree. *See infra* note 340 and accompanying text. Consent decrees are of a "hybrid nature," having both judicial and contractual dimensions. *See* Bergdall, *supra* at 326-328 (noting that the terms of a consent decree are of a contractual nature, but the enforcement is of a judicial nature); *see also* discussion in David L. Callies, *The Use of Consent Decrees in Settling Land Use and Environmental Disputes*, 21 STETSON L. REV. 871, 871-72 (1992).

When used in this fashion, ADR does not replace the judicial forum; instead it fits within the structure of litigation. *See id.* at 871 ("Such a [consent] decree has the advantage of judicial enforceability often lacking in other forms of alternative dispute resolution [which] takes it several steps beyond mere settlement of litigation."). As this Article suggests, the use of judicially structured negotiation may be essential to preserve the ability of courts to create a remedy in complex litigation. *See supra* notes 314-21 and accompanying text. Moreover, this Article suggests on-going jurisdiction in treaty conservation cases to ensure judicial oversight of the remedy implementation. *See infra* Section V.A.4. The proposed use of ADR to achieve a consent decree subject to the ongoing jurisdiction of the court is a far more limited application than the use of ADR to supplant judicial process altogether in environmental controversies—a use which creates a much broader set of dangers to the ideals of justice and fairness.

Nevertheless, the procedural informality of ADR in any setting, even limited ones, may create subtle, yet significant, threats to due process, fairness, equality, and justice. For that reason, Professor Delgado urges consideration of procedural safeguards to be used in conjunction with the ADR process to reduce the likelihood of bias or unfairness. *See* Delgado et al., *supra* at 1403. While procedural constraints increase the cost of ADR and decrease its flexibility, they may provide necessary "checks and balances" to ameliorate the inherent risks associated with ADR. *Id.* at 1404.

For further discussion of ADR in natural resource conflicts involving treaty rights, see Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L. J. 25, 42 (1997) (finding appropriate the use of negotiated settlements in the context of litigation in view of "the limitations of the justice system in providing an adequate remedy").

340. *See* United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990), characterizing the Columbia River Management Plan (CRFMP) as a "consent decree" and stating: "A consent decree is 'essentially a settlement agreement subject to continued judicial policing' . . . . [It is] the product of negotiation and compromise . . . . [C]onsent decrees are often designed to be carried out over a number of years." The Ninth Circuit's characterization of the CRFMP as a consent decree differed slightly from the district court's approach. *See* United States v. Oregon, 699 F. Supp. 1456, 1461 (D. Or. 1988) (noting that the CRFMP is not actually a consent decree, because it is "not a final judgment but rather is limited to a ten year period and subject to modification in the interim," but not offering any alternative characterization of the plan).

The use of consent decrees in various areas of litigation has engendered a rich body of both practical and theoretical commentary which addresses issues well beyond the scope of this article. *See, e.g.*, Bergdall, *supra* note 339; Callies, *supra* note 339; Phillip G. Oldham, *Regulatory Consent Decrees: An Argument for Deference to Agency Interpretations*, 62 U. CHI. L. REV. 393 (1995); Susan B. Dorfman, *Mandatory Consent: Binding Unrepresented Third Parties Through Consent Decrees*, 78 MARQ. L. REV. 153 (1994); Paul S. Penticuff, Note, *A New Standard for the Modification of Consent Decrees*, 57 MO. L. REV. 1391 (1992).

341. Callies, *supra* note 339, at 895 (noting increasing use of consent decree in settling complex land use and environmental litigation).

adversarial processes. Most judges lack the time to immerse themselves in the details of developing an appropriate remedy, and they may also lack the requisite scientific or technical expertise to engage fully in the development of the remedy,[342] particularly in a context so complex as species management. Allowing the sovereign parties to identify points of agreement and work out the details of a remedy, using their own administrative and scientific expertise, saves tremendous judicial time and expense and is more likely to result in a remedy tailored toward the practical exigencies of the situation.[343] In the Columbia River salmon context, the time spent in adversarial processes may itself inflict irreparable injury on a species that hangs on the verge of extinction.[344]

Courts have embraced the negotiated remedy process in the context of treaty harvest litigation.[345] In *United States v. Oregon*, for example, the court

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342. *See* Farrell, *supra* note 316, at 284-85 (describing demands of modern complex litigation and suggesting significant role for special masters).

343. As one commentator warns, however, the use of consent decrees raises numerous issues regarding compliance with existing statutory law, and "it behooves the courts to take special care that they do not become an unwilling substitute for . . . [environmental] agencies simply for the sake of convenience and expediency." Callies, *supra* note 339, at 897.

344. *See* Wondolleck et al., *supra* note 339, at 305-06 (noting failure of traditional processes to address species recovery with necessary expediency and suggesting use of ADR in species conflicts).

345. *See, e.g.*, Klamath Tribes v. United States, No. 96-381-HA, 1996 WL 924509, at *3-4 (D. Or. 1996) (consent decree used to approve settlement agreement between Klamath Tribes and government regarding management and regulation of treaty resources); Wilkinson, *supra* note 330, at 403 (describing co-management plan for shared fisheries resulting from treaty litigation in Great Lakes region); Puget Sound Gillnetters Ass'n v. District Court of Washington, 573 F.2d 1123, 1133 (9th Cir. 1978) (encouraging negotiated remedy among parties in Washington harvest litigation); Yakima Indian Nation v. Baldrige, 605 F. Supp. 833 (W.D. Wash. 1985) (using stipulated settlement process and continuing jurisdiction to resolve allocation of Pacific salmon fishery between Alaska and the Pacific Northwest states and tribes).

Negotiation has also been used to settle Indian water rights claims. For discussion, see John A. Folk-Williams, *The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights*, 28 NAT. RESOURCES J. 63 (1988). A prominent example of successful negotiation in the Columbia River Basin involves the Umatilla Tribes' water rights. For discussion, see Janet C. Neuman, *Run, River, Run: Mediation of a Water-Rights Dispute Keeps Fish and Farmers Happy for a Time*, 67 U. COLO. L. REV. 259 (1996).

Professor Rebecca Tsosie observes that modern negotiated settlements of tribal land and resource issues resemble the "old treaty-making procedures" with an important distinction:

> [T]he consent principle as it developed throughout the treaty period set up an exclusive relationship between the federal government and the tribes. States had no formal legal role in this relationship, although they had a significant political role as they pressed for increased cessions of Indian land.
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> . . . [T]he modern consent principle is quite different from its historical antecedent. Although the federal government is still heavily involved, such agreements often reflect an accommodation to the interests of state governments. States have considerable power in the negotiations, opening the exclusive federal-tribal relationship to a third layer of sovereignty. This expansion has changed the contours of American federalism.

Tsosie, *supra* note 339, at 29-33.

approved a negotiated remedy agreed upon by the federal government, states, and tribes to implement treaty rulings allocating harvest shares.[346] The result was a plan for co-managing harvest known as the Columbia River Fish Management Plan (CRFMP).[347] Treaty rights litigation in the Great Lakes area has also used a negotiated remedy process.[348] Professor Margaret Farrell applauds the Great Lakes experience as presenting a unique model of "'integrative bargaining' that maximized the interests of all parties by permitting the parties to offer settlement resources and commitments that a court would not have had authority to order."[349]

A negotiated remedy structure, however, can only be effective if the court establishes clear working principles of law upon which the relief is based. The

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346. *See* United States v. Oregon, 699 F. Supp. 1456, 1469 (D. Or. 1988) (describing and approving Columbia River Fish Management Plan). *See* Wood, *Regaining the Sovereign Prerogative, supra* note 54, at 49.

