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"Salmon is Culture, and Culture is Salmon": Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation

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"Salmon is Culture, and Culture is Salmon": Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation

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"Through the treaties we reserved that which is most important to us as a people: [*t*]*he right to harvest salmon in our traditional fishing areas. But today the salmon is disappearing because the federal government is failing to protect salmon habitat. Without the salmon there is no treaty right. We kept our word when we ceded all of western Washington to the United States, and we expect the United States to keep its word."*

—Billy Frank, Jr.[1]

"The Lummi are salmon people; salmon is culture, and culture is salmon."

—Merle Jefferson, Sr.[2]

I. INTRODUCTION

As the effects of climate change manifest themselves in the Pacific Northwest, salmon, and salmon-dependent northwest tribes, will face the greatest hardships.[3] For the tribes in and around the Salish Sea, salmon are inextricably linked to identity. Salmon are not simply a way of life—they are life.[4] As United States District Judge George H. Boldt

1. NW. INDIAN FISHERIES COMM'N, A REPORT FROM THE TREATY INDIAN TRIBES IN WESTERN WASHINGTON: TREATY RIGHTS AT RISK: ONGOING HABITAT LOSS, THE DECLINE OF THE SALMON RESOURCE, AND RECOMMENDATIONS FOR CHANGE 6 (July 14, 2011), *available at* http://nwifc.org/w/wp-content/uploads/downloads/2011/08/whitepaper628finalpdf.pdf (quoting Billy Frank, Jr., former Chairman, Nw. Indian Fisheries Comm'n).

2. NAT'L MUSEUM OF THE AM. INDIAN, EDUC. OFFICE, BACKGROUND INFORMATION ON THE LUMMI NATION 1, *available at* http://www.nmai.si.edu/environment/pdf/07_01_Teacher_Background_Lummi.pdf (last visited Apr. 24, 2015) (quoting Merle Jefferson, Sr., Exec. Dir., Lummi Nation Natural Res. Dep't).

3. *See* Darryl Fears, *As Salmon Vanish in the Dry Pacific Northwest, So Does Native Heritage*, WASH. POST (July 30, 2015), *available at* http://www.washingtonpost.com/national/health-science/as-salmon-vanish-in-the-dry-pacific-northwest-so-does-native-heritage/2015/07/30/2ae9f7a6-2f14-11e5-8f36-18d1d501920d_story.html; *see also* NAT'L WILDLIFE FED'N, FACING THE STORM: INDIAN TRIBES, CLIMATE-INDUCED WEATHER EXTREMES, AND THE FUTURE FOR INDIAN COUNTRY 20 (2011), *available at* http://www.nwf.org/~/media/PDFs/Global-Warming/Reports/ TribalLands_ExtremeWeather_Report.ashx.

4. *See* CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES AND THE INDIAN WAY (2000).

observed in his seminal decision on treaty-reserved fishing rights, "[t]he symbolic acts [of the first-salmon ceremony], attitudes of respect and reverence, and concern for the salmon reflect a ritualistic conception of the interdependence and relatedness of all living things."[5] For the tribes of the Pacific Northwest, "[s]almon is culture, and culture is salmon."[6]

Salmon are particularly vulnerable to the impacts of climate change. Climate change poses a perhaps insurmountable challenge to salmon, already struggling to survive from the effects of overfishing, development, and habitat degradation.[7] As a cold-water fish, salmon are particularly impacted by fluctuations in water temperature.[8] As glaciers and snow packs high in the North Cascades melt, the temperature of mountain streams—the habitat vital for spawning grounds and juvenile salmon—will increase.[9] By 2080, scientists estimate that the average water temperature of these mountain streams will rise to seventy degrees Fahrenheit, a temperature lethal to juvenile salmon and salmon eggs.[10] Between 2050 and 2100, scientists estimate that fifty percent of all stream habitat for salmon will be lost.[11] Rising temperatures and melting snow packs also cause increased flooding, which, in turn, increases sedimentation and scours away the gravel creek beds necessary for

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> "We have ceremonies for the first salmon of each run. We bring everybody together and share the first salmon, and we train our children that way. When we eat the salmon we give out offerings to the fish and the river. We're not separate from the river. Indian people don't have a cathedral. We have the land and the river."

Id. at 99 (quoting Billy Frank, Jr.); *see also* Fears, *supra* note 3.

5. United States v. Washington, 384 F. Supp. 312, 351 (W.D. Wash. 1974) [hereinafter *Boldt Decision*].

6. NAT'L MUSEUM OF THE AM. INDIAN, *supra* note 2 (quoting Merle Jefferson, Sr.).

7. *See* Hal Bernton, *Snowpack Drought Has Salmon Dying in Overheated Rivers*, SEATTLE TIMES (July 25, 2015), *available at* http://www.seattletimes.com/seattle-news/environment/snowpack-drought-has-salmon-dying-in-overhea ted-rivers.

