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Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?

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DAMAGING INDIAN TREATY FISHERIES: A VIOLATION OF TRIBAL PROPERTY RIGHTS?

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I. INTRODUCTION

In seven decisions spanning over seventy years, the United States Supreme Court has upheld the unique value and solemn import of Indian treaty fishing rights.[1] Uncertainty remains, however, over whether non-Indians may diminish or even destroy, with impunity, the fish that tribes have a treaty-secured right of taking.

One case, pending in the Ninth Circuit Court of Appeals, poses that very question.[2] The Nez Perce Tribe (Tribe) will be urging the Ninth Circuit to reverse the district court ruling that damages may not be awarded against the Idaho Power Company (Company) for infringing upon the Tribe's treaty right of taking fish. According to the Tribe, the Company's dams and impoundments destroyed a substantial portion of the tribal fisheries in the Snake River. A key factor in the district court's decision to deny relief was its characterization of the treaty fishing right as an insufficient property interest in the resource to support a cause of action. The court's ruling leaves the Tribe in a legal position inferior to that of ordinary commercial fishers who, without any treaty right to fish, can obtain monetary and other relief for damage to fisheries. It also places the Tribe in a legal position inferior to that of federal and state governments that, like the Tribe, regulate fish harvest and use.

This Article considers the soundness of the legal reasoning articulated by the magistrate, accepted by the district court, and incorporated into the *Nez Perce Tribe* opinion.[3] It specifically addresses whether a treaty fishing right is a property interest for which compensatory damages may be sought and identifies alternative legal theories used to protect Indian treaty

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1. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679-81 (1979) (relying upon United States v. Winans, 198 U.S. 371 (1905); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); Tulee v. Washington, 315 U.S. 681 (1942); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); and Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977)).

2. Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994), *appeal pending*, No. 94-36237 (9th Cir.).

3. In *Nez Perce Tribe v. Idaho Power Co.*, the trial judge adopted the magistrate's findings, reasoning, and conclusions, contained in a Report and Recommendation entered on July 30, 1993. *Nez Perce Tribe*, 847 F. Supp. at 793.

fisheries from threatened harm or destruction caused by habitat degradation. These theories lend support to the argument that a treaty fishing right is a property interest for which money damages may be sought. As a matter of common law, tribes should have a cause of action for damages and equitable relief under trespass, nuisance, and other common law vehicles, when their rights in treaty fisheries are interfered with or harmed.

II. THE NATURE OF TREATY FISHING RIGHTS

A. *More than an Ordinary Opportunity to Try to Catch Fish*

In the mid-nineteenth century, Isaac Stevens, the first Governor and first Superintendent of Indian Affairs of the Washington Territory, aided by a small group of advisors, negotiated treaties with a number of Indian tribes in the Pacific Northwest that reserved to the Indians their aboriginal fishing rights. Because of the importance of fish to these tribes, the treaties contained language that reserved to the Indians the "right of taking fish at all usual and accustomed places in common with all citizens of the Territory."[4]

In the early 1900s, the Supreme Court broadly construed the Stevens treaties' "right of taking fish at all usual and accustomed grounds and stations" and ruled that such treaty language protected Indians from exclusion from their fisheries by private parties or state regulation. The *Winans* Court declared a fundamental principle of interpretation for these treaties: that they were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[5] *Winans* held that the Indians had an implied right of access over private lands, which it described in property terminology as a "servitude," to reach their fisheries.[6] Relying on the *Winans* decision, courts have enforced tribal fishing rights against various types of encroachment.[7]

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4. Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957. *See also* Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point Elliot, Jan. 27, 1855, 12 Stat. 957; Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933; Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939; Treaty with the Walla Walla, June 9, 1855, 12 Stat. 945; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty of Olympia, July 1, 1855, 12 Stat. 971; Treaty with the Quinaielts, July 1, 1855, 12 Stat. 971; Treaty with the Flathead, July 16, 1855, 12 Stat. 975.

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

6. *Id.*

7. In *Winans*, the Supreme Court not only declared a right of access across private lands to reach treaty fisheries, but also prohibited non-Indians from using state-licensed fish wheels that prevented treaty fishers from harvesting a share of the fish runs at their usual and accustomed fishing areas. *Id.* at 382. Later cases have followed and expanded on the *Winans* principles. In 1918, the Court upheld Yakima fishing rights as to areas on the south side of the Columbia River, stating that the treaty must be construed according to the likely understanding of the Indian negotiators rather than an Anglo, technical meaning. Seufert Bros. Co. v. United States, 249 U.S. 194, 198-99 (1918). In 1942,

In the late 1960s the Supreme Court reaffirmed the *Winans* principles in its three *Puyallup* decisions,[8] and in 1979 it determined that the treaty phrase, "in common with," warranted an equal division between the states and tribes of the fish runs subject to treaty harvest. The Supreme Court ruled in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*[9] that the Stevens treaties entitled the Indians to an opportunity to harvest up to fifty percent of each salmon run destined for or passing through the tribes' usual and accustomed fishing places.[10] The Court reviewed its six prior decisions on the fishing clause in the Stevens treaties, finding that the principal issue was "virtually 'a matter decided' by our previous holdings."[11]

Describing *Winans*, the *Fishing Vessel* Court stated the 1905 decision "assured the Indians a share of the fish" and "the treaty guarantee[d] the Indians more than simply an 'equal opportunity' along with all of the citizens of the State to catch fish."[12] The *Fishing Vessel* Court found in its three *Puyallup* decisions even more explicit rulings; "they clearly establish the principle that neither party to the treaties may rely on the State's regulatory powers or on property law concepts to defeat the other's right to a 'fairly apportioned' share of each covered run of harvestable anadromous fish."[13] The Supreme Court declared:

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applying these treaty interpretation principles, the Court declared a state license fee invalid as to treaty fishers. Tulee v. Washington, 315 U.S. 681, 685 (1942). These early decisions continue to guide the outcome of disputes over the meaning of treaty fishing rights. In 1994, when the federal district court in *United States v. Washington* adjudicated the extent of treaty rights to harvest shellfish from privately held tidelands and other areas, the court applied the same principles announced in *Winans*. *See* United States v. Washington, 873 F. Supp. 1422, 1428, 1444 (W.D. Wash. 1994).

8. Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968).

9. 443 U.S. 658 (1979).

10. *Fishing Vessel*, 443 U.S. at 685-86.

11. *Id.* at 679. In *Fishing Vessel*, the Supreme Court affirmed Judge Boldt's famous decision that allocated fifty percent of the available fish to the tribes. *Id.* at 685-86 (upholding the allocation announced in United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 688-89 (9th Cir. 1975)). The *Fishing Vessel* Court concluded:

> For notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a "matter decided" by our previous holdings.
>
> The Court has interpreted the fishing clause in these treaties on six prior occasions. In all these cases the Court placed a relatively broad gloss on the Indians' fishing rights and—more or less explicitly—rejected the State's "equal opportunity" approach.

Id. at 679. The *Fishing Vessel* Court also upheld the tribes' right to manage and regulate their fisheries free from state control, with an exception for situations threatening the perpetuation of the fish resource. *Id.* at 682.

12. *Id.* at 681.

13. *Id.* at 682 (discussing Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968); Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977)).