347. *See supra* note 346 and accompanying text. The 1988 plan, however, was only in effect for ten years. *United States v. Oregon*, 699 F. Supp. at 1460. It has not been successfully renegotiated since it expired in 1998. *See* Paul Lumley & Mike Matylewich, *Fall Fishery Blues*, WANA CHINOOK TYMOO, Winter 1999, at 18.

348. Professor Margaret Farrell describes the Great Lakes example in Farrell, *supra* note 316, at 261-63. In *United States v. Michigan*, three tribes brought suit against the State of Michigan seeking to enforce treaty fishing rights in Lake Michigan. United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *as modified*, 653 F.2d 277 (6th Cir. 1981). The court appointed law professor Fancis McGovern as a special master to assist in managing the case and to facilitate possible settlement among the parties. Farrell, *supra* note 316, at 262. Professor McGovern encouraged the parties to bargain over a set of variables extending beyond the pure allocation question at issue in the litigation, to include issues regarding time and manner of fishing, appropriate gear, and resource replenishment. *Id.* As described by Professor Farrell, the parties also agreed to pool their scientific information and to direct their experts to make consensus recommendations. *Id.* They also agreed to employ a neutral expert in decision-modeling to "create a computer-assisted negotiation process that disclosed general agreement among the biologists about important factual questions, and permitted settlement plans offered by the parties to be evaluated as scorable games." *Id.* at 263. The negotiations produced a settlement among the representatives of all the parties, but one tribe refused to ratify the agreement. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 893 (4th ed. 1998) (describing Michigan treaty rights settlement). Nevertheless, the court adopted the agreement into an order which was binding on all the parties. *Id.* The fact that one tribe did not agree to the settlement indicates that the negotiation process was not completely successful, but the process is nonetheless useful as a study of techniques for resolving inter-sovereign disputes in treaty conservation litigation.

The fifteen-year consent decree originally entered in the Michigan fishing rights case expired in 2000. In August 2000, five Michigan Indian tribes, the State of Michigan, and the U.S. Department of the Interior successfully renegotiated the agreement. The new agreement will govern allocation, management, and regulation of state and tribal fisheries in the treaty waters of the Great Lakes for the next twenty years. Telephone interview with Jim Zorn, Great Lakes Indian Fish and Wildlife Commission (Sept. 25, 2000); *Tribes Sign Fishing Rights Policy*, ASSOCIATED PRESS NEWSWIRES, Aug. 8, 2000, *available at* 2000 WL 25186375; *Tribal Nations, State of Michigan, and Interior Department Sign Agreement to Settle Indian Fishing Rights Dispute*, U.S. NEWSWIRE, Aug. 7, 2000, *available at* 2000 WL 21169740; Eric Sharp, *State of Michigan, Tribes Happy With New Fishing Agreement*, DETROIT FREE PRESS, Aug. 17, 2000, *available at* http://www.freep.com.

349. Farrell, *supra*, note 316, at 262-63; *see also* Wilkinson, *supra* note 330, at 407-08 (describing co-management scheme resulting from Michigan treaty rights litigation).

court's rulings at the liability stage of litigation define the sidewalls within which the parties may negotiate a remedy.[350] The negotiation process will accomplish little if the tribes do not have firmly defined, enforceable rights.[351] A declaratory judgment affirming the treaty right to protection of salmon capital combined with strict parameters setting general time frames and goals for rebuilding runs is a prerequisite to any meaningful relief.[352] Short of that, the federal and state sovereigns will likely give lip service to treaty rights but continue their regulatory policies of eradicating salmon capital.

One serious criticism of a negotiated remedy process is that the public does not have a position at the table. Environmental advocates, the fishing industry, businesses, and recreational groups all have an interest in the outcome of any negotiations conducted among various sovereigns to allocate species conservation responsibilities. Designing a broad remedy structure within the judicial branch deprives these public and special interests of the participation they would normally be entitled to if the remedy were created

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350. *See* Wilkinson, *supra* note 330, at 403 ("The judicial decisions [in treaty litigation] to date have been valuable and necessary in announcing the continuing validity of the treaty promises and in establishing the broad regime for applying the treaties' relatively general terms to modern circumstances."); Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1038 (1983) (O'Connor, J., dissenting) ("[A] statement of relative rights may induce the parties to cooperate in devising a plan to accommodate not only the rights of all but also the difficulties of management, as the [state governments] did when sued by the Indians for enforcement of treaty fishing rights."); United States v. Washington, 384 F. Supp. 312, 413, 417-18 (W.D. Wash. 1974) (ordering states and tribes to develop program to implement harvest ruling and noting, "[i]n order to facilitate that implementation, it is necessary and desirable to define with specificity the obligations of the parties under the decision, making allowance for special practical problems and circumstances which a court of equity must heed").

351. Commentators emphasize that ADR can only be fair if the parties have equality in bargaining position. *See* AMY, *supra* note 339, at 130 ("[W]ithout a relative balance of power between the disputing parties, sincere negotiations [are] unlikely to take place."); Tsosie, *supra* note 339, at 36 n.62 and accompanying text. In the context of natural resource conflicts, the only practical way for tribes to gain equality of power with the other sovereigns is through a judicial declaration of their rights. *See id.*, *supra* note 339, at 39-42 ("[T]he legal claims of Indian people give them bargaining power. . . . In Indian natural resources disputes, unlike other types of disputes, the law provides the central starting point in any negotiation."); *id.* at 70 ("[T]he tribes have been required to initially litigate their claims to establish a legal entitlement before the states have perceived that they must negotiate an agreement to protect their interests in the same resource."); Folk-Williams, *supra* note 345, at 71 (discussing Indian water rights, noting, "the necessary precursor to negotiation is a litigation strategy aimed at winning recognition of the power of one or more parties").

352. While this approach would generally leave the details of salmon restoration to the parties, there may be some restoration measures that are so critical that a court must mandate them as part of establishing sidewalls. For example, overwhelming scientific evidence suggests that breaching four Snake River dams is essential to recovering the imperiled Snake River species. *See supra* notes 300-01 and accompanying text. Moreover, judicial enforcement of the Endangered Species Act may require court-ordered structural or operational modifications of the major fish-killing dams. *See* Wood, *Endangered Rivers*, *supra* note 300, at 268. NMFS is studying a dam-breaching scenario within the context of the ESA. *See* Blumm & Corbin, *supra* note 230, at 556, 603; Blumm, *Saving Snake River*, *supra* note 300, at 1003. A court might enforce this measure as one of the parameters of relief in treaty rights litigation.

within a standard administrative structure. At a very general level, this concern may partially be allayed by the fact that the negotiating parties are sovereign governments which have the authority of the citizens they represent. The concern, however, may warrant designing the negotiation process to include appropriate notice to interested parties of critical bargaining points and the opportunity to comment through amicus participation.[353]

In approving a consent decree incorporating the terms of a settlement, a judge has the duty to ensure that the outcome of the negotiations results in a remedy adequate to implement the rights of the parties within legally defined parameters set forth during the liability stage of litigation.[354] The court's determination must be independent of the fact that all parties agree to particular terms.[355] This judicial scrutiny provides some measure of security to protect general public interests against a negotiation process that is imbalanced or flawed. Though the remedy must approximate the liabilities of the parties as determined by the court, a judicial remedy need not enforce rights of the parties with flawless exactitude. Particularly in the treaty fishing context, courts have emphasized that mathematical precision is not necessary when enforcing treaty rights,[356] and that "central tenant[s]" of equity

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353. An emerging body of law addresses the rights of third parties in consent decrees. *See* discussion at Callies, *supra* note 339, at Part IV; Bergdall, *supra* note 339, at 329.

It should be noted that the number of parties affected by a court's ruling in the treaty conservation context far surpasses the realm of interests affected by past harvest rulings, which concerned primarily fishing interests. Accordingly, the remedy model developed in past harvest litigation should be examined carefully as to its adequacy regarding the rights of third parties.