8. *See* OFFICE OF POLICY, PLANNING AND EVALUATION, CLIMATE CHANGE DIV., ENVTL. PROT. AGENCY, ECOLOGICAL IMPACTS FROM CLIMATE CHANGE: AN ECONOMIC ANALYSIS OF FRESHWATER RECREATIONAL FISHING, EPA-220-R-95-004 2-20, Exhibit 2-7 (1995), *available at* http://nepis.epa.gov/Exe/ZyPDF.cgi/40000F7W.PDF?Dockey=40000F7W.PDF

9. NAT'L WILDLIFE FED'N, *supra* note 3, at 21.

10. Katie Campbell & Saskia de Melker, *Northwest 'Salmon People' Face Future with Less Fish*, PBS NEWSHOUR (July 18, 2012), http://www.pbs.org/newshour/updates/climate-change-july-dec12-swinomish_07-18/.

11. NAT'L WILDLIFE FED'N, *supra* note 3, at 21 (citing OFFICE OF POLICY, PLANNING AND EVALUATION, *supra* note 8, at 2-47, Exhibit 2-27).

spawning habitat.[12] As the sea levels rise and ocean temperatures increase, salmon runs will move to new grounds and then disappear completely.[13]

Between Seattle, Washington, and Vancouver, British Columbia, sits the Lummi Indian Reservation, home to the Lummi Nation ("Nation"). The Nation is nestled on a small peninsula jutting into the northern reaches of Puget Sound, the northeastern waters of the San Juan Islands, and the southern extent of the Straight of Georgia, waters collectively known as the Salish Sea.[14] In recent years, the Nation has found itself at the center of a national and international debate over coal production, economic development, climate change, and ecological and cultural preservation.[15]

Just a stone's throw to the north of the Nation's reservation is Xwe'chi'eXen,[16] the site of the Cherry Point Refinery—the largest refinery in Washington.[17] It is also the proposed site of a coal and bulk commodities export facility—the Gateway Pacific Terminal ("Terminal")—one of three sites in the Pacific Northwest proposed to ship Montana and Wyoming coal to markets primarily in Asia.[18] The Nation has spearheaded efforts to block the construction of the Terminal by enforcing its treaty-reserved right to take fish and its broader implied

12. *Id*.

13. *Id*.

14. *See generally Home*, LUMMI NATION, http://www.lummi-nsn.org/website/index2.html (last visited Sept. 19, 2015).

15. *See* Richard Walker, *Lummi Nation Asks Army Corps to Deny Permit for Coal Export Terminal*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 1, 2015), http://indiancountrytodaymedianetwork.com/2015/01/08/lummi-nation-asks-army-corps-deny-permit-coal-export-terminal-158609.

16. The Lummi call Cherry Point "Xwe'chi'eXen," the Lummi word for the mink that they used to hunt there. Xwe'chi'eXen is a culturally significant landscape, revered by the Lummi. It is the home of the "Ancient Ones," and "honored by the Lummi people and their ancestors since the beginning of time for its traditional, cultural, and spiritual significance." LUMMI NATION AWARENESS PROJECT, XWE'CHI'EXEN: A PLACE OF CULTURAL AND SPIRITUAL SIGNIFICANCE, *available at* http://lnnr.lummi-nsn.gov/LummiWebsite/userfiles/281_FINALNovemberSquolQuolAwarenessProject.pdf (last visited Jan. 12, 2016).

17. *Cherry Point Refinery*, BRITISH PETROLEUM, http://www.bp.com/en_us/bp-us/media-room/infographics/cherry-point-refinery.html (last visited Jan 7, 2016).

18. *See generally* Hal Bernton & Brian M. Rosenthal, *Demand Cools as Fight Rages over Coal-Export Terminals*, SEATTLE TIMES (Sept. 3, 2013), *available at* http://www.seattletimes.com/seattle-news/demand-cools-as-fight-rages-over-coal-export-terminals. The other proposed terminals, both on the Columbia River, are the Coyote Island Terminal in Boardman, Oregon, and the Millennium Bulk Terminals in Longview, Washington.

right to habitat protection.[19] The Nation has cited the adverse impacts the Terminal could potentially have on traditional fisheries—including the construction of a new loading dock, increased shipping traffic, shipwrecks and spills, and the effects of coal dust—as reasons for its opposition.[20] The Nation's efforts to preserve its treaty rights, sovereignty, and way of life by blocking the construction of the terminal, however, conflicts with other tribes who view natural resource development—especially coal—as key to their survival and preserving their way of life.[21] The fight over the Terminal, then, is a clash between conflicting values, cultures, sovereigns, and views of the future.[22] The Nation's ability to protect its way of life and block the construction of the Terminal rests on its ability to reestablish the implied right to habitat protection.

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19. *Lummi Nation Officially Opposes Coal Export Terminal in Letter to Army Corps of Engineers*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 2, 2013), http://indiancountrytodaymedianetwork.com/2013/08/02/lummi-nation-officially-opposes-coal-export-terminal-letter-army-corps-engineers-150718. In its 2011 report on treaty rights, *Treaty Rights at Risk*, the Northwest Indian Fisheries Commission identified three major actions the federal government must take to "remedy th[e] erosion of treaty-reserved rights," including "protect[ing] and restor[ing] western Washington treaty rights by *better protecting habitat*." NW. INDIAN FISHERIES COMM'N, *supra* note 1, at 5 (emphasis added).