> It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," . . . and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.[14]

To the Court, it was "perfectly clear" that the Indians were led to believe that their fishing right would be protected,[15] noting assurances by United States treaty negotiators, such as Governor Stevens' statement that, "This paper secures your fish."[16]

B. *The Treaty Right as a Property Right*

While Anglo-American common law regarding property is not to be used to limit the nature and scope of treaty fishing rights,[17] that does not mean tribes should be deprived of the common law protections afforded property rights, the fisheries of other governing bodies, and commercial fishers.[18] The *Fishing Vessel* decision leaves no doubt that the Stevens treaties secured not merely the opportunity to try to catch fish, but a right to take a share of the fish supply that would be available absent human interference.[19] This right of taking fish is analogous to other property rights. It is a recognized property interest that is compensable if harmed.[20]

As declared in *Winans*, treaty fishing rights are reserved rights; they are to be measured by the Indians' rights that preexisted the formation of

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14. *Id.* at 676.

15. *Id.* at 667.

16. *Id.* at 667 n.11.

17. *Id.* at 684. The Court stated, "[t]he purport of our cases is clear. Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area." *Id.*

18. *See id.* at 686 n.27.

19. *Id.* at 678 (emphasizing the right of taking fish).

20. *See* Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123, 1128 (9th Cir. 1978); United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975) *cert. denied*, 423 U.S 1086 (1976); Whitefoot v. United States, 293 F.2d 658, 659-60 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); Northern Paiute Tribe v. United States, 30 Ind. Cl. Comm'n 210, 218 (1973); Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968); United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1298, 1305 (9th Cir. 1981); Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1511-12 (W.D. Wash. 1988). The water rights that the tribes reserved that may be used for the purpose of preserving Indian fisheries are also property rights entitled to protection. The water rights extend to all the water appurtenant to a tribe's reservation that is necessary to achieve the purposes of the reservation, including the preservation and enhancement of fisheries. *See* United States v. Anderson, 736 F.2d 1358, 1362, 1365 (9th Cir. 1984).

the United States.[21] Prior to ceding their vast territories to the United States, fishing tribes who were parties to the Stevens treaties had an aboriginal right to occupy and use the banks of the river for fishing purposes. "[This] Indian 'right of occupancy [was] considered as sacred as the fee simple of the whites.'"[22] At the time Europeans happened upon this part of the world, principles of international law mandated that the property rights of the original inhabitants be fully respected.[23] Absent purchase through treaty or agreement, or acquisition by a "just war," these rights were to remain undiminished.[24] The Stevens treaties were designed to permit the purchase of lands occupied by the Northwest Indians, presumably on fair and honorable terms.[25] To sweeten the deal, the protection of fishing rights was guaranteed.[26] Thus, the land cessions were not intended to diminish tribal fishing rights in any significant way. The only limitation on tribal fishing anticipated by the parties to the treaties was that non-Indians would be able to harvest a share of the abundant fish resource.[27]

The treaty fishing right satisfies common law concepts of property. In defining property, courts have looked to whether there is a legally protected expectation of benefit from some object. As explained in a modern casebook on property:

> For the lawyer, "property" is not a "thing" at all although "things" are the subject of property. Rather, as Jeremy Bentham asserted, property is a *legally protected "expectation * * * of being able to draw such or such an advantage from the thing" in question*, "according to the nature of the case."[28]

The Stevens treaties certainly created an expectancy among the Indian beneficiaries of a perpetual opportunity to rely on fishing for subsistence,

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

22. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 668-69 (1974) (quoting United States v. Santa Fe Pac. R.R., 314 U.S. 339, 345 (1941)).

23. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 50-58 (1982 ed.).

24. *Id.* The treaty-secured right in the fish resource goes beyond that of ordinary fishers in other respects. One of the unique aspects of reserved tribal rights is that they are not considered susceptible to balancing against other priorities. The concept that federally reserved rights cannot be balanced away because of other priorities or concerns has been recognized by both the Supreme Court and lower courts. *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 138-39 (1976); Swim v. Bergland, 696 F.2d 712, 717-18 (9th Cir. 1983); United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1983); New Mexico v. Aamodt, 537 F.2d 1102, 1113 (10th Cir. 1976). In other words, the quantity and quality of the resource reserved by the tribes, rather than competing interests, should determine the scope of protection that must be afforded.

25. COHEN, *supra* note 23, at 66-70, 330-31.

26. COHEN, *supra* note 23, at 66 & n.46.

27. *See Fishing Vessel*, 443 U.S. at 668.

28. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 1.1 at 1 (2d ed. 1993) (emphasis added) (footnote omitted).

commerce, and cultural cohesion, absent some naturally occurring limitation. As the Supreme Court stated nearly a century ago in *Winans*,

> it was decided [at the lower court] that the Indians acquired no rights but what any inhabitant of the Territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more . . . .
>
> 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 . . . .[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 . . . .They imposed a servitude on every piece of land as though described therein . . . .The contingency of the future ownership of the lands, therefore, was foreseen and provided for . . . .And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.[29]

More recently, the Court held that the treaty fishing clause was intended to reserve more than "merely the chance . . . occasionally to dip [the Indians'] nets into the territorial waters."[30] In holding that the Indians reserved a unique and valuable fishing right, the Court emphasized that the Stevens treaty language provided for a "right of *taking* fish" which would be "*secured*" by the treaties and that the harvest of salmon had been relatively predictable.[31] It has characterized the relationship between the treaty fishing tribes to the states in regard to their shared fish resource as a cotenancy.[32] The Ninth Circuit Court of Appeals has also specifically stated that the treaty right to fish is a "communal property right" of the tribe.[33]

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29. *Winans*, 198 U.S. at 380-82.

30. *Fishing Vessel*, 443 U.S. at 679. In so ruling, the Court reiterated the points it had made in *Winans*. *See id.* at 680-81.

31. *Id.* at 678 (emphasis added). Because of the "relative high degree of predictability and productive stability" of anadromous fish, the Court analogized their management to the cultivation of "crops." *Id.* at 663.

32. *Id.* at 686 n.27. The Court noted:

> The logic of the 50% ceiling is manifest. For an equal division—especially between parties who presumptively treated with each other as equals—is suggested, if not necessarily dictated, by the word "common" as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.

Id.

33. United States v. Washington, 520 F.2d 677, 687-88, 691 (9th Cir. 1975), *cert. denied*, 423

As explained in a 1991 civil rights action, in which Indians alleged defendants had instigated a racially-motivated campaign of violence and intimidation to prevent the exercise of treaty fishing rights in Wisconsin,[34]

> [t]he rights the Chippewa possess are property rights for which they contracted with the United States government over 150 years ago. The state's protection of those rights is no different from its protection of the property rights of non-Indians. Just as the law protects non-Indians' use and enjoyment of property they have bargained for, whether it be real estate, an automobile, a contractually-guaranteed job or admission to a private club, the law protects the Chippewa's use and enjoyment of the property they bargained for.[35]

The action was brought under a federal statute that protects "property rights" of citizens.[36] In rejecting defendants' claims that the Indians had a mere usufructuary right that fell outside the scope of the federal statute, the court held that defendants "have violated the right to use their property that is guaranteed plaintiffs under 42 U.S.C. § 1982."[37]

The treaty fishing tribes have a legally protected expectancy that they will be able to continue to draw an advantage from the fish resource.

III. THE NEZ PERCE TRIBE'S RIGHT TO TAKE FISH

A. Nez Perce Tribe v. Idaho Power Company[38]

The Treaty with the Nez Perces[39] is one of the treaties negotiated by Isaac Stevens. Article III, like other Stevens treaties with Northwest tribes, reserved "the right of taking fish at all usual and accustomed places in common with the citizens of the Territory."[40] Like other Northwest fish-

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U.S. 1086 (1976).