354. *See* United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990) ("Before approving a consent decree, a district court must be satisfied that it is at least fundamentally fair, adequate and reasonable. In addition, because it is a form of judgment, a consent decree must conform to applicable laws.") (internal citation omitted); United States v. Oregon, 699 F. Supp. 1456, 1461 (D. Or. 1988) ("[T]he court should examine [a consent decree] carefully to ascertain not only that it is a fair settlement but also that it . . . represents a reasonable factual and legal determination based on the facts of record . . . .").

355. *See United States v. Oregon*, 913 F.2d at 581 (noting consent decrees that affect the public interest or third parties impose a "heightened responsibility on the court to protect those interests").

356. *See* Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1026 (1983) ("A decree may not always be mathematically precise or based on definite present and future conditions."); United States v. Oregon, 913 F.2d 576, 585 (9th Cir. 1990) ("Deviations from this exact [50% allocation] formula have been tolerated to accommodate the [complexities in the case]."); United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974):

> While emphasizing the basic principle of sharing equally in the opportunity to take fish at usual and accustomed grounds and stations, the court recognizes that innumerable difficulties will arise in the application of this principle to the fisheries resource. For the present time, at least, precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience.

jurisprudence allow flexible decrees to accommodate practical or equitable concerns.[357]

3. Co-management Remedy Implementation Structure

The focal point of a negotiated remedy on a macro, sovereign-to-sovereign level should be a management structure to implement court-determined conservation responsibilities. Courts have acknowledged the constantly changing nature of the fisheries environment and the impracticality of rendering an "overly-detailed judicial predetermination" of management issues.[358] Rather than negotiate innumerable numbers of detailed anticipatory solutions to complex site-specific problems that may arise, the parties should use the remedy stage of litigation to create a sound management structure to carry out the treaty conservation rulings. Such a structure should be anchored by principles of liability, anticipate the general matrix of management issues that are likely to arise, and set forth procedures for resolution. This approach has generally been successful in the *United States v. Oregon* litigation where the parties developed a Columbia River Fish Management Plan (CRFMP) to implement court-ordered allocation principles.[359] During the years it was in effect, the CRFMP served as a template for administrative coordination among states and tribes in the harvest management arena.[360]

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357. United States v. Oregon, 657 F.2d 1009, 1015 (9th Cir. 1981). In the context of approving the CRFMP which created a framework for implementing harvest allocations among the various states and tribes, the Ninth Circuit noted, "[A] consent decree need not impose all the obligations authorized by law .... Rather, the court's approval [is an] 'amalgam of delicate balancing, gross approximations and rough justice.'" *United States v. Oregon*, 913 F.2d at 580-81 (citation omitted).

358. *See* Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969).

359. United States v. Oregon, 699 F. Supp. 1456, 1469 (D. Or. 1988). *See* Wilkinson, *supra* note 330, at 406 (describing state-tribal co-management system in Pacific Northwest as a "model for the nation"). Unfortunately, the CRFMP expired at the end of 1998, and the parties have not yet successfully renegotiated the plan. Paul Lumley & Mike Matylewich, *Fall Fishery Blues*, WANA CHINOOK TYMOO, Winter 1999, at 19. The primary parties to the CRFMP were the Yakama, Nez Perce, Umatilla and Warm Springs Tribes, the states of Oregon, Washington, and Idaho, and the federal government. *United States v. Oregon*, 699 F. Supp. at 1458. For discussion of tribal co-management within the context of the CRFMP, see Wood, *Regaining the Sovereign Prerogative*, *supra* note 54, at 48-52; Wilkinson, *supra* note 330, at 406-07. The idea of extending the CRFMP model to establish a multi-sovereign cooperative management structure for fish habitat protection in ceded areas was first explored in Wood, *Regaining the Sovereign Prerogative*, *supra*, at 48-57, 63-64 (analyzing procedural mechanisms of the CRFMP and noting, "The CRFMP, which sets up a cooperative co-management process for many aspects of harvest management, might readily be extended to the context of habitat protection."). More recent commentary suggests the same. *See* Goodman, *supra* note 54, at Part V.B.

360. The CRFMP stated: "The tribes and the states of Oregon and Washington currently share regulatory jurisdiction over mainstem treaty Indian fisheries. This requires compatibility of tribal and state regulations. The purpose of this section is to promote effective tribal/state co-management and facilitate enforcement by insuring compatibility of tribal and state law." COLUMBIA RIVER FISH MANAGEMENT PLAN Part IV.E. (Nov. 9, 1987) [hereinafter CRFMP] (on file with author).

Co-management principles are key to any structure implementing a treaty conservation ruling. As sovereigns with shared interests in a migratory fishery, tribes must have a substantive role in managing the natural capital that sustains their treaty assets; experience has amply demonstrated the inadequacy of exclusive management by the other sovereigns.[361] While tribes cannot gain direct regulatory authority over salmon habitat or populations off the reservations due to the tribes' domestic dependent nation status,[362] they can gain a substantive role in the enforcement of their treaty rights through inter-sovereign processes established in a court decree. The right of tribes to co-manage their treaty resources along with state and federal governments is already well-settled in the area of harvest allocation.[363]

Co-management should frame not only policy decisions, but scientific determinations as well. Issues of species recovery turn on scientific assumptions over which the federal government, tribes, and states often have serious differences. For example, federal managers support barging as an effective method for salmon recovery, while tribal and state managers believe that barging greatly exacerbates salmon decline and that breaching dams is necessary for species recovery.[364] Although recovery choices certainly involve policy issues, the projections as to which method will be most effective in restoring salmon populations is cast as a scientific issue.[365] Observers contend with apparent justification that federal managers "politicize" the science of salmon management to serve federal and industrial interests.[366] If tribes do not participate meaningfully in scientific determinations governing salmon recovery, their treaty rights may well fall sway to the highly politicized process that has arguably subverted salmon recovery for the last two decades.[367]

A co-management role for tribes in the technical and scientific realm puts tribal scientists on equal footing with federal and state scientists. This contrasts with the classic litigation model in the administrative law context,

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361. *See* Wood, *Wildlife Capital Part I, supra* note 1, at Section II.B.2.

362. *See supra* note 48 and accompanying text.

363. *See* Wilkinson, *supra* note 330, at 406-09 (providing examples from Columbia River Basin, Puget Sound, and Great Lakes region); *see also* Idaho *ex rel.* Evans v. Oregon, 462 U.S. 1017, 1038 (1983) (O'Connor, J., dissenting) (noting success of tribal co-management with states in implementing treaty rulings).

364. *See* Wood, *Endangered Rivers, supra* note 300, at 226-27.

365. *Id.* at 226-27, 244-45.

366. *See* Wood, *Wildlife Capital Part I, supra* note 1, at 24, 25 nn.130-32 and accompanying text; Wood, *Endangered Rivers, supra* note 300, at Part IV.D. (and sources cited therein); Blumm & Corbin, *supra* note 230, at 602-04.

367. *See* Wood, *Endangered Rivers, supra* note 300, at 255-67 (arguing for a "shifting deference" standard which would allow deference to tribal science in judicial review of scientific determinations under the ESA).

where the courts accord tremendous deference to federal agencies on scientific and technical matters.[368] If agency science is politicized, such judicial deference in effect insulates flawed agency decisions from meaningful scrutiny[369] and excludes tribal science from the realm of decision-making. Unlike the administrative law context, the agency deference principle should have no direct legal force in treaty based litigation.[370] The co-management process should accord equivalent roles to tribal and other agency science.