20. *See* U.S. ARMY CORPS OF ENG'RS, WASH. DEP'T OF ECOLOGY & WHATCOM CNTY., SCOPING SUMMARY REPORT, at Appendix 1 – Native American Tribes Scoping Comments (Mar. 29, 2013), *available at* http://www.eisgatewaypacificwa.gov/sites/default/files/content/files/Appendix_I_Tribes.pdf; *see also* Richard Walker, *The Case Against Coal Terminals: Lummi Cite Heath, Environmental Factors*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 27, 2015), http://indiancountrytodaymedianetwork.com/2015/02/27/case-against-coal-terminals-lummi-cite-health-environmental-factors-159382; *see also* Richard Walker, *Lummi Call Coal Terminals an Absolute No-Go, Invoking Treaty Rights*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 26, 2015), http://indiancountrytodaymedianetwork.com/2015/02/26/lummi-call-coal-terminals-absolute-no-go-invoking-treaty-rights-159381.

21. *See* Amy Martin, *Crow Tribe Says Coal Development Crucial to Survival*, INSIDE ENERGY, MONT. PUB. RADIO (Oct. 23, 2015), http://mtpr.org/post/crow-tribe-says-coal-development-crucial-survival.

22. "For Bill James, hereditary chief at Lummi, this fight isn't over only crab and salmon fishing grounds, but something bigger, *schelangen*, their people's way of life. Mitigation . . . doesn't capture what would be lost if the last of this cove was developed for industry." Lynda V. Mapes, *Northwest Tribes Unite Against Giant Coal, Oil Projects*, SEATTLE TIMES (Jan. 16, 2016), *available at* http://www.seattletimes.com/seattle-news/environment/northwest-tribes-unite-against-giant-coal-oil-projects/ (emphasis in original).

The Nation is a signatory to the Treaty of Point Elliot ("Treaty").[23] In 1980, United States District Judge William H. Orrick, Jr., of the United States District Court for the Western District of Washington, found that "[t]he right to take fish in usual and accustomed grounds,"[24] language found in every Stevens Treaty,[25] implied a broader right to habitat protection.[26] The court concluded that in order to exercise the right to take fish, there must exist fish to be taken.[27] Axiomatic to the survival and existence of the fish, the court concluded, was the need for a healthy habitat.[28] The court thus established the implied right to habitat protection as an integral part of the Stevens Treaties and the so-called

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23. Treaty Between the United States and the Dwámish, Suquámish, and other Allied and Subordinate Tribes of Indians in Washington Territory, Apr. 11, 1859, 12 Stat. 927 [hereinafter Treaty of Point Elliot].

24. Treaty with the Nisqualli, Puyallup, etc. art. 3, Dec. 26, 1854, 10 Stat. 1132 [hereinafter Treaty of Medicine Creek]; *see* Treaty of Point Elliot, *supra* note 23, at art. V.

25. Between 1854 and 1855, Washington Territory Governor Isaac I. Stevens penned and signed six treaties between the United States and the tribes in the Pacific Northwest. These treaties are known as the "Stevens Treaties," and contain nearly identical language concerning the reservation of fishing rights. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 18.04[2][e][iii], 1169 nn.38-39 (Nell Jessup Newton, ed., 2012) [hereinafter COHEN'S HANDBOOK]; *see generally* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662 n.2 (1979) [hereinafter *Fishing Vessel*]; *see also* United States v. Washington, 506 F. Supp. 187, 189 n.2. (W.D. Wash. 1980) [hereinafter *Washington III*]. The Stevens Treateis include: Treaty of Point Elliot, *supra* note 23, at art. V; Treaty of Medicine Creek, *supra* note 24, at art. 3; Treaty Between the United States of America and the S'Klallam Indians art. IV, Apr. 29, 1859, 12 Stat. 933 [hereinafter Treaty of Point No Point]; Treaty Between the United States of American and the Makah Tribe of Indians art. IV, Apr. 18, 1859, 12 Stat. 939 [hereinafter Treaty of Neah Bay]; Treaty Between the United States and the Yakima Nation of Indians art. III, Apr. 18, 1859, 12 Stat. 951 [hereinafter Treaty with the Yakimas]; Treaty Between the United States and the Qui-nai-elt and Quil-leh-ute Indians art. III, Apr. 11, 1859, 12 Stat. 971 [hereinafter Treaty of Olympia]. Similar language is found in three other treaties signed and penned by Governor Stevens: Treaty Between the United States of America and the Nez Percé Indians art. III, Apr. 29, 1859, 12 Stat. 957 [hereinafter Nez Perce Treaty of 1855]; Treaty Between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians art. III, Apr. 18, 1859, 12 Stat. 975 [hereinafter Treaty of Hellgate]; Treaty Between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories art. I, Apr. 11, 1859, 12 Stat. 945 [hereinafter Walla Walla Treaty].

26. *Washington III*, 506 F. Supp. at 189 n.1 (interpreting Treaty of Medicine Creek, *supra* note 24, at art. III).

27. *Id.* at 203.

28. *Id.* at 205.