34. Lac du Flambeau Indians v. Stop Treaty Abuse-Wisconsin, Inc., 759 F. Supp. 1339, 1342 (W.D. Wis. 1991).

35. *Id.* at 1352. In 1991 a preliminary injunction was issued to prevent defendants from interfering intentionally with the Indians' exercise of treaty fishing rights. *See* Lac du Flambeau Indians v. Stop Treaty Abuse-Wisconsin, Inc., 781 F. Supp. 1385, 1387 (W.D. Wis. 1992). Several appeals followed. In 1994, the Seventh Circuit ruled that injunctive relief was proper and agreed that the interference with these treaty fishing rights had been racially motivated. Lac du Flambeau Indians v. Stop Treaty Abuse-Wisconsin, Inc., 41 F.3d 1190, 1194 (7th Cir. 1994).

36. *See* 42 U.S.C. § 1982 (1994).

37. *Lac du Flambeau Indians*, 759 F. Supp. at 1350.

38. 847 F. Supp. 791 (D. Idaho 1994).

39. Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957 (1859).

40. Treaty with the Nez Perces, June 11, 1855, art. III, 12 Stat. 958. The court noted that the Nez Perce treaty had the same purpose as similar Stevens treaties and is subject to the same body of federal Indian treaty fishing case law and special rules of construction. *Nez Perce Tribe*, 847 F. Supp. at 805-06.

ing tribes, the Nez Perce ceded its extensive land holdings to the United States for various promises, secured by treaty, including assurances from the United States that the Tribe could continue to rely on its fisheries.[41]

In August 1955 the Federal Power Commission (FPC) issued a license for the Hell's Canyon Complex, consisting of the Hell's Canyon Dam, Oxbow Dam, and Brownlee Dam, to the Company. There is no dispute that the number of salmon and steelhead in the Snake River greatly declined following construction of the Hell's Canyon Complex in the mid-1950s.[42] While the FPC conditioned federal authorization on the Company's affirmative efforts to avoid and mitigate fish losses,[43] the Tribe claims that the Company failed to comply with these license conditions and engaged in activities that impaired the Nez Perce treaty right of taking fish.[44] In December 1991 the Tribe sued for damages in federal district court, relying on common law theories.[45]

The Tribe claims that the Company showed little respect for treaty fishing rights.[46] The Tribe specifically alleges the following. To save money at Brownlee Dam, the Company declined to adopt the protection measures for outmigrating juvenile salmon, which state and federal fisheries agencies had recommended to satisfy the license conditions. It built and negligently operated nets and traps, which resulted in the near-extinction of upriver chinook stocks. During the construction of Oxbow Dam, while attempting to repair defective fish traps, the Company dewatered sixty miles of river, killing large numbers of fall chinook spawners. While repairing erosion at Oxbow Dam, the Company again dewatered the river and killed fish downstream.[47]

Idaho Power Company moved to dismiss the federal court action, contending that the Tribe did not have a cause of action for money damages. The District Court agreed.[48] However, in the course of doing so, the

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41. *See Nez Perce Tribe*, 847 F. Supp. at 806. *See also* Sohappy v. Smith, 302 F. Supp. 899, 906 & n.1 (D. Or. 1969) (official records of treaty negotiations reflect assurances of continued fishing rights given to Indians as inducement for their acceptance of the treaties).

42. *Nez Perce Tribe*, 847 F. Supp. at 794.

43. *See In re* Idaho Power Co., 14 F.P.C. 55, 80 (1955) (Article 35 of the Order Issuing License (Major) imposing certain obligations upon Idaho Power Company to provide facilities "for the purpose of conserving the fishery resources.").

44. *Nez Perce Tribe*, 847 F. Supp at 794.

45. *Id.*

46. *Id.*

47. *See* Appellant's Opening Brief at 4-10, Nez Perce Tribe v. Idaho Power Co., *appeal pending* (9th Cir.) (No. 94-36237).

48. *Nez Perce Tribe*, 847 F. Supp. at 795. The district court in *Nez Perce Tribe* rejected the Magistrate's conclusion that the Company could be held liable to the Tribe for money damages resulting from inundation of traditional tribal fishing places. *See* Nez Perce Tribe v. Idaho Power Co., No. 91-0517-S-HLR, Order on Second Report and Recommendation and Dismissing Action, at 7 (D. Idaho Sept. 28, 1994).

court ruled that a federal district court has subject matter jurisdiction over an action to protect rights grounded in a federal treaty or federal common law.[49] The court also held that the Federal Power Act did not preempt a state cause of action for property damages that the Tribe might otherwise have.[50] Finally, the court held that the licensing proceedings under the Federal Power Act, conditioning and otherwise regulating the project, and a subsequent fishery settlement signed by various state agencies, could not preclude the Tribe's cause of action since the Federal Energy Regulatory Commission (FERC) did not have jurisdiction to award monetary damages; the prior actions presented to FERC had addressed different issues.[51]

The court stated that the determination of whether the Tribe is entitled to monetary relief for Idaho Power Company's diminishment of its fish supply "is related to the nature and extent of the Tribe's treaty fishing rights."[52] The conclusion in *Nez Perce Tribe* was "that the Tribe does not have a legally cognizable cause of action for an award of monetary damages."[53] The primary reason given was that

> tribes do not own the fish but only have a treaty right which provides an opportunity to catch fish if they are present at the accustomed fishing grounds. In the Court's view, monetary damages for loss of property cannot be awarded for injury to a fish run in which the plaintiff tribe owns only an opportunity to exploit.[54]

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49. *Nez Perce Tribe*, 847 F. Supp. at 800.

50. *Id.* at 812. The court concluded, however, that the Federal Power Act did preempt any federal common law damage remedy that might be fashioned for the Tribe. *See id.* at 817.

51. *Id.* at 800-03.

52. *Id.* at 805.

53. *Id.* at 795. The claim for compensation based on exclusion from usual and accustomed fishing places through inundation was the subject of a separate decision. *See* Nez Perce Tribe v. Idaho Power Co., No. 91-0517-S-HLR, Order on Second Report and Recommendation and Dismissing Action (D. Idaho Sept. 28, 1994). The Magistrate had concluded that the Company could be held liable in conversion for the inundation of the Tribe's usual and accustomed fishing places. The court viewed the Tribe's claim as a new type of cause of action. While it held that the Federal Power Act (FPA) did not preempt state common law, it also held that the FPA did not allow the creation of a new federal common law based cause of action. *Id.* at 5-6. As to the Magistrate's reliance on Section 814 of the FPA and the Fifth Amendment to find protection of the Tribe's property interests, the Court maintained that the Tribe had "only a right of access to fishing places," which was nothing more than a right to cross land to reach the river and fish. *Id.* at 7-8. The court viewed the Tribe's claimed protection of its fishing right as a claim that "all river banks would remain forever the same." *Id.* at 8. Protecting those particular habitat conditions essential to the survival of fish does not, of course, mean leaving all river banks unaltered. Yet, the court seemed to consider the damage claim as presenting a choice between protecting tribal fishing and stopping all development. *See id.* at 8-9. It essentially concluded that the treaty right did not protect the Indians against being crowded out from their fisheries by other human activity and that treaty secured fisheries could be diminished, even destroyed, by other economic activities. *Id.*

54. *Nez Perce Tribe*, 847 F. Supp. at 795-96. The court appeared to equate the question of whether the treaty creates a habitat protection right and an independent cause of action as conclusive