While the actual design of co-management structures may vary tremendously according to the particular characteristics of the governmental and environmental context, one element seems essential. The structure should include a dispute resolution procedure to invoke when tribal, state, and federal managers disagree over particular issues in both the policy and scientific realms. Such a procedure makes the co-management structure more flexible and able to respond to conflicts expeditiously.[371] Not only does the process save the parties from going to court over individual issues that require rapid resolution, but it also may result in a more enduring, cooperative relationship among the tribal and state co-managers. Nevertheless, where irreconcilable disputes arise and the resolution process fails, the structure should provide for resort to federal courts under on-going jurisdiction.[372]

Though no longer in effect,[373] the CRFMP provides an example of co-management in both the scientific and policy realms with a dispute resolution procedure to handle conflicts of either sort. The CRFMP identified the individual fisheries and set forth specific management criteria for each one, including escapement goals and rebuilding objectives.[374] The plan established a Technical Advisory Committee (TAC) to provide coordination between tribal, state and federal fishery managers in developing specific harvest criteria as each season approached.[375] The TAC was comprised of fisheries scientists

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368. *See id.* at 255-56.

369. *See id.* at 245 nn.351-53 and Section IV.A; Blumm & Corbin, *supra* note 230, at 604 (suggesting that NMFS may be "practicing its own form of 'agenda-driven' science [and] coupled with the deferential review the courts are giving NMFS decision making, [NMFS may have] all the scientific 'cover' the agency needs to continue 'business as usual' under the ESA").

370. *See* Muckleshoot v. Hall, 698 F. Supp. 1504, 1520 (W.D. Wash. 1988) (declining to apply principle of deference to treaty rights claims, holding, "the treaty rights question is a legal issue which the court decides de novo").

371. As Professor Bergdall observes, consent decrees can be "powerful and often unwieldy beasts," and their flexibility may depend on alternative dispute resolution systems that are built into the decree itself. Bergdall, *supra* note 339, at 329-30.

372. *See infra* Section V.A.4.

373. *See supra* note 359.

374. CRFMP, *supra* note 360, Part II; Wood, *Regaining the Sovereign Prerogative, supra* note 54, at 49.

375. CRFMP, *supra* note 360, at Part IV.A; Wood, *Regaining the Sovereign Prerogative, supra* note 54, at 50 (describing TAC). The CRFMP established a similar committee to provide recommendations on

representing each of the sovereign parties to the *United States v. Oregon* litigation.[376] The TAC collected and analyzed data from the various tribal, state and federal fisheries agencies and made reports and technical recommendations regarding harvest management.[377] The co-management at this scientific and technical level was designed to fit within the inter-state harvest regime that pre-existed the *United States v. Oregon* litigation. The Columbia River Compact, an interstate agency created by Congress in 1918 to govern harvest of the Columbia River salmon, established harvest restrictions on the river.[378] After the TAC arrived at a set of harvest criteria, it submitted it to the Compact for approval.[379] While the recommendations of the TAC were not binding, the Compact typically adopted them because they were derived from a consensus process involving all affected parties.[380] After the Compact adopted restrictions to govern the fishery, the various state and tribal jurisdictions translated the restrictions into regulations that applied to their own fishers.[381]

In addition to the TAC, the plan also established a "Policy Committee."[382] This was in recognition of the fact that harvest questions often have policy aspects relating to equitable treatment of fishers. The functions of the TAC and the Policy Committee were carefully delineated in an effort to prevent political questions from infecting the purely scientific aspects of harvest management.[383] The Policy Committee was comprised of a representative

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production issues. *See* CRFMP, *supra* note 360, at Part IV.B. (creating "Production Advisory Committee").

376. The TAC was comprised of one technical representative from each of the following entities: Idaho, Oregon, Washington, the Nez Perce Tribe, the Umatilla Tribe, the Warm Springs Tribe, the Yakama Indian Nation, the Shoshone-Bannock Tribe, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. *See* CRFMP, *supra* note 360, at Part IV.A. The Shoshone-Bannock Tribe had a seat at the TAC even though it was not a party to the overall agreement. *See id.* at Part I.A (listing parties to CRFMP).

377. *See id.* at Part IV.A.

378. *See* United States v. Oregon, 699 F. Supp. 1456, 1459 (D. Or. 1988); *see also* Wood, *Regaining the Sovereign Prerogative, supra* note 54, at 50.

379. *See United States v. Oregon*, 699 F. Supp. at 1468.

380. *See id.*

381. *See* Wood, *Regaining the Sovereign Prerogative, supra* note 54, at 50. Each sovereign enforces its own harvest regulations.

> [T]he Columbia River Inter-Tribal Fish Commission, an inter-tribal agency representing the four tribes on fishery matters, has a substantial law enforcement division which has gained an impressive record in abating illegal harvest. Moreover, the states and tribes have entered into cooperative law enforcement agreements which allow for combined efforts on the difficult problems posed by poaching. These agreements provide that Indian fishers cited by state or federal enforcement officers for violating fishing regulations shall be referred to tribal authorities for prosecution.

Id.

382. CRFMP, *supra* note 360, at Part IV.C.

383. Wood, *Regaining the Sovereign Prerogative, supra* note 54, at 50 (describing Policy

from each party, and its function was to "facilitate cooperative action by the Parties with regard to fishing regulations, policy disputes, coordination of the management of fisheries on Columbia River runs, and production and harvest measures."[384]

Integral to the overall CRFMP structure was a dispute resolution process. The court necessarily played a role, but the role was restrained and structured to allow maximum opportunity for the parties to settle their disputes internally, outside of the judicial forum. Because many disputes involved purely technical questions requiring expertise beyond the realm of standard judicial inquiry, the court maintained a neutral "technical advisor" to provide advice to the court on scientific questions and to serve in a dispute resolution capacity when disagreements arose within the CRFMP planning process.[385]

The CRFMP provided that if the members of the TAC could not reach consensus in designing harvest criteria or on other technical issues, any party could request through the TAC Chairman review of the matter by the court's technical advisor.[386] The TAC would convene a session, over which the technical advisor presided, to address the technical dispute. The technical advisor's role in this capacity was one of facilitator, not arbitrator.[387] If the advisor determined that the parties were unable to reach an accord, the Chairman of the TAC would report the dispute to the various tribal, state, and federal management agencies, carefully indicating areas where consensus had been achieved and areas where disagreement still existed.[388] The report would set forth each member's recommendations and the technical justifications supporting them.[389] This process alone stimulated consensus-building because it often demonstrated to all involved the various strengths and weaknesses, on a purely technical level, of each party's position. If the matter remained unresolved, it was referred to the Policy Committee, which reviewed the entire record and attempted to reach resolution.[390] As a last resort, the CRFMP provided that any party could bring remaining issues to the court.[391]

Committee).

384. CRFMP, *supra* note 360, at Part IV.C.

385. *Id.* at Part IV.A.5; Wood, *Regaining the Sovereign Prerogative*, *supra* note 54, at 50-51 (describing role of technical advisor).

386. CRFMP, *supra* note 360, at Part IV.A.5.

387. *Id.*

388. *Id.* at Part IV.A.5, 6.

389. *Id.* at Part IV.A.6.

390. *Id.* at Part IV.D.4.