Fishing Clause.[29] The United States Court of Appeals for the Ninth Circuit, however, reversed, concluding that the Treaties did not imply a broader right to habitat protection.[30]

If reestablished, the implied right could provide tribes with a tool to proactively challenge projects that would affect their usual and accustomed fishing grounds. In this way, the Nation could use the implied right to halt the construction of the Terminal—or any other project—before it even began. In the decades since the Ninth Circuit rejected the establishment of the implied right, the climate and the reality of declining fisheries has changed, and the law and attitudes towards tribal involvement have evolved, providing the Nation—and other tribes—with the opportunity to reestablish the implied right to habitat protection.[31] This paper examines the development of the implied right to habitat protection, the need for the right, its impacts on the state and the economy, and its standard of liability. This paper attempts to create a blueprint by which the Nation can reestablish the implied right to habitat protection and use it to halt the construction of the Terminal.

II. THE DEVELOPMENT OF THE RIGHT TO TAKE FISH

In the Pacific Northwest, the Fishing Clauses in the Stevens Treaties recognizes the essential importance of fishing. In signing these treaties, the tribes viewed the reservation of fishing rights as the consideration for which they would cede their historic homelands to the United States.[32] In particular, the Nation signed the Treaty of Point Elliot in 1855.[33] Article Five of the Treaty provides:

> [*t*]*he right of taking fish at 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 and gathering roots and berries on open and unclaimed lands.

29. *Id.* at 203.

30. United States v. Washington, 694 F.2d 1374, 1380 (9th Cir. 1982) [hereinafter *Washington IV*].

31. *See infra* Section III.

32. *See* O. Yale Lewis, III, Comment, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281 (2003) ("[t]his was the consideration for which they ceded essentially all of their aboriginal territory to non-Indians." *Id.* at 307).

33. Treaty of Point Elliot, *supra* note 23.

> Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.[34]

In the Pacific Northwest, nearly every treaty between the United States and Indian nations reserved to the tribes the right to fish in their usual and accustomed places.[35]

The right reserved in the treaties is not the right for the mere opportunity to catch fish, but the right to actually take and harvest fish.[36] The Supreme Court of the United States has rejected the interpretation that the Stevens Treaties merely granted tribes the right to an "equal *opportunity*" to take fish.[37] Instead, the Supreme Court has interpreted the treaties as reserving tribes the right to *take*—or *harvest*—fish.[38] This right extends to "every fishing location where members of a tribe customarily fished from time to time at and before treaty times."[39] These rights are not grants to the tribes, but are instead reservations of rights existing before the treaties.[40]

A. The Right to Cross and Occupy: United States v. Winans

In *United States v. Winans*, the seminal case on the right to take fish, the Supreme Court found that tribes' right to take fish extended off their reservations.[41] At the turn of the Twentieth Century, the Winans brothers operated a fish wheel[42] on the banks of the Columbia River with a permit from the State of Washington.[43] The Winans' operation created a monopoly over the fish in the Columbia River.[44] The United States sued the brothers on behalf of the Yakima Nation for violating the

34. *Id.* art. V (emphasis added).
35. *See supra* note 25.
36. *Fishing Vessel*, 443 U.S. at 678.
37. *Id.* (emphasis added).
38. *Id.*
39. *Boldt Decision*, 384 F. Supp. at 332.
40. United States v. Winans, 198 U.S. 371, 381 (1905).
41. *Id*.
42. A fish wheel is a waterwheel-like structure that is placed on a river and supported by a dock or barge. A revolving arm with baskets and paddles is attached to a rim, which rotates in the current of the river. The baskets dip into the river and are pushed out by the current, scooping up passing fish. The fish are then tilted out into a hopper as the baskets crest and dip back into the water. A channel is created in the river to funnel fish into the path of the fish wheel's baskets. *See generally Catching Salmons with Fish Wheels*, AMUSING PLANET (May 28, 2015), http://www.amusingplanet.com/2015/05/catching-salmons-with-fish-wheels.html.
43. *Winans*, 198 U.S. at 382.
44. *Id.*

Yakima's treaty rights, accusing them of harvesting most of the passing fish and denying any substantial harvest to Yakima fishermen.[45]

Employing the Indian law canons of construction,[46] the Supreme Court determined that at the time the treaty was signed, the Yakima Nation understood its right to fish as extending beyond its reservation.[47] The Court recognized that the right to fish off the reservation was implied within the broader meaning of the treaty.[48] Moreover, the Court determined that the right to take fish off-reservation created an easement over private and state land.[49] The right "impose[s] a servitude upon every piece of land as though described therein."[50] This easement supersedes any state or private action attempting to block Indian access to traditional fishing grounds.[51] Additionally, the Court viewed this easement, and the right to fish generally, as a property interest held by the tribe in common with its members.[52] The Court determined that the treaty conveyed to the Tribe certain rights in property, specifically, "the right to cross [the land] to the river" and "the right to occupy [the land] for the purpose" of fishing.[53] While the Court recognized that the tribes retained exclusive fishing rights within their reservations, the "right outside of those boundaries [was] reserved 'in common with citizens of the territory.'"[54] Indians and tribes did not retain an exclusive right to fish at usual and accustomed fishing grounds off-reservation.[55]

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45. *Id*. at 377.