B. *The* Nez Perce Tribe *Decision Misconstrues the Nature of the Treaty Fishing Right*

In order to have a cause of action for damages to its fisheries, the court required that the Tribe either own the fish or that their capture be a certainty.[55] In the Magistrate's report, it was noted that the Tribe possessed no "guarantee" that a certain amount of fish could always be caught.[56] Yet, while an absolute guarantee as to the amount of harvest could not be made, the Supreme Court has recognized that, by virtue of the nature of the salmon runs and the "relative predictability" of their return to certain areas at certain times, the Stevens treaty tribes could "almost certainly" expect (absent human interception, obstruction, or destruction) large quantities of fish to "be available at a given place at a given time" and that the tribes would have a "right of taking" their treaty share of these fish.[57]

In denying the Tribe relief for destruction of its treaty secured fishery, the district court distinguished the decisions against the United States that applied the Fifth Amendment's property protections to treaty fishing rights,[58] stating that the cases involved property "actually owned" by the property owner.[59] The opinion continued by stating that "[i]n the instant action, the Tribe does not own a property interest in the fish, but rather has *only* a treaty right entitling their members to take fish at the usual and accustomed places."[60] The district court's suggestion that the Fifth

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of the question whether common law causes of action for infringement of property interests apply to treaty fishing rights. *See id.* at 807. It noted that two earlier district court decisions had decided, for differing reasons, that no cause of action had been created by the treaties. *Id.* at 810 & n.22. It also relied on the vacated opinion of the Ninth Circuit Court of Appeals (United States v. Washington, 694 F.2d 1374 (9th Cir. 1982)) regarding the treaty habitat protection right, interpreting the Ninth Circuit's reasoning in that decision to support a claim for discrimination against the treaty right in permitting development, but not to provide for monetary relief, except in some unidentified, exceptional circumstance. *Id.* at 808-10.

55. *Id.* at 813.

56. *Id.* at 814.

57. *Fishing Vessel*, 443 U.S. at 663, 678. When the Supreme Court said that the treaty did not guarantee a specified percentage, it was most likely referring to its ruling that the treaty share could be reduced upon a showing by the state that tribes no longer needed that allocation. *Id.* at 686 n.27, 686-87. The right to an equal share is a ceiling. Absent a judicial determination that a fifty percent share is no longer needed, the state and private parties are under a duty, in light of the treaty language, to allow tribes an opportunity to take their full, "in common" share. *Id.* at 685. *See also* United States v. Washington, 384 F. Supp. at 343.

58. *Nez Perce Tribe*, 847 F. Supp. at 810.

59. *Id.* at 810.

60. *Id.* (emphasis added). *But see, e.g.*, Whitefoot v. United States, 293 F.2d 658, 659-61 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962) (compensation provided for all of tribe's fishing privileges); Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1515-16 (W.D. Wash. 1988) (treaty fishing right includes rights of access and rights to take fish). *See also* COHEN, *supra* note 23, at 566

Amendment cases involved only land areas owned by the affected tribe, rather than loss of use of a particular treaty fishery because of inundation or other habitat damage, is factually incorrect.[61] Courts have recognized that "[t]he treaty fishing right [securing the right of access and the right to take fish] is a property right protected under the fifth amendment . . . ."[62] Why the treaty fishing right would not be a protectable property interest, enforceable against private parties, is not clear.

The legal classification of property does not demand that fish be captured before a protectable property interest can be found. As stated years ago:

> It has been said that "in a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his effort to acquire it . . . ."[63]

Contemporary common law provides that

> interests in land, *as well as all other interests*, are protected by three general tort theories. The three theories are intended to address these situations: (1) the defendant intended an invasion of *a legally protected interest*; (2) the defendant accidentally, but negligently or recklessly, brought about an invasion of *a legally protected interest*; and (3) the defendant accidentally caused an invasion of *a legally protected interest* in the course of engaging in some kind of activity . . . for which a limited strict liability is imposed.[64]

The Supreme Court emphasized that the treaty right was far more than "merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters."[65] In *Nez Perce Tribe*, the court dismissed this statement, stating that it could not alter the scope of the treaty right, which at most protects against development that discriminates against treaty fishers.[66]

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n.37 (discussing claims under the Indian Claims Commission Act for the infringement or extinguishment of fishing rights recognized by treaty).

61. *See, e.g.*, Confederated Tribes v. Alexander, 440 F. Supp. 553, 555 (D. Or. 1977) (reservoir's impairment of access to and use of treaty fishing stations, dam's elimination of steelhead run, and dam's blockage of chinook migration violate treaty right to fish at all usual and accustomed grounds and stations).

62. *Muckleshoot*, 698 F. Supp. at 1516.

63. Brennan v. United Hatters of North America Local No. 17, 65 A. 165, 171 (N.J. 1906).

64. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 1005-06 (5th ed. 1984) (emphasis added).

65. *Fishing Vessel*, 443 U.S. at 679.

66. *Nez Perce Tribe*, 847 F. Supp. at 809.

Extrapolating from the court's reasoning would preclude not only a tribal cause of action, but also that of a state or individual fisher; neither owns fish before the fish are harvested.[67] The denial of a common law cause of action for monetary relief when tribal fisheries are damaged actually places tribal governments in a legal posture inferior to that of other governmental fish regulators. Although the fish are not deemed "owned" until harvested, governmental entities hold a legally protected interest in the fish and wildlife, which they may permit to be harvested by their citizens and which are subject to their regulatory authority.[68] Whatever the precise nature of the property right in fish, governmental entities have the right to sue for damages to resources on behalf of their citizens.[69]

That the Supreme Court has stated that the treaty fishing share may be subject to reduction upon a showing that a tribe no longer needs the maximum entitlement for a moderate living[70] does not mean a tribe lacks a legally protectable interest in the fish resource. The rights of other governments in a natural resource—whether a fish supply, water right, or other resource—are subject to allocation and reduction; that does not mean, however, that they are without recourse if the resource that they may presently use is degraded or destroyed.[71] Nor does the Federal Power Act preempt a tribal cause of action for monetary relief when its treaty fishing right is impaired.[72] The court's conclusion that the treaty right

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67. *See, e.g.*, Hughes v Oklahoma, 441 U.S. 322, 334-35 (1979); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977).

68. *See* Puget Sound Gillnetters Ass'n v. United States Dist. Court, 573 F.2d 1123, 1132 & n.14 (9th Cir. 1978); Tlingit and Haida Indians v. United States, 389 F.2d 778, 785-87 (Ct. Cl. 1968); Department of Fisheries v. Gillette, 621 P.2d 764, 766-67 (Wash. Ct. App. 1980). The governments of the treaty tribes share management authority with the states and are the primary regulators of their treaty fisheries. As a matter of common law, a treaty tribe (no less than the State of Washington in *Gillette*) should be legally capable of protecting the fish resource on which its treaty fisheries rely. *See Gillette*, 621 P.2d at 766-67.

69. *See Gillette*, 621 P.2d at 765 (besides trespass, common law cases rely on negligence and nuisance theories).

70. *Fishing Vessel*, 443 U.S. at 686-87.

71. *See, e.g.*, New Jersey v. New York, 283 U.S. 805 (1931), *modified*, 347 U.S. 995 (1954) (1954 decree amending the 1931 allocation of waters from the Delaware River between New York and New Jersey); *Gillette*, 621 P.2d at 766-67.