391. *Id.* at Part I.C. Settlement sometimes ensued after the parties resorted to court action. In a serious fishing dispute during the fall of 1994, after weeks of meetings in which the parties had been unable to achieve consensus, Judge Marsh of the district court of Oregon succeeded in persuading the parties to arrive at a settlement during a two-hour recess from the courtroom. *See* Roberta Ulrich, *Tribes Receive Commercial Fishing Season Extension*, OREGONIAN, Sept. 3, 1994, *available at* http://

4. Judicial Enforcement Through On-going Jurisdiction

A judicial remedy to protect wildlife capital should also provide for the on-going jurisdiction of the court which can be invoked when disputes cannot be settled through the agreed upon dispute resolution processes. Ongoing jurisdiction is a prominent feature of treaty harvest litigation; the district courts in both the *United States v. Washington* and *United States v. Oregon* treaty litigation maintain continuing jurisdiction over disputes that arise in implementing the courts' treaty rulings.[392] Having a continued judicial forum as part of the remedy in treaty conservation cases is necessary in order to maintain the sidewalls of a liability ruling, because it allows the court to decide implementation disputes concerning specific scientific or policy issues and also to enforce components of the remedy structure. The latter role has characterized the courts' involvement in historic treaty litigation when defiant state parties refused to implement the court's treaty rulings.[393]

Whether the court acts as final decision-maker over implementation disputes or in an enforcement capacity, on-going jurisdiction has two distinct advantages in the species recovery context. The first is that it allows quick access to the court without the need for reinitiating an entirely new lawsuit. In the wildlife context the element of time distorts the parties' negotiating positions because the crisis of extinction adds a premium to quick action and a penalty to delayed action. Moreover, when dealing with fishing rights, ongoing jurisdiction is necessitated by the narrow window of time in which fishing seasons take place. Harvest seasons in the rivers of the Pacific Northwest occur as the fish are migrating from the ocean back to their natal waters to spawn.[394] The harvest thus occurs within a limited time frame, and the seasons and precise catch limits may not be set in advance of the migration. As the court in *United States v. Washington* noted, many fishing restrictions cannot be made until the fish are actually passing through the fishing areas, and therefore "[c]ontinuing the jurisdiction of th[e] court in the present cases

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www.newslibrary.com.

392. *See* United States v. Oregon, 699 F. Supp. 1456, 1459 (D. Or. 1988); Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969); United States v. Washington, 384 F. Supp. 312, 347 (W.D. Wash. 1974).

393. As the Supreme Court described the *United States v. Washington* litigation:

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except 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.

Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 n.36 (1978).

394. *See* Wood, *Trust III*, *supra* note 234, at 768-69 (describing Indian fishing practices in Columbia River Basin).

may, as a practical matter, be the only way of assuring the parties an opportunity for timely and effective judicial review of such restrictions . . . [because it provides a] readily available early hearing and determination of factual and legal questions that may arise in interpreting and applying such rulings."[395] A special process for expedited rulings from the court may be necessary for conflicts, such as harvest, in need of urgent resolution.[396]

A second advantage of on-going jurisdiction in treaty conservation cases is that one judge may keep control over the case as it progresses and changes through the years. Familiarizing new judges with the case requires enormous time and expense due to the sheer complexity of modern wildlife issues. Moreover, the negotiated remedy process creates, in effect, a quasi-administrative structure to implement judicial liability rulings, thereby adding another level of complexity to implementation and enforcement. Under on-going jurisdiction, one judge overseeing the same litigation for an extended period of time will have more familiarity with the case, which in turn should result in more informed decisions and significant cost and time savings to the court and the parties.[397]

5. The Use of Special Masters

A final feature of the remedy structure in treaty conservation cases may be the use of special masters to assist the court in performing a variety of functions. Special masters have been used extensively in treaty harvest litigation.[398] Judges have authority to appoint special masters under Rule 53 of the Federal Rules of Civil Procedure as well as under their inherent powers.[399] While it is constitutionally problematic to use special masters in

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395. *United States v. Washington*, 384 F. Supp. at 347.

396. Because harvest occurs during periods of migration which last only a few weeks, the CRFMP negotiated in the *United States v. Oregon* litigation provided for expeditious judicial review, and the court often adjusted its schedule of cases to hear fishing disputes before they were rendered moot by natural conditions. *See* CRFMP, *supra* note 360, at 6; Wood, *Regaining the Sovereign Prerogative*, *supra* note 54, at 51.

397. Of course a legitimate counter-concern is that one judge maintaining control of the case forecloses the opportunity for more pluralistic decision-making that may result from random case assignment throughout a judicial district.

398. *See, e.g.*, United States v. Washington, 135 F.3d 618, 643 (9th Cir. 1998) (approving district court's use of panel of four special masters but requiring reconfiguration of method by which masters are appointed); *United States v. Washington*, 384 F. Supp. at 413 (appointment of special master to assist court in resolving future matters which may arise in implementing the decision); Farrell, *supra* note 316, at 261-64 (describing role of special master in Michigan treaty rights litigation).

399. *See* Farrell, *supra* note 316, at Part III. In non-jury trials, Rule 53 of the Federal Rules of Civil Procedure limits the appointment of special masters to cases in which some "exceptional condition requires it." FED. R. CIV. P. 53(b). According to Professor Margaret Farrell, the restriction poses less of a barrier when the special master's function is to oversee a remedial matter as opposed to the merits of a case.

making liability determinations—a role reserved for Article III judges[400]—complex litigation often requires the services of a variety of "parajudicials" to coordinate and oversee the quasi-administrative processes necessitated in the remedy phase of cases.[401]

Special masters may play three separate roles in the remedy phase of treaty conservation litigation. First, they may structure the negotiated remedy process and facilitate settlement among the parties.[402] Courts increasingly select professionals experienced in mediation or in the particular subject matter of the suit as special "settlement masters" to move the parties towards a negotiated settlement.[403] When used in this capacity, the parajudicial brings the resources of the court to create a more flexible, workable remedy structure than that which would be created by a judge acting in a singular capacity.[404] Such masters identify areas of consensus, narrow the issues, and may separately discuss with the parties the strengths and weaknesses of their positions.[405] Special masters may use flexible processes in this phase of litigation, such as "shuttle diplomacy, investigating facts outside the courtroom, commissioning studies, [c]onducting informal fact finding proceedings, [and engaging in] ex parte communications."[406] By having the time to devote to the case as well as the latitude to use informal procedures, special masters are better able than judges to work with the parties towards agreement. At the same time, the special master serves as a necessary buffer between the parties and the judge in the event of unresolvable disputes.[407]

Farrell, *supra*, at 249 n.50 and accompanying text.

She notes that courts have made broad use of Rule 53 authority to appoint special masters in complex litigation spanning antitrust, patent, institutional reform, products liability, mass tort, and malpractice cases. *Id.* at 249 nn.51-55 and accompanying text. Special masters may also be appointed upon the consent of the parties. *Id.* at 246 n.37 and accompanying text. Finally, courts have special statutory authority to appoint magistrates as special masters. *Id.* at 246 n.39 (discussing the Magistrates Act, 28 U.S.C. § 636).

400. *See* Farrell, *supra* note 316, at 250-51 nn.62-68 and accompanying text.

401. *See id.* at 236-38 ("In many of their roles masters function like administrative agencies within the judiciary, appointed to carry out the new tasks we give to courts."). The use of special masters in the remedial phase of litigation does not seem to pose a Constitutional problem. *See id.* at 250-51 nn.66-68 and accompanying text.

402. *See id.* at 250-51 (noting that in this capacity appointment of a master is usually made with the initial consent of the parties, and the master's effectiveness depends on the parties' continued agreement).

403. *Id.* at 262-66 (discussing cases using settlement masters). For further discussion of settlement masters, see Kenneth R. Feinberg, *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 ALB. L. REV. 881 (1996).

404. *See* Farrell, *supra* note 316, at 265.

405. *Id.* at 262-67 (providing examples); Feinberg, *supra* note 403, at 886-89 (same).

406. Farrell, *supra* note 316, at 278; *see also id.* at 242 (noting frequent use of other informal proceedings such as "round table discussions, conference calls, personal interviews and correspondence with the parties").

407. *See id.* at 263-65; Feinberg, *supra* note 403, at 885, 891-92 (discussing "buffer" role but also expressing concern over ill-defined ethical norms pertaining to appropriate contact between settlement masters and the court over the subject of negotiations).