46. The Indian law canons of construction prescribe that treaties, statutes, and executive orders are to be interpreted as tribes would have understood them at the time they were signed, and that ambiguities are to be construed in favor of tribes. *See* COHEN'S HANDBOOK, *supra* note 25, at § 2.02[1], 113-15.

47. *Winans*, 198 U.S. at 380.

48. *Id.* at 381.

49. *Id.*

50. *Id.*

51. COHEN'S HANDBOOK, *supra* note 25, at § 18.04[2][f], 1174 (citing *Winans*, 198 U.S. at 381-82). Indeed, in certain instances courts have found that fishing rights extend the tribe the right to moor fishing vessels uninterrupted. *See* Grand Travers Band of Ottowa & Chippewa Indians v. Dir., Mich. Dep't of Natural Res., 141 F.3d 635 (6th Cir. 1998).

52. *Winans*, 198 U.S. at 381; *see generally* COHEN'S HANDBOOK, *supra* note 25, at § 18.04[1], 1164.

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

54. *Id*.

55. The Treaty of Point Elliot and the Stevens Treaties use the term "usual and accustomed grounds." This paper uses that term interchangeably with "traditional fisheries."

B. Equal Sharing: United States v. Washington—The Boldt Decision

In the seventy years following the *Winans* decision, the commercial fishing industry in Washington exploded.[56] Large-scale commercial fishing placed increasing pressure on the smaller Native fishing operations.[57] The loss in harvest for tribes was particularly acute, as fish provided income and food, and were the center of religious and cultural identity, causing tribes to push back against what they saw as infringements on their treaty rights.[58] Under pressure, the United States initiated a two-phase series of litigation against Washington in 1970 to determine the precise scope of the right to take fish.[59] "Phase I" dealt with the allocation of fish allowed to be harvested by Native and non-Native fishermen in usual and accustomed places.[60] "Phase II" dealt with whether hatchery-raised fish were to be included in the allocation and whether the right to fish implied a right to habitat protection.[61]

In *United States v. Washington*, known as the *Boldt Decision*, Judge Boldt found that the phrase "in common with" used in the Stevens Treaties reserved for the tribes the right to take fifty percent of all fish harvested in usual and accustomed grounds off-reservation.[62] Judge Boldt explained:

> it is incumbent upon [the State] to take all appropriate steps within [its] actual abilities to assure as nearly as possible an *equal sharing* of the opportunity for treaty and non-treaty fishermen to harvest every species of fish to which the treaty tribes has access at their usual and accustomed fishing places.[63]

The Ninth Circuit agreed, stating that Judge Boldt's "50-50 [sic] apportionment . . . best effectuates what the Indian parties would have expected if a partition of fishing opportunities had been necessary at the

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56. David A. Bell, *Columbia River Treaty Renewal and Sovereign Tribal Authority Under the Stevens Treaty "Right-to-Fish" Clause*, 36 PUB. LAND & RESOURCES L. REV. 269, 289 (2015).

57. *Id*.

58. *Id*. at 290.

59. *Id.*

60. *Washington III*, 506 F. Supp. at 191.

61. *Id.*

62. *Boldt Decision*, 384 F. Supp. at 343; United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975) [hereinafter *Washington II*].

63. *Boldt Decision*, 384 F. Supp. at 344 (emphasis added).

time of the treaties."[64] Additionally, the Ninth Circuit agreed that Judge Boldt's fifty percent allocation not only applied to the tribes' usual and accustomed grounds, "but also [to] those [fish] destined for those grounds but captured downstream or in marine waters."[65]

C. A Moderate Living: Washington v. Washington State Commercial Passenger Fishing Vessel Association

Judge Boldt's equal sharing allocation came before the Supreme Court in 1979, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*.[66] "Due to continuing and widespread state defiance after the *U.S. v. Washington* [sic] rulings," the United States intervened on behalf of tribes to yet again determine the meaning of the right to take fish.[67] The central issue before the Supreme Court was whether Judge Boldt's determination that tribes were entitled to fifty percent of all fish taken in traditional fishing grounds was a valid interpretation of the "in common with" language of the Stevens Treaties.[68]

Citing its earlier decision in *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, the Supreme Court reiterated that the right described in the treaties was not "a right to compete with nontreaty [sic] fishermen on an individual basis," but rather a "right to a substantial portion of the run."[69] The Court then reexamined what it meant by "a substantial portion of the run."[70] Ultimately, the Court found that the treaty reserved for tribes the right to take enough fish "necessary to provide the Indians with a livelihood[—]that is to say, a moderate living."[71] The Court held "the maximum possible allocation to the Indians is fixed at 50% [sic]."[72]

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64. *Washington II*, 520 F.2d at 688.

65. *Id.*

66. *Fishing Vessel*, 443 U.S. 658.

67. Bell, *supra* note 56, at 292.

68. *Fishing Vessel*, 443 U.S. at 662.

69. *Id.* at 683 (discussing Puyallup Tribe, Inc. v. Dep't of Game of State of Wash., 433 U.S. 165 (1977)).

70. *See id*. at 683-89.

71. *Id*. at 686.