72. 16 U.S.C. §§ 791-828c (1994). The Federal Power Act (FPA) expressly preserves rather than terminates such common law causes of action, does not empower the Commission to grant monetary relief for violation of property rights, and lacks the express congressional authorization necessary to affect treaty fishing rights. Far from immunizing licensees, acceptance of the federal license obligates them to "recognize and protect" the property interests of others. *See* Henry Ford & Son, Inc v. Little Falls Fibre Co., 280 U.S. 369, 379 (1930). The FPA provides that hydropower licensees "shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works . . . [but that] in no event shall the United States be liable therefor." 16 U.S.C. § 803(c). As the district court in *Nez Perce Tribe* acknowledged, the Commission "does not have jurisdiction to adjudicate property disputes or to award monetary damages;" there is no dispute

could be practically eliminated through changing circumstances caused by human degradation of the fish habitat does not comport with the likely Indian understanding and expectation when the terms of their treaties were accepted.[73]

Essential to the negotiation of Indian treaties was the United States' recognition that Northwest bands and village were sovereign entities. The courts, in interpreting the treaties, have been guided by the premise that Indian treaties are "essentially a contract between two sovereign nations."[74] Tribes hold the right of taking fish for their members.[75] The treaties protect the tribes' regulatory power over the fishery.[76] Tribes, like other governments that regulate fisheries, should be able to invoke the common law to preserve the fish resource and be compensated for its loss.

The court in *Nez Perce Tribe* attempted to distinguish other treaty fishing rights cases, offering distinctions that do not require characterizing the nature and extent of the treaty right as less deserving of protection than other interests for which monetary relief may be awarded when harmed.[77] The court distinguished the treaty rights cases because they involve the award of injunctive rather than damage relief and because they deal with other types of interference with the right of taking (such as overharvest, catch limitations, and exclusion from fishing areas).[78] The court viewed far differently the question of whether treaty fishing tribes have a

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that the Commission clearly lacks authority to adjudicate property rights and award damages for harm. *Nez Perce Tribe*, 847 F. Supp. at 800. Nor did Congress authorize the Commission to diminish treaty fishing rights as part of a license. *See* United States v. Dion, 476 U.S. 734, 738-40 (1986); *Fishing Vessel*, 443 U.S. at 690; Swim v. Bergland, 696 F.2d 712, 719 (9th Cir. 1983); Confederated Tribes v. Alexander, 440 F. Supp. 553 (D. Or. 1977); COHEN, *supra* note 23, at 222-25. *See also*, Covelo Indian Community v. Federal Energy Regulatory Comm'n, 895 F.2d 581, 586 (9th Cir. 1990); Washington State Dep't of Fisheries v. Federal Energy Regulatory Comm'n, 801 F.2d 1516, 1517, 1519 n.3 (9th Cir. 1986). Furthermore, the court's concern in *Nez Perce Tribe* with whether the FPA creates a cause of action only serves to confuse the issues since the claim for relief was based on common law. In declining to "create" a cause of action, the district court mischaracterized the claim as a novel one rather than one based on firmly established tort law. *See Nez Perce Tribe*, 847 F. Supp. at 815-17.

73. *Compare Nez Perce Tribe*, 847 F. Supp. at 814 (concluding that treaty rights must be interpreted in light of new and changing circumstances), *with Fishing Vessel*, 443 U.S. at 667-69 & n.14, 676-77 (holding that treaty rights cannot be lost by the mere passage of time nor by the impact of illegal exclusion or illegal regulation on Indian harvests).

74. *Fishing Vessel*, 443 U.S. at 675. In signing the Stevens Treaties, there was no agreement that tribes would be divested of tribal management and regulatory control over their fisheries. *Id.* at 668 n.12. The Stevens treaties reserved a governmental role for the tribes with regard to fisheries management. The federal district court orders implementing the treaty right have established procedures for tribal/state co-management of fisheries. *See, e.g.*, United States v. Washington, 459 F. Supp. 1020, 1107, 1118 (W.D. Wash. 1978) (post trial orders adopting salmon and steelhead management plans); United States v. Washington, 384 F. Supp. 312, 420 (W.D. Wash. 1974).

75. Whitefoot v. United States, 293 F.2d 658, 663 (Ct. Cl. 1961).

76. Settler v. Lameer, 507 F.2d 231, 237 (9th Cir. 1974).

77. *Nez Perce Tribe*, 847 F. Supp. at 807.

78. *Id.*

remedy for destruction of the fish runs themselves.

Even without a treaty or property right, fishers can have a cause of action for damages resulting from wrongful environmental harm diminishing the fish resource. From early English common law[79] to modern, American jurisprudence, the principle has been sustained that the wrongful interruption of or interference with a person's fishing rights gives rise to an action for damages for the injury caused thereby, whether by trespass or other common law grounds.[80] Private individuals and businesses have a common law duty to provide fish passage, avoid pollution, and use other fish protection measures. Harm to fishers resulting from the failure to take these measures is considered reasonably foreseeable and a sufficient basis for liability in trespass, negligence, or nuisance.[81] Damage claims brought by fishermen are one of the "classic exceptions" to the rule that compensation for pure economic loss may not be sought in admiralty cases.[82]

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79. *See, e.g.*, Child v. Greenhill, 79 Eng. Rep. 1077 (Eng. 1639); Fitzgerald v. Firbank, 2 Ch. 96 (Eng. 1896).

80. *See* 36A C.J.S. *Fish* § 20 (1961). "Where a person's fishery rights are wrongfully interrupted or interfered with by another, he may maintain an action of trespass or action for damages for the injury caused thereby . . . ." *Id. See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558, 568 (9th Cir. 1974); Snug Harbor Packing Co. v. Schmidt, 394 P.2d 397, 399 (Alaska 1964); Bales v. City of Tacoma, 20 P.2d 860, 863 (Wash. 1933). *See also* Carr v. United States, 136 F. Supp. 527, 535 (E.D. Va. 1955); Beacon Oyster Co. v. United States, 63 F. Supp. 761, 764 (Ct. Cl. 1946); Mansfield & Sons Co. v. United States, 94 Ct. Cl. 397, 421 (1941); State Dep't of Pollution Control v. International Paper Co., 329 So. 2d 5, 7-8 (Fla. 1976); Jurisich v. Louisiana Southern Oil & Gas Co., 284 So. 2d 173, 182 (La. App. 1973); Department of Fisheries v. Gillette, 621 P.2d 764, 767 (Wash. Ct. App. 1980).

81. *See* Holyoke Water-Power Co. v. Lyman, 82 U.S. (15 Wall.) 500, 512-13 (1872); Carbone v. Ursich, 209 F.2d 178, 182 (9th Cir. 1953); Maddox v. International Paper Co., 47 F. Supp. 829, 830 (W.D. La. 1942); Carson v. Hercules Powder Co., 402 S.W.2d 640, 642 (Ark. 1966); People v. Truckee Lumber Co., 48 P. 374, 374-75 (Cal. 1897); Skansi v. Humble Oil & Ref. Co., 176 So. 2d 236, 238 (La. 1965); Cottrich v. Myrick, 12 Me. 222, 229-36 (1835); Commonwealth v. Chapin, 21 Mass. (5 Pick.) 199, 292-93 (1827); Stoughton v. Baker, 4 Mass. 521, 528 (1808); Hampton v. North Carolina Pulp Co., 27 S.E.2d 538, 545-46 (N.C. 1943); Department of Fisheries v. Gillette, 621 P.2d 764, 767 (Wash. Ct. App. 1980); State v. Roberts, 59 N.H. 256 (1879). Failure to provide for fish passage, when required by state law, can constitute negligence per se. *See* WASH. REV. CODE ANN. § 75.20.060 (1994). *See also* Conway v. Monidah Trust Co., 132 P. 26 (Mont. 1913) (discussing negligence per se generally); Columbia River Fisherman's Protective Union v. City of St. Helens, 87 P.2d 195, 199 (Or. 1939) (regarding reliance on the public trust doctrine for recovery); Monroe v. Withycombe, 165 P. 227, 229 (Or. 1917) (holding state, as sovereign, can assert property interest in wildlife for its people in common).