A second role of a special master is to provide a neutral, yet personalized and streamlined forum in which to resolve disputes expediently as they arise during implementation of the remedy.[408] As noted above, consent decrees in treaty conservation litigation should provide for dispute resolution processes to resolve ongoing co-management conflicts at both the policy and technical levels.[409] Special masters may play a role in either mediating or arbitrating such disputes. Conversely, should the conflict be an irreconcilable one and need resolution by a judge, a special master can investigate complex scientific issues and make recommendations to the court.[410] In order to preserve neutrality at the level of formal judicial decision-making, the master who plays an unsuccessful mediation or arbitration role should not be the same person called upon to frame issues for the judge; within complex negotiated remedy structures there may be a need for more than one special master.

By providing resources to assist settlement and streamline judicial resolution when necessary, special masters may add tremendous value to the remedy implementation phase of litigation. The special master's intimate familiarity with the case and (in some circumstances) special expertise in scientific issues[411] expedites resolution of disputes. This is an important objective in the species conservation context where an issue between the parties may truly have immediate and irrevocable consequences to the survival of a species.

A third role of special masters in the remedy phase is assisting the court with necessary enforcement of the consent decree.[412] Ideally, any consent decree should be self-implementing, particularly when the parties to it are sovereign governments whose representatives have agreed to its terms. Yet, experience from past treaty harvest litigation—in which state agencies blatantly violated district court orders[413]—supports ongoing court jurisdiction to provide swift enforcement in necessary cases. Enforcement in the treaty conservation context, unlike cases involving single parties with private disputes, is likely to be extraordinarily complex. Past enforcement of treaty harvest rights alone required the district court to take over an entire harvest

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408. *See* Farrell, *supra* note 316, at 267-70 (discussing role of special master in overseeing remedy implementation).

409. *See supra* notes 371-90 and accompanying text.

410. *See* Farrell, *supra* note 316, at 267-68 (describing role of special masters as "active investigator" during remedy implementation phase of complex toxic tort litigation). For discussion of the use of special master to handle scientific issues in litigation, see Margaret G. Farrell, *Coping With Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927 (1994).

411. *See* Farrell, *supra* note 316, at 242 n.20 and accompanying text (noting appointment of special masters for their particular specialized expertise).

412. *See id.* at 271-72 (noting appointment of special masters to investigate compliance with remedial decrees in institutional reform suits).

413. *See supra* note 393 and accompanying text.

management regime, thereby placing the district court judge in the position of "fishmaster."[414] A broad remedy designed to manage natural wildlife capital will entail even more complexity. While the Supreme Court has unequivocally affirmed the authority of district courts to take over administrative management when faced with blatant repudiation of their orders,[415] the prospect is nevertheless a daunting one and requires special resources of the court.

Special masters serve an essential role in meeting this immediate challenge when the need arises. Using the expertise gained from continuous involvement in the case, they may deploy pre-developed contingency processes that, in practical terms, combine to form an enforcement "agency" within the court.[416] Due to time exigencies which are so often present in species conservation conflicts, only a special master with long-standing familiarity with the case, the parties, the issues, and the remedy structure will be effective in such an enforcement role. While direct judicial management of the sort necessitated in past harvest litigation may be a rare occurrence, judicial readiness to carry out such enforcement is a vital sidewall to any treaty rights ruling. However, the prospect of swift judicial enforcement under the ongoing jurisdiction of the court is only realistic if the court has a pre-developed remedy implementation process and special resources to invoke should the parties violate their negotiated consent decree.[417]

In sum, due to the complexity and unique remedial challenges of treaty conservation litigation, the special master may constitute an indispensable component of the remedy structure. The function of special masters is to create and implement a "designer" remedy suited to carry out broad liability rulings among sovereigns. In essence, the special master creates a unique administrative capacity within the court to oversee the remedy phase of the litigation.[418] In light of the numerous roles special masters may perform, a district judge may appoint several individuals to carry out different functions.[419] It may be necessary to hire other parajudicials as well to provide administrative support.

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414. *See supra* notes 315, 322 and accompanying text.

415. *See supra* note 322 and accompanying text.

416. *See* Farrell, *supra* note 316, at 238 (noting, "[i]n many of their roles, masters function like administrative agencies within the judiciary").

417. There is, though, a danger that if a special master develops a bias in a case over a period of time, he or she may subvert enforcement of the decree. Special procedural safeguards should be in place to protect against this.

418. *See supra* note 416 and accompanying text.

419. In most cases the parties pay for the services of a special master. *See* Farrell, *supra* note 316, at 247 n.42 and accompanying text.

Of course, despite the numerous benefits of using special masters, there are serious, legitimate concerns associated with their use. In overseeing the remedy phase of litigation, the special master in effect usurps the classic judicial role traditionally carried out by Article III judges; this transformation triggers significant concern among some commentators.[420] Moreover, while functioning much like an administrative agency within the judiciary, special masters are "answerable only to the judge who appoints them [and] not bound by an Administrative Procedures Act and are not accountable to the electorate through either the legislative or executive branches."[421] Additionally, long-standing involvement with a case gives the special master tremendous power over the parties, and the potential for bias is significant. Another serious concern is that a special master who leaves a case after long involvement will create an administrative void before the next individual becomes fully acquainted with the intricacies of the remedy structure, the parties, and the issues. These and other concerns certainly warrant further scholarly and judicial attention to develop appropriate procedural safeguards.

B. Damages

No matter how ambitious, injunctive relief cannot immediately restore the natural capital of the species. During the time of rebuilding, which may take more than a century,[422] violations of treaty rights will continue despite recovery measures taken pursuant to an injunction. These continuing violations form the basis of a damages remedy potentially available in other forums as a corollary to injunctive relief.[423] As noted earlier, damages claims may be used in concert with claims for injunctive relief as part of an overall strategy to force rebuilding of salmon runs.[424] This section briefly explores the nature of damages in the treaty rights context.

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420. *See, e.g.*, Resnik, *supra* note 317, at 377 nn.5-11 and sources cited therein.

421. *See* Farrell, *supra* note 316, at 238.

422. *See supra* note 287 and accompanying text.

423. Examination of procedural hurdles in such litigation is well beyond the scope of this Article. Instead, this section simply explores the concept of natural resource damages as it applies to theories of "wildlife capital" presented earlier.

Apart from damages, in theory, tribes could also gain some in-kind compensation for their losses through a transfer of non-Indian fishing rights to the Indian sector. However, the equitable fifty-fifty allocation of yield is firmly settled by the "law of the case" in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686 (1979), and *United States v. Oregon*, 913 F.2d 576, 585 (9th Cir. 1990) (but also noting that deviations from the 50% division required by the law of the case "have been tolerated to accommodate the complex sharing required by the unique nature of the Columbia River runs and the parties that are entitled to share it"). Moreover, depriving the non-Indian sector of its harvest entitlement could re-ignite former hostilities on the part of non-Indian fishermen and could paralyze a sector of society that is advocating hard for salmon restoration.

424. *See supra* notes 326-29 and accompanying text.

At the outset, it is imperative to understand that damages are no substitute for equitable relief consisting of steps to restore salmon as expeditiously as possible to allow a full measure of tribal fishing.[425] Throughout the history of federal-Indian relations, the majority society has "bought out" Indian property rights by providing damages for takings.[426] In this manner, tribal land, resources, and a way of life have been destroyed time and again under the guise of fair compensation. The Columbia River tribes have made it clear that their cultural survival depends on actual fish, not dollars.[427] While it is perhaps more expedient for the federal government to simply pay out damages to tribes rather than restore fish, the fundamental premise of the treaties requires more—the preservation of a fishing culture and way of life. Accordingly, courts should be strict in enforcing injunctive relief even in light of pending damages claims based on continuing violations.