72. *Id.* The Court also determined that tribal allocations of the fish harvests would include fish taken within reservation boundaries. *Id.* at 687. Furthermore, the Court also concluded that fish taken for ceremonial and subsistence needs would be included in the tribes' allocations. *Id.* at 688. The Court did, however, agree that fish taken by non-Indians "from identifiable runs that are destined for traditional fishing grounds" would count against their allocation. *Id.*

III. HABITAT PROTECTION AS AN IMPLIED TREATY RIGHT

A. United States v. Washington, *506 F. Supp. 187 (W.D. Wash. 1980)*

The *Boldt Decision*, its subsequent Ninth Circuit affirmation, and *Fishing Vessel* represented Phase I of the United States's litigation against Washington.[73] Phase II commenced with the Western Washington District Court's 1980 decision interpreting the Stevens Treaties to imply a broader right to habitat protection.[74] While the Ninth Circuit eventually reversed the district court, it did recognize the possibility that some iteration of a habitat protection right might be found under the correct circumstances.[75]

The district court recognized five specific environmental conditions needed for a healthy fish population to survive and the right to be executed: "'(1) access to and from the sea, (2) an adequate supply of good-quality water, (3) a sufficient amount of suitable gravel for spawning and egg incubation, (4) an ample supply of food, and (5) sufficient shelter.'"[76] The court noted it was "undisputed" that these conditions were being adversely impacted by human development degrading the quality of the fisheries habitat.[77] If the trend were to continue, the court concluded, "the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty."[78] Such a result would void a decade of litigation and the explicit language of the treaties.[79]

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73. *Washington III*, 506 F. Supp. at 191.

74. *Id.* at 205. While the court's holding on the issue of hatchery-raised fish has little bearing on the court's determination of the habitat issue, the district court found hatchery-raised fish "are 'fish' within the meaning of the treaties' fishing clause," and must be included in the fifty percent allocation. *Id*. at 202.

75. *Washington IV*, 694 F.2d at 1389 ("[a]lthough we reject the environmental servitude created by the district court, we do not hold that the State of Washington and the Indians have no obligations to respect the other's rights in the resource." *Id*.).

76. *Washington III*, 506 F. Supp. at 203 (quoting WASH. DEP'T OF FISHERIES, U.S. DEP'T OF FISH AND WILDLIFE SERV. & WASH. DEP'T OF GAME, JOINT STATEMENT REGARDING THE BIOLOGY, STATUS, MANAGEMENT, AND HARVEST OF THE SALMON AND STEELHEAD RESOURCES OF THE PUGET SOUND AND OLYMPIC PENINSULAR DRAINAGES AREAS OF WESTERN WASHINGTON 17 (1973) [hereinafter JOINT BIOLOGICAL STATEMENT] (on file with the *Public Land & Resources Law Review*)).

77. *Id*.

78. *Id.*

79. *Id*. at 203, 205.

Relying extensively on the court opinions in Phase I, the district court found "that implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation."[80] The court went on to state that "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[81] The court noted that the "paramount purpose of the treaties" was to protect the tribes' right to take fish.[82] The court stated, "[i]t is equally beyond doubt that the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless."[83]

The district court rooted its holding in precedent, stating that "[t]he Supreme Court all but resolved the environmental issue" in *Fishing Vessel*.[84] In *Fishing Vessel*, the Supreme Court stated that the treaties did not reserve to tribes "'merely the chance * * * [sic] occasionally to dip their nets into the territorial waters,'" but "something considerably more tangible": the right to take and harvest fish.[85] The Supreme Court rejected Washington's argument that the right to take fish merely conferred upon the tribes the right of "an equal opportunity to try to catch fish."[86] Extrapolating upon this right, the district court determined that because the treaties reserved to the tribes the right to *take* fish, it necessarily reserved the right to a habitat healthy enough to support the existence of fish.[87]

The district court insisted that the implied right to habitat protection was essentially the same as previously implied rights recognized by the courts.[88] The court pointed to the implied-reservation-of-water doctrine[89] as consistent with its finding that the Stevens Treaties

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80. *Id*. at 203.
81. *Id*.
82. *Id*. at 205.
83. *Id*.
84. *Id*. at 203.
85. *Id*. (quoting *Fishing Vessel*, 443 U.S. at 679).
86. *Id*. (discussing *Fishing Vessel*, 443 U.S. at 678).
87. *Id*. (discussing *Fishing Vessel*, 443 U.S. at 679).
88. *Id*. at 204.
89. The implied-reservation-of-water doctrine states that when the federal government sets aside—reserves—public land, it impliedly reserves water rights as well. United States v. New Mexico, 438 U.S. 696, 702 (1978). The implied water right exists when "water is necessary to fulfill the very purposes of which a federal reservation was created." *Id.* These water rights may not be implied when it is merely "valuable for a secondary use of the reservation." *Id*. The implied right reserves only the "amount of water necessary to fulfill the purpose of the

implied a right to habitat protection.[90] The district court found there could be "no doubt that one of the primary purposes of the treaties . . . was to reserve the tribes the right to continue fishing as an economic and cultural way of life."[91] Indeed, the tribes, as parties to the Stevens Treaties, ceded massive tracts of land to the United States for the express reservation of certain rights, including the right to fish uninterrupted as they had before the treaties.[92] The court determined that it was "beyond doubt that the existence of an environmentally-acceptable habitat was necessary for the survival of the fish."[93] Without such an implied right, "the expressly-reserved right to take fish would be meaningless and valueless."[94] The court found that it was "necessary to recognize an implied environmental right in order to fulfill the purpose of the fishing clause."[95] Indeed, the court noted that other courts had already found implied water rights for the purpose of protecting fish. The district court relied on both *Cappaert v. United States*[96] and *United States v. Anderson*,[97] which stood for the understanding that the implied-reservation-of-water doctrine could be invoked to ensure "the unimpaired flow of sufficient quantities of water []as . . . necessary for the protection of fish."[98]