82. *See* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 308 (1927). Although *Robins Dry Dock* was an admiralty case, Justice Holmes' opinion is cited generally for the rule that remote economic losses, without physical injury to anything in which the plaintiff has a proprietary interest, are not compensable. *Id.* at 308-09. The *Robins Dry Dock* principle "is essentially a principle of disallowance of damages because of remoteness . . . ." Holt Hauling & Warehousing Sys., Inc. v. M/V Ming Joy, 614 F. Supp. 890, 896 n.13 (E.D. Pa. 1985) (quoting Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710 (4th Cir. 1978)). However, a limited exception to this rule has existed for commercial fishermen, who may recover damages without physical harm. *See* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 625 (1st Cir. 1994); Emerson G.M. Diesel, Inc. v. Alaskan Enter., 732 F.2d

Moreover, the admiralty limitation does not apply where physical injury to that in which the plaintiff has a proprietary interest is involved.[83]

IV. ALTERNATIVE LEGAL THEORIES TO PROTECT TRIBAL FISHERIES

In addition to generally applicable common law principles, several legal theories specific to treaty fishing tribes may serve to protect tribal fisheries. These theories underscore the nature of the treaty fishing right and the historical context of the treaty assurances made to Indians and support the proposition that the treaty fishing right is a compensable property interest.

A. *A Treaty Right to Habitat Protection*

The Stevens treaties may have created an implied right to protection of fish habitat conditions essential to the preservation of the tribes' fisheries.[84] Although the treaty habitat protection litigation in *United States v. Washington*[85] considered the state's obligations, private parties would also be obligated to refrain from impairing the exercise of the treaty right.[86]

The issue before the district court in *United States v. Washington* was the availability of prospective relief against the state if it permitted degradation of habitat conditions necessary to treaty fisheries. The court held

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1468, 1472 (9th Cir. 1984); Union Oil Co. v. Oppen, 501 F.2d 558, 567-69 (9th Cir. 1974); Carbone v. Ursich, 209 F.2d 178, 181-82 (9th Cir. 1953); Golnoy Barge Co. v. M/T Shinoussa, 841 F. Supp. 783, 785 (S.D. Tex. 1993); Louisiana *ex rel.* Guste v. M/V Testbank, 524 F. Supp. 1170, 1173-74 (E.D. La. 1981).

83. Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 625 (1st Cir. 1994).

84. *See* United States v. Washington, 506 F. Supp. 187, 202 (W.D. Wash. 1980) (declaring a habitat protection right), *modified*, 694 F.2d 1374 (9th Cir. 1982), *vacated*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985).

85. "Phase I" of the *United States v. Washington* litigation addressed issues related to quantification of treaty fishing rights; the Supreme Court's *Fishing Vessel* decision, 443 U.S. 658 (1979), stands as the culmination of the first stage. "Phase II" of the *United States v. Washington* litigation addressed the hatchery and environmental issues raised but not settled in the Phase I litigation.

86. The fact that the United States was a party to the treaties does not mean that only the United States is bound to respect a tribe's reserved rights. *See* Winters v. United States, 207 U.S. 564, 577-78 (1908); United States v. Winans, 198 U.S. 371, 384 (1905); United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash 1980); United States v. Michigan, 471 F. Supp. 192, 281 (W.D. Mich. 1979). *Cf. Fishing Vessel*, 443 U.S. at 692 n.32. The treaties bind not only the United States and states, but individual citizens as well. *See Fishing Vessel*, 443 U.S. at 692 n.32; *Winans*, 198 U.S. at 382; Puget Sound Gillnetters Ass'n v. Moos, 603 P.2d 819, 825-26 (Wash. 1979). The *Muckleshoot* holding noted in *Nez Perce Tribe* conflicts with this principle. *Nez Perce Tribe*, 847 F. Supp. at 810 n.22. Nor can private parties rely on state or federal authorization or illegal conduct to excuse their actions. *See Fishing Vessel*, 443 U.S. at 684-85; Cramer v. United States, 261 U.S. 219, 234 (1923); Ewert v. Bluejacket, 259 U.S. 129, 138 (1922); Utah Power and Light Co. v. United States, 243 U.S. 389, 408-09 (1917); *Winans*, 198 U.S. at 382; United States v. Southern Pac. Transp. Co., 543 F.2d 676, 699 (9th Cir. 1976); Masonite Corp. v. Guy, 77 So.2d 720, 722 (Miss. 1955).

that, because the treaty negotiators intended to perpetuate the Indian right to make a living from fishing, an attendant right to protection from deterioration of the fish habitat was also reserved.[87] The district court concluded that a treaty right to habitat protection was virtually mandated by long-standing principles of Indian law as well as a long line of judicial decisions on the Stevens treaties, stating "[t]he Supreme Court all but resolved the environmental issue when it expressly rejected the State's contention . . . that the treaty right is but an equal opportunity to try to catch fish . . . ."[88]

On appeal, the Ninth Circuit Court of Appeals initially held that the treaties created a habitat protection right. The court declared that a "cooperative stewardship" existed between the state and the tribes, which required that "in carrying out their affairs, the State and the Tribes must each take reasonable steps commensurate with their respective resources and abilities to preserve and enhance the fishery."[89] On rehearing, however, the court reversed, at least as to the ripeness for a definition of any treaty habitat protection obligation. It vacated the federal district court's ruling and its own "reasonable steps" standard, holding that the district court decision had been premature and without a sufficiently concrete factual context. The Ninth Circuit stated:

> The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.[90]

Accordingly, the Ninth Circuit indefinitely postponed disposition of the habitat protection issue. Uncertainty still lingers, therefore, over whether the treaty provides a cause of action for tribes when environmental degradation threatens or damages their fisheries.

The argument for an implied treaty right of habitat protection draws upon the special rules of Indian treaty construction and the historical evi-

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87. United States v. Washington, 506 F. Supp. at 204-05.

88. *Id.* at 203.

89. United States v. Washington, 694 F.2d 1374, 1381 (9th Cir. 1983). The Ninth Circuit, in an earlier decision, had referred to the duty of those who were parties to the treaties (and their successors in interest) to not act in a manner that destroyed the fishery. United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975). The court analogized the relationship between a state and treaty fishing tribes to a cotenancy and said that "[a] cotenant is liable for waste if he destroys the property or abuses it so as to permanently impair its value . . . . By analogy, neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed." *Id. See also* Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 555-56 (D. Or. 1977); United States v. Washington, 384 F. Supp. at 401-02.

90. United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985) (*en banc*).

dence of the likely understanding of Indians when they agreed to cede millions of acres of land in exchange for assurances that they would always be able to rely on their fisheries for their economic, subsistence, and cultural needs.[91] Indian treaties are entitled to a broad and liberal construction that is consistent with the understandings of the treaty negotiators and furthers the purpose of treaty rights.[92] Interpretations should take into account the unequal bargaining position of the parties, language barriers and similar disadvantages faced by the tribes.