Further, in any discussion of damages, it is critical to note that ongoing violations of treaty rights—actions which are subject to corrective measures through injunctive relief—are not the same as treaty abrogations. A treaty abrogation is a congressionally authorized action that reflects a clear and plain intent on the part of Congress to *extinguish* a property right created by a treaty.[428] In an instance where Congress is clearly aware of the impact of a federal project on treaty fishing rights, authorizes the federal project anyway, and compensates tribes for loss of property, abrogation occurs with respect to those particular treaty rights.[429] Overall, the generalized depletion of salmon capital resulting from federal and private hydro-operations and habitat destruction throughout the Columbia River Basin amounts to an ongoing violation of treaty rights without congressional abrogation of such rights. The distinction is vital in terms of damages for fisheries losses. Treaty abrogation requires one-time compensation for the permanent taking of native "property"

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425. *See* Tsosie, *supra* note 339, at 35 ("[I]ndian people have legal rights to land and resources under American law [and] a paper victory is not enough for contemporary Indian tribes, who desire actual use of land, water, and hunting and fishing rights.").

426. For discussion of the Indian claims process, see DAVID H. GETCHES, ET AL., *supra* note 267, at 311-18.

427. Nez Perce Brief, *supra* note 58, at 34 (describing the role of salmon in tribal culture).

428. *See* United States v. Dion, 476 U.S. 734, 740 (1986) (federal statutes may abrogate treaties only if there is "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty"). In the context of Pacific Northwest Treaty fishing rights, the Court has noted, "Absent *explicit* statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights." *Washington Passenger Fishing Vessel*, 443 U.S. at 690 (emphasis added).

429. For example, Congress provided compensation for the loss of tribal use of fishing sites inundated as a result of the construction of the Dalles Dam on the Columbia River. *See* Whitefoot v. United States, 293 F.2d 658, 658-63 (Ct. Cl. 1961).

protected by the Fifth Amendment of the Constitution,[430] whereas ongoing violations invoke damages of a reoccurring nature until the violations abate.

A tribal claim for such ongoing violations approximates most closely a claim for natural resource damages. Such damages are now a common form of compensation for a sovereign's loss of natural assets.[431] Federal statutes such as the Clean Water Act, the Oil Pollution Act, and the Comprehensive Environmental Response Cleanup and Liability Act provide for such damages,[432] and they are also available in common law.[433] Exhaustive regulations issued pursuant to statutory natural resource damages provisions provide a methodology for computing such damages,[434] which may include losses to fish, wildlife, habitat, water resources and other natural assets.[435]

Two characteristics mark this type of damages remedy within the context of federal statutory law, and these logically apply to the common law context as well. First, only sovereign entities, as opposed to individuals, can claim natural resource damages.[436] This limitation flows from the nature of sovereign property interests in natural assets, which sovereigns hold in trust for the benefit of their citizenry.[437] Federal statutes limit recovery of natural resource damages to the federal government, tribes, and states.[438]

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430. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968).

431. *See generally* Charles B. Anderson, *Damage to Natural Resources and the Costs of Restoration*, 72 TUL. L. REV. 417 (1997); Judith Robinson, *The Role of Nonuse Values in Natural Resource Damages: Past, Present, and Future*, 75 TEX. L. REV. 189 (1996); Thomas A. Campbell, *The Public Trust, What's it Worth?*, 34 NAT. RESOURCES J. 73, 82-83 (1994).

432. *See* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607 (1994); Clean Water Act, 33 U.S.C. § 1321(f)(4)(1994); Oil Pollution Act of 1990, 33 U.S.C. § 2706 (1994). The Oil Pollution Act essentially replaced the liability created in the Clean Water Act for oil spills. *See* Robinson, *supra* note 431, at 189 n.3 (discussing aforementioned statutes).

433. *See* Anderson, *supra* note 431, at Part III; Campbell, *supra* note 431, at 82-86; Robinson, *supra* note 431, at Part III; Carter H. Strickland, Jr., *The Scope of Authority of Natural Resource Trustees*, 20 COLUM. J. ENVTL. L. 301, Part III.A (1995). Some common law claims may be preempted if they fall within a comprehensive program established by federal statutory law. *See* Anderson, *supra* note 431, at 434-45 (discussing preemption under Clean Water Act). Claims against the federal government or states may involve issues of sovereign immunity, which are beyond the scope of this Article.

434. *See* discussion at Robinson, *supra* note 431, at Part VI; Anderson, *supra* note 431, at 202-07. The ability of economists to set a monetary value on natural assets has greatly advanced efforts to internalize costs of environmental destruction. *See* Susan L. Smith, *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law*, 31 WILLAMETTE L. REV. 261, Part III.B (1995).

435. *See* CERCLA, 42 U.S.C. § 9601(16) (definition of "natural resources").

436. *See* Montauk Oil Transp. v. Steamship Mutual Underwriting Ass'n, No. 90 CIV. 5702 (KMW), 1996 WL 340000, at 2-3 (S.D.N.Y. June 19, 1996); Ala. Sport Fishing Ass'n v. Exxon, 34 F.3d 769, 772-73 (9th Cir. 1994); Anderson, *supra* note 431, at 434.

437. *See Montauk*, 1996 WL 340000 at 2-3; *Alaska Sport Fishing Ass'n*, 34 F.3d at 773; *see also* Wood, *Wildlife Capital Part I*, *supra* note 1, at 58 nn.268-70.

438. CERCLA, 42 U.S.C. § 9601(16) (definition of "natural resources"); Oil Pollution Act of 1990, 33 U.S.C. § 2702(b)(2)(A) (definition of "natural resources" also includes resources held by "foreign trustees"). The Oil Pollution Act, however, does allow recovery of other types of damages by individuals.

Second, monetary awards derived from natural resource damages must be applied to restoration of the natural asset or acquisition of equivalent resources.[439] This restriction logically flows from the nature of sovereign ownership of natural resources, which is a property interest in the form of a trust. Trust law requires preserving (and where possible, restoring) the corpus of the trust, or its principal.[440]

It is important to apply this restriction in the context of common law natural resource damages awarded to tribal sovereigns. The intent of the treaties was to secure a fishing right in perpetuity,[441] and courts have emphasized that the tribes will lose this right if they abandon their fishing culture.[442] Yet native populations are vulnerable to economic pressures brought on by extreme poverty.[443] A restriction that natural resource damages be applied to restoration of the resource helps ensure that a short-term flow of cash damages does not displace a tribal fishing economy which, until this point, has endured for millennia.

There are established economic approaches to calculating natural resources damages. Economists can quantify the lost value of a single fish, or a hundred thousand fish, occurring from a single event or series of events.[444] In order to apply this methodology to the tribal treaty context, it is necessary to define the aggregate number of lost fish per year that forms the basis of the damages entitlement. Certainly any calculation would require periodic modification as the natural capital grows and tribal losses diminish; application of the "moderate living standard" would also trigger adjustments.[445]

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33 U.S.C. § 2702 (b)(2)(B)-(C) (allowing individuals to recover for losses to real or personal property and for loss of subsistence use of natural resources).

439. *See, e.g., Alaska Sport Fishing Ass'n*, 34 F.3d at 772 (citing statutory law); Clean Water Act, 33 U.S.C. § 1321(f)(5); Oil Pollution Act, 33 U.S.C. § 2706 (c)(2)(C)(f); CERCLA, 42 U.S.C. § 9607 (f)(1).

440. *See* Ohio v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974) (concluding that "where the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit . . . to protect the corpus of the trust property"); 76 AM. JUR. 2D Trusts § 365 (1992) (noting that the "primary duty of a trustee is the preservation of trust assets"); *id.* § 443 (same); *see also* Wood, *Wildlife Capital Part I, supra* note 1, at Section V.B.

441. *See supra* note 106 and accompanying text.

442. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 687 (1979) ("[I]f [the tribe] should find other sources of support that lead it to abandon its fisheries, a 45% or 50% allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those circumstances could not reasonably require an allotment of a large number of fish.").