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reservation." Cappaert v. United States, 426 U.S. 128, 141 (1976). When the implied water right is necessary for the fulfillment of expressly reserved rights, the right "arise[s] by implication *regardless* of the equities that may favor competing water users." *Washington III*, 506 F. Supp. at 205 (citing *Cappaert*, 426 U.S. at 138-39) (emphasis added). The implied-reservation-of-water doctrine applies not only to federally set-aside public land, *see Cappaert*, 426 U.S. 128, but also to the creation of Indian reservations. *See* Winters v. United States, 207 U.S. 564 (1908). In *Winters v. Untied States*, the seminal case applying the doctrine to Indian reservations, the Supreme Court determined that the entire purpose of the treaty establishing the Fort Belknap Indian Reservation was "the civilization and improvement of the Indians. *Id.* at 567. Thus, the establishment of the reservation impliedly reserved enough water to support agriculture on the reservation. *Id.*

90. *Washington III*, 506 F. Supp. at 204.

91. *Id.*

92. *See* Lewis, *supra* note 32, at 307.

93. *Washington III*, 506 F. Supp. at 205.

94. *Id.*

95. *Id.*

96. *Cappaert*, 426 U.S. 128 (implied-reservation-of-water doctrine reserved enough groundwater to protect pupfish in Devils Hole, Ash Meadows National Wildlife Refuge).

97. United States v. Anderson, 591 F. Supp. 1 (E.D. Wash. 1982), *aff'd*, 732 F.2d 1358 (9th Cir. 1984) (the implied-reservation-of-water doctrine reserved enough water to protect the Spokane Indian Reservation fishery).

98. *Washington III*, 506 F. Supp. at 205.

The district court agreed with the plaintiff tribes and the United States that, similarly to *Cappaert* and *Anderson*, the Stevens Treaties implied the right that water be of a sufficient quality to support traditional fisheries.[99] Indeed, the court noted that the reservation of fishing rights was even more crucial to the purpose of the Stevens Treaties than the implied reservation of water was to the reservations at issue in *Cappaert* and *Anderson*.[100] The court held that the right to habitat protection "*must* be implied in order to fulfill the purposes of the fishing clause."[101]

In fashioning a remedy, the district court determined that the implied right to habitat protection did not apply at large, but rather applied insofar as it protected the rights explicitly reserved by the tribes.[102] Citing *Fishing Vessel*, the court noted that tribes reserved no more than fifty percent of the fish taken in usual and accustomed grounds, or that, which provides the tribes a moderate living.[103] The court found it was that "minimal need which gives rise to an implied right to environmental protection of fish habitat," and emphasized that "the scope of the State's environmental duty must be ascertained by examining the treaty-secured fishing right, rather than selecting a desirable standard."[104] The court determined the duty imposed upon the State did not hold it to the standard of "no significant deterioration," but rather required the State keep from degrading the fishery habitat so as not to deprive the tribes of their moderate living needs, nothing more.[105]

B. United States v. Washington, *694 F.2d 1374 (9th Cir. 1982)*

On appeal, the Ninth Circuit overturned the district court, finding that the Stevens Treaties did not imply a broader right to habitat protection.[106] The Ninth Circuit rejected the "underpinnings of the district court's opinion," finding that *Fishing Vessel* neither guaranteed an adequate supply nor any particular quantity of fish.[107] Going further still, the Ninth Circuit stated:

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99. *Id*.
100. *Id*.
101. *Id*. (emphasis added).
102. *Id*. at 208.
103. *Id*. (citing *Fishing Vessel*, 443 U.S. at 686-87).
104. *Id.*
105. *Id.* at 207-08.
106. *Washington IV*, 694 F.2d at 1380.
107. *Id*.