The likely Indian understanding (related to future reliance on tribal fisheries) is entitled to greater consideration than any particular technical definition of legal terms.[93] Furthermore, any right which Indian people did not expressly give up is generally deemed reserved.[94] Ambiguities in treaties, statutes, executive orders, or agreements regarding Indian rights and immunities are to be resolved in favor of and protective of Indian interests.[95]

The language of the fishing provisions in the Stevens treaties of the Northwest is typified by the Treaty of Medicine Creek, which provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens . . . .[96]

In 1979, the *Fishing Vessel* Court flatly rejected the argument that this language secured nothing more than an opportunity to try to catch fish on an equal basis with non-Indians.[97] In reaching this conclusion, the Supreme Court emphasized the historical context of the treaty negotiations.

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91. *See Fishing Vessel*, 443 U.S. at 676-77.

92. *See Fishing Vessel*, 443 U.S. at 675-76 (following the principles of treaty interpretation in Tulee v. Washington, 315 U.S. 681 (1942); Seufert Bros. Co. v. United States, 249 U.S. 194 (1919); United States v. Winans, 198 U.S. 371 (1905)).

93. *Id. See also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Jones v. Meehan, 175 U.S. 1, 11 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

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

95. *See Fishing Vessel*, 443 U.S. at 675-76 (treaty); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) (statute); Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (statute); Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (agreement); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973) (treaty and statute); Arizona v. California, 373 U.S. 546, 600 (1963) (executive order).

96. Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (italics in original).

97. *Fishing Vessel*, 443 U.S. at 676.

The Northwest tribes were primarily fishing societies. The abundant fish resource was the lifeblood of their economy and culture. To protect salmon and trout, tribes had customs to prevent waste and pollution. They practiced religious rites to ensure the return of anadromous fish.[98] When Governor Stevens undertook to negotiate the release of Indian land claims in Washington Territory, he was aware of the tremendous importance of fish to the Indians and their desire to be able to continue to rely on fishing.[99]

Thus, a major part of Governor Stevens' job of selling the treaties to the Indians and convincing them to cede their vast territories was assuring them that non-Indian settlement would never threaten their highly successful fish-dependent economies and culture.[100] The following words were typical of the guarantees the Governor made:

> Are you not my children and also 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?[101]

It is unlikely that the tribes would have expected that non-Indians could permanently diminish or destroy their supply of fish. The treaty negotiators intended the treaties to preclude forever non-Indian settlers from monopolizing the Indian fisheries, regardless of whether this monopolization occurred directly through commercial harvests or indirectly through other activities.[102]

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98. *Id.* at 665; United States v. Washington, 384 F. Supp. at 351.

99. *Fishing Vessel*, 443 U.S. at 666 & n.9.

100. *Id.* at 667 n.11.

101. *Id.* This statement was made during the negotiations of the Point-No-Point Treaty. The treaties were intended to assuage tribal fears that white settlement would interfere with their continued fishing. In the treaty negotiations, Indians were induced to give up millions of acres of land in exchange for very little monetary compensation by the promise that their fishing rights would be preserved. *Id.* at 676-77. The treaty fishing clause was to "protect them from the risk that non-Indian settlers might seek to monopolize their fisheries." *Id.* at 666. It was to keep settlers from crowding out Indians from meaningful use of their fishing places. *Id.* at 676. One of the adjudicated purposes of the treaties is to ensure that non-Indians will not be able to usurp the Indian fisheries for their own priorities and uses. The Supreme Court noted that these treaties are contracts between sovereign nations. *Id.* at 675.

102. *Id.* at 676-77. When, on December 20, 1994, Judge Edward Rafeedie construed the treaty fishing right as it applies to shellfish, he ruled:

> The one significant promise for purposes of this litigation is the promise by the United States to the Indians that they would enjoy a permanent right to fish as they always had. This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The Indians were repeatedly assured that they would continue to enjoy the right to fish as they always had, in the places where they had always fished.

When the federal district court in *United States v. Washington* concluded in 1980 that the treaties created a right to have the fishery habitat protected from man-made despoliation, it stated that

> [v]irtually every case construing this fishing clause has recognized it to be the cornerstone of the treaties and has emphasized its overriding importance to the tribes . . . .The Indians understood, and were led by Governor Stevens to believe, that the treaties entitled them to continue fishing in perpetuity and that the settlers would not qualify, restrict, or interfere with their right to take fish . . . .
>
> The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken.[103]

The court analogized the existence of an implied treaty right to environmental protection of the fishery with the reserved water rights doctrine. Under that doctrine, commonly referred to as the "Winters" doctrine, the creation of an Indian reservation implicitly reserves rights in appurtenant waters to fulfill the purposes of the reservation.[104] Winters rights serving fishery purposes are protected property interests and those tribes whose land reservations have been denuded of water necessary for fish runs have a cause of action for damages.[105]

B. *Trust Responsibility*

While the issue of whether the Stevens treaties impose a habitat protection obligation upon the states and private parties remains unresolved, courts have clearly imposed an obligation on the United States to protect treaty resources, justified (at least in part) by the United States' trust re-

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> There is no indication in the minutes of the treaty proceedings that the Indians were ever told that they would be excluded from any of their ancient fisheries.

United States v. Washington, 873 F. Supp. at 1435. Judge Rafeedie is one of four federal district court judges to apply the same, long-standing, principles of treaty interpretation in regard to *United States v. Washington* proceedings. Judges in Oregon, Michigan, and elsewhere have reached similar conclusions regarding the nature and scope of such reserved treaty fishing rights.

103. United States v. Washington, 506 F. Supp. at 203.

104. *See, e.g.*, Winters v. United States, 207 U.S. 564, 575-78 (1908) (prohibited upstream water withdrawals that undermined agricultural uses on the reservation).

105. *See, e.g.*, Joint Bd. of Control v. United States, 832 F.2d 1127, 1131-32 (9th Cir. 1987); United States v. Adair, 723, F.2d 1394, 1401 n.3 (9th Cir. 1983), *cert. denied sub nom.* Oregon v. United States, 467 U.S. 1252 (1983); United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1293-94 (9th Cir. 1981); Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981); Northern Paiute Nation v. United States, 30 Ind. Cl. Comm'n 210, 211-14 (1973). It has been held that a treaty fishing right implies a right to a quantity of water to support a fishery which, in turn, necessitates that the water have sufficient flow, including proper temperatures, to protect the fish. *See* United States v. Anderson, 736 F.2d 1358, 1365 (9th Cir. 1984) (upholding lower court order requiring non-Indians to maintain a minimum stream flow for survival of a fishery).

sponsibility to the tribes and the property nature of treaty rights.