443. *See* discussion at Wood, *Trust II, supra* note 338, at 150-58.

444. For discussion on natural resource damage valuation, see Robinson, *supra* note 431; Anderson, *supra* note 431.

445. *See supra* notes 272-75 and accompanying text.

One approach to calculating the aggregate loss on a yearly basis is to develop a formula estimating the "natural yield" that would result from "natural capital" without losses caused by non-Indian actions. As previously explained, "natural capital" internalizes a deduction representing the "natural encumbrance,"[446] and therefore describes the asset after naturally occurring losses have taken their toll. As explained in Section IV.A, the suggested baseline tribal property right is 50% of the "natural yield," which expresses the right in terms of fish quantities.[447] Adjustments to that figure arise from equitable factors as well as application of the "moderate living" ceiling devised by the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*[448] The resulting figure becomes what could be called the "native entitlement."[449] The difference between the actual harvest quota allocated to tribes in a given year and the "native entitlement" calculated for that year represents, in essence, the "ghost fish" to which the tribes are legally entitled but that are not available for tribal harvest. Applying the methodology of natural resource damage calculation, economists can place a monetary value on these "ghost fish." As previously suggested, a court awarding this type of relief should require that damages for loss of these fish fund restoration measures designed to rebuild the asset over time consistent with obligations incumbent on sovereign trustees.

While natural resource damages may form the central component to a damages remedy, circumstances may also warrant compensation for economic losses suffered by tribal fisherman as a result of destroyed fish runs. As far back as 1939 the Supreme Court of Oregon found that non-Indian fishermen in the Columbia River could sustain a claim for damage to their livelihoods caused by disposal of large quantities of chemicals and sewage which were destroying the supply of salmon and "causing irreparable injury to plaintiffs in their vocation as fishermen."[450] The court found that the fishermen's claim was distinct from claims the state might bring for damage to the fishery itself.[451] By analogy, federal statutory law allows recovery for loss of "subsistence use of natural resources" arising from oil pollution[452]—a type of

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446. *See supra* notes 268-69 and accompanying text.

447. *See supra* note 271 and accompanying text. The natural yield, of course, incorporates a deduction for necessary escapement. *See supra* note 268 and accompanying text.

448. *See supra* notes 272-73 and accompanying text.

449. The suggested distinction between the core property right and the "native entitlement" is relevant, because the latter represents an adjustment of a property right due to equitable factors.

450. Columbia River Fishermen's Protective Union v. City of St. Helens, 87 P.2d 195, 196 (Or. 1939).

451. *Id.* at 198 ("[T]his suit is not brought for the purpose of obtaining the salmon but to protect the right of fishermen to pursue their vocation of fishing.").

452. Oil Pollution Act of 1990, 33 U.S.C. § 2702(b)(2)(C) (allowing recovery by "any claimant who so uses natural resources which have been . . . destroyed . . . without regard to the ownership or management

damage distinct from natural resource damages, which accrue to governmental trustees.[453] As applied to the context of Indian fishing, damages for loss of subsistence are compelling because of the tremendous individual economic reliance on fishing as a livelihood. Such damages, however, should categorically form a component of an overall damages award to tribal governments rather than be awarded to individual tribal fishermen themselves. Courts have firmly recognized the authority of tribal entities to distribute the benefits of treaty property rights among their members.[454]

In the case of Columbia Basin treaty fisheries, economic losses invoke two competing policy concerns. On one hand, tribal fishermen may be unable to sustain their livelihood without some form of economic support during the time salmon stocks are in the process of recovering. Damages to mitigate for economic losses may be a vital financial bridge during economic hardship, and in that sense they may be absolutely crucial to preserving the tribal fishing culture. On the other hand, cash awards to replace lost fishing opportunities may also lead individuals to abandon their fishing livelihoods over time. A middle ground might take the form of an award of damages representing economic losses, administered through tribal entities with the restriction that such funds be used for creating job opportunities related to fish restoration.[455]

CONCLUSION

This Article and its companion article have explored the tribal property right to wildlife capital, using the Columbia River Basin salmon crisis as a case study for applying theories premised on treaty rights. Part I addressed the tribal property right to protect the first component of wildlife capital: replenishing populations of species. It invoked a theory of sovereign

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of the resources").

453. *Id.* §§ 2702(b)(2)(A), 2706(a).

454. *See* Whitefoot v. United States, 293 F.2d 658, 662 n.8 (Ct. Cl. 1961) (holding damages for loss of treaty fishing sites properly awarded to tribe, not individual Indians) ("[T]he Indian tribe has, among its powers of sovereignty, the power to regulate the use and disposition of individual property among its members."). *See also* United States v. Washington, 520 F.2d 676, 691 (9th Cir. 1975) ("The fact that, in general, Indians held property communally has led the courts to hold that property rights, vis-a-vis the United States, are vested in the tribe not in the individual. Disputes among members of the tribe are left for the tribe to adjust internally."); HANDBOOK, *supra* note 48, at 606 (tribal member's interest in communally held tribal property is "derivative" of tribal membership, and "[r]ights to use tribal property are determined by the tribe pursuant to its internal political processes").

455. Amidst the present salmon crisis, many tribal members who cannot fish are seeking positions in the field of salmon restoration. *See* Smith & Berg, *supra* note 57, at 10-14 (describing positions in education, harvest management, enforcement, salmon restoration projects, and the "Salmon Corps," a tribal-federal partnership program which provides 100 jobs to tribal youth each year to engage in salmon restoration).

trusteeship in wildlife to establish a protectable form of tribal property interest in such populations.

This Article (Part II) then addressed native property rights to the second component of wildlife capital: the natural production areas necessary for species survival. It characterized the tribal property right as a native sovereign servitude that tribes hold in the lands ceded long ago to the federal government. The servitude has its origin in the aboriginal management that tribes exercised across their territories in pre-treaty times. It represents a property interest reserved by tribes, either through the express language of treaties, or by necessary implication as a corollary to other reserved property interests, or by implication as a critical incident of sovereignty. The native sovereign servitude falls into a genre of other servitudes held by governments in various forms, the most common of which may be the public trust easements held by states.

While both Parts I and II of this work focused on the Columbia River Basin salmon crisis as a case study for applying principles of sovereign property rights, the theoretical framework is transferable to other treaty right conflicts as a foundation for defining inter-sovereign obligations towards wildlife. At a time when species nationwide are rapidly moving towards extinction, it is imperative that courts define conservation responsibilities among sovereigns through common law, particularly in cases where statutory law offers little meaningful protection.

This Article urged a judicial role based on the model of past treaty harvest litigation between states and tribes. Using a hybrid judicial/administrative approach, courts should define clear parameters of sovereign conservation obligations and provide a structure within which the sovereign parties may negotiate a consent decree setting forth a co-management scheme to implement the court's liability rulings. The implementation of such a remedy should be subject to the continuing oversight and enforcement of the court.

Certainly this role calls for judicial innovation and courage. Courts in the past have readily accepted the responsibility of enforcing treaty rights, even in the face of overwhelming political and economic forces threatening tribal interests. Indeed, the judicial response to the salmon harvest conflicts of two decades ago was both bold and practical, as courts defined and enforced a tribal treaty right to take up to 50% of the harvestable fish in the rivers.[456]

In hindsight, that chapter of treaty rights litigation, while celebrated as a landmark in federal Indian law, had a tragic element of mistaken focus. While courts were defining and enforcing a tribal property right to the yield component of the treaty fisheries, industrial forces were rapidly destroying the

456. *See supra* note 4 and accompanying text.

salmon capital, and the tribal victories rang ever more hollow in subsequent years as the salmon moved toward extinction. In retrospect, courts should have defined the tribal property interest as one in salmon capital as well as yield. Such judicial definition now seems the only prospect for saving the species, as well as the tribal salmon culture itself, from disappearing forever.