This trust responsibility is an overlay on Indian treaty obligations. The federal trust responsibility to Indian tribes applies to all federal entities.[106] It imposes its own obligations with regard to enforcement of Indian treaty rights. A tribe is "entitled to rely on the United States its guardian, for needed protection of its interests."[107] A tribe is not required to prove to what extent and how its property needs protection. Federal agencies have a duty to investigate potential adverse impacts on treaty-secured resources thoroughly, and not simply make a "judgment call " or balance competing interests, in choosing the appropriate course of action.[108] The trust responsibility has also been held to require strict compliance with administrative policies, such as consultation with Indians, that are intended to protect Indian interests.[109] Ordinarily, the federal trustee must exercise at least the level of care required of a private fiduciary.[110] If, however, the trustee has greater skills or knowledge than the ordinary person, he must use all the skill and knowledge at his disposal.[111] The standard of performance need not be limited by treaty or statute, if common law trust principles impose a higher standard.[112] The courts have repeatedly said that the common law trust responsibility toward Indians and their property must be judged by the "most exacting fiduciary standards."[113] Situations in which competing federal mandates make the exercise of the trust responsibility difficult do not excuse a federal agency from honoring the trust responsibility.[114] The government's trust duties have been held to include a duty to prevent diversion of water needed for a tribal fish-

106. *See* Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981). The *Nance* court stated that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Id.*

107. United States v. Creek Nation, 295 U.S. 103, 110 (1935).

108. *See* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1973); Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, No. C94-1621C (W.D. Wash. May 8, 1996) (order upholding the Corps' denial of permits for fish farm net pens based on Corps' fiduciary duty to Indian tribes and Corps' duty to ensure that Indian treaty fishing rights are given full effect).

109. *See* Oglala Sioux Tribe v. Andrus, 603 F.2d 707, 716-19 (8th Cir. 1979).

110. *See* United States v. Mason, 412 U.S. 391, 398 (1973); Navajo Tribe v. United States, 364 F.2d 320, 322 (Ct. Cl. 1977); Menominee Tribe v. United States, 101 Ct. Cl. 10, 19-20 (1944). *But see* Nevada v. United States, 463 U.S. 110, 127-28 (1983) (discussing the Secretary's ability to act as trustee for two parties with conflicting interests).

111. *See* Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973).

112. *See* Eric v. Secretary of Dep't of Housing and Urban Dev., 464 F. Supp. 44, 49 (D. Alaska 1978).

113. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). *See also* United States v. Creek Nation, 295 U.S. 103, 109-11 (1935); American Indians Residing on the Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980, 990 (Ct. Cl. 1981); Oneida Tribe v. United States, 165 Ct. Cl. 487, 493 (1964).

114. *See* Nevada v. United States, 463 U.S. at 128.

ery.[115]

Only Congress can take away the treaty right, and then only upon payment of just compensation. Thus, federal agencies cannot authorize the construction of dams which damage treaty secured fisheries without express Congressional authorization and compensation to the tribes under the Fifth Amendment.[116]

C. *Other Statutory Sources of a Cause of Action*

Federal statutes also provide tribes with a cause of action when essential fish habitat conditions are degraded and treaty fishing rights are affected.[117] For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[118] provides tribes with a source of recovery when parties are liable under CERCLA for "damages for injury to, destruction of, or loss of natural resources."[119] "Natural resources" are defined within CERCLA to include fish and wildlife "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by . . . any Indian tribe.[120] CERCLA's natural resource damage recovery scheme provides that the federal government, state government, or tribal government, as trustee of the natural resources, may seek compensatory damages for the loss of a resource. CERCLA recognizes an Indian tribe's property interest in fish and wildlife and provides for mone-

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115. *See* Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. at 256-57 (Secretary must insure that all water not obligated to local water district flows to Pyramid Lake, which had been the Tribe's principal source of livelihood); Northern Paiute Nation v. United States, 30 Ind. Cl. Comm'n 210, 215 (1973) (creation of reservation established an obligation on the part of United States to preserve tribal fisheries).

116. Years before *United States v. Washington*, it was well established that the United States could be held liable for monetary damages if reserved Indian fisheries were harmed by federal mismanagement, appropriation, condemnation, or environmental degradation. *See, e.g.*, Whitefoot v. United States, 293 F.2d 658, 660 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); Northern Paiute Nation v. United States, 30 Ind. Cl. Comm'n 210, 216-18 (1973); United States v. Winnebago Tribe, 542 F.2d 1002, 1007 (8th Cir. 1976). The United States has been subject to declaratory and injunctive relief for impairing treaty rights through habitat degradation. *See* Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510-16, 1517 (W.D. Wash. 1988); Confederated Tribes of the Umatilla Indian Reservation v. Callaway, Civ. No. 72-211 (D. Or. 1973) (Army Corps of Engineers and Bonneville Power Administration must operate the Columbia River Power System so as not to impair or destroy treaty fishing rights); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 555-56 (D. Or. 1977) (Army Corps of Engineers cannot construct dam and reservoir that would flood traditional tribal fishing sites and destroy a steelhead run because Congress had not authorized impairment of treaty fishing rights); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. at 257-61.

117. *See* Michael Mirande, *Tribes, Wildlife, and Compensation*, 4 NAT. RESOURCES & ENVT. 10 (1990).

118. 42 U.S.C. §§ 9601-9675 (1994).

119. 42 U.S.C. § 9607(a)(4)(C).

120. 42 U.S.C. § 9601(16).

tary damage recovery accordingly. Treaty tribes have also employed the Federal Power Act[121] and the National Environmental Policy Act[122] to protect their fisheries from hydroelectric or other development which threatens essential fish habitat conditions.[123]

Congress has expressly provided for a tribal governmental role in fish protection in various legislation, recognizing that treaty fishing tribes have a particular interest in the preservation of fish and fish habitat. Because of tribal sovereign powers to manage and regulate treaty fisheries, Congress has included treaty tribes in various statutory fish protection schemes.[124]

V. CONCLUSION

Federal common law establishes that the Stevens treaties were intended to provide greater, not lesser, protection to the tribes' fishing rights. The treaty fishing tribes reserved a "right of taking fish." The treaties secured the right and assured tribes that they would not be displaced from their fisheries by non-Indians. The well-established case law treats the treaty fishing right as property protected by the Fifth Amendment. It is also well-recognized that Indian tribes are governments that share a legal interest with the states and the federal government in protecting the fish resource. The tribes' entitlement to sue for relief, whether for an injunction or damages, stems from a variety of alternative sources: the treaty right of access; the treaty right of habitat protection; common law rights of property holders and commercial fishers; the right of governmental resource managers; and various statutory provisions.

The "only a treaty right" concept in *Nez Perce Tribe*[125] diminishes the significance and import of Indian treaty promises as construed in earli-

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121. 16 U.S.C. §§ 791a-828c (1994).

122. 42 U.S.C. §§ 4321-4370d (1994).

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

124. Salmon and Steelhead Conservation and Enhancement Act, 16 U.S.C. §§ 3301-3345 (1994). The fisheries management and enhancement plans under the Enhancement Act are products of a system in which tribes have not only representation but also a veto power. 16 U.S.C. §§ 3311(d), 3321(b). Pacific Salmon Treaty Act, 16 U.S.C. §§ 3631-3644 (1994). Treaty tribes are explicitly recognized as fishery managers responsible for implementing legislation for the U.S.-Canada Treaty through appropriate laws and regulations within their jurisdictions. 16 U.S.C. § 3633(b). Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. §§ 839-839h (1994). The Northwest Power Act places Indian tribes on the same level as federal and state agencies in the planning processes. 16 U.S.C. § 839b(g)(3) and (h)(2). Tribes have jointly participated in the development of the Columbia River Fish and Wildlife Program, 16 U.S.C. § 839b(h), and the Regional Energy Plan, 16 U.S.C. § 839b(d), pursuant to the Northwest Power Act's mandate to avoid and mitigate the harsh results of poorly planned hydropower projects on the Columbia through careful study and planning.

125. 847 F. Supp. at 810.

er decisions; it allows for the evisceration of the reserved right of taking fish that Indians were led to believe would always be theirs in exchange for the cession of their vast property interests in the Pacific Northwest.