> [t]o stop there, however, would be to unduly minimize the treaty obligation and ignore the natural dependence on one another of all who share the fishery and the necessity for all to work together to preserve and enhance its productive capacity. More is required to resolve adequately the issue of the environmental right.[108]

Instead of merely rejecting the premise of the district court's opinion, the Ninth Circuit identified "four main objections" it had with the implied right: "the absence of a basis in precedent, the lack of theoretical or practical necessity for the right, its unworkably complex standard of liability, and its potential for disproportionately disrupting essential economic development."[109]

1. The Absence of a Basis in Precedent

The Ninth Circuit stated that while *Fishing Vessel* held that tribes were entitled to a certain share of fish, it did not prescribe "in what manner or under what circumstances this share was entitled to protection."[110] Where the district court found that *Fishing Vessel* held that tribes reserved the *right to take* enough fish to support a moderate living, the Ninth Circuit found that *Fishing Vessel* only held that tribes reserved the *right to fish for* enough fish to support a moderate living.[111] The Ninth Circuit determined that the treaties reserved only the right to take "a share of the available fish, rather than . . . a fixed quantity."[112] Such a right, the court found, did not impute any duty upon the State to maintain the fisheries at any level.[113] While the court recognized that the existence of fish was fundamental to the ability of tribes to exercise their treaty right, the court stated that this truth "does not establish that the Tribes possess an environmental right" requiring the fisheries to be maintained at the current, historic, or even "economically satisfactory levels."[114]

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108. *Id.*
109. *Id.* at 1381.
110. *Id.*
111. *Id.*
112. *Id.* at 1382 (citing *Fishing Vessel*, 443 U.S. at 685-87) (emphasis removed).
113. *Id.* at 1381.
114. *Id.*

While the Ninth Circuit recognized "that there must be fish to give value to the right to take fish," it substantially qualified this statement by asserting that a "right may be subject to contingencies which would render it valueless."[115] The court stated that an event that strips away the practical value of exercising a right "does not impair *the right itself*, but merely eliminates the gain its holder hoped to realize."[116] The Ninth Circuit recognized, however, that state regulation could not discriminate against native fisheries.[117] "A pattern of development which concentrated the adverse effect of growth on treaty fish runs and spared non-treaty runs" could violate the treaty.[118] The court determined that no environmental right was needed to remedy such violations, as such actions would by themselves clearly violate the treaty.[119]

The Ninth Circuit also rejected the district court's reliance on the implied-reservation-of-water doctrine.[120] In theory, the Ninth Circuit recognized that the implied-reservation-of-water doctrine could be used to enforce some level of habitat protection in traditional fishing grounds.[121] The court concluded that in certain instances, the right could be used "for the development and maintenance of replacement fishing grounds," but only when "access to fishing grounds was one purpose for the creation of the reservation."[122] The court found the doctrine inapplicable to the case before it, however, as it determined that the reservation of fishing rights was not the main purpose for the creation of tribes' reservations under the Stevens Treaties.[123] Instead, the court viewed it as "an independent grant not dependent on the existence of a reservation."[124] The court noted that the implied-reservation-of-water

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115. *Id*.

116. *Id*. (emphasis in original).

117. *Id*. at 1382 (citing Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 48 (1973)).

118. *Id*.

119. *Id*.

120. *Id*. at 1383-84.

121. *Id*. at 1383 (citing Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981)).

122. *Id*. (citing *Walton*, 647 F.2d at 48).

123. *Id.* at 1383-84.

124. *Id.*; *see contra* United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

> In view of the historical importance of hunting and fishing, and the language of Article I of the 1864 Treaty, we find 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. This was at the forefront of the Tribe's concerns

doctrine generally applied to the *quantity* of water in traditional fishing grounds, not the *quality*.[125] The implied-reservation-of-water doctrine, the court noted, was not necessary to guarantee tribes the right to "a fair share" of fish.[126]

2. Lack of Necessity

The Ninth Circuit also found that there was no "theoretical or practical need for an environmental right" because the State did not have an interest in allowing the fisheries to decline.[127] The court rejected the argument that the State would destroy the fisheries "unless prevented by an environmental right."[128] The court pointed out that the State licensed 6,000 non-Indian commercial and 280,000 non-Indian recreational and

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> in negotiating the treaty and was recognized as important by the United States as well.

Id. at 1409. Article I of the treaty states, "and *the exclusive right of taking fish in streams and lakes, including in said reservation*, and of gathering edible roots, seeds, and berries within its limits, *is hereby secured to the Indians aforesaid*." Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians art. I, July 2, 1866, 16 Stat. 707 [hereinafter Treaty with the Klamaths] (emphasis added). Similar language is found in four of Governor Steven's treaties, including one of the Stevens Treaties: Treaty with the Yakimas, *supra* note 25, at art. III; Treaty of Hellgate, *supra* note 25, at art. III; Walla Walla Treaty, *supra* note 25, at art. I; Nez Perce Treaty of 1855, *supra* note 25, at art. III.

125. *Washington IV*, 694 F.2d. at 1384; *see contra* United States v. Gila Valley Irrigation Dist., 920 F. Supp. 1444, 1454 (D. Ariz. 1996), *aff'd*, 117 F.3d 425 (9th Cir. 1997) (the implied-reservation-of-water doctrine reserved the San Carlos Apache Tribe a sufficient *quality* of water to support agriculture).

126. *Washington IV*, 694 F.2d at 1384; *see contra cf.* Parravano v. Babbitt, 861 F. Supp. 914 (N.D. Cal. 1994), *aff'd*, 70 F.3d 539 (9th Cir. 1995) (as a matter of fist impression, the district court determined that "off-reservation regulation of fisher[ies] pursuant to non-treaty based tribal fishing rights" was permissible to the same extent as treaty-based fishing rights. *Id.* at 924. The court noted that "for the Tribes' federally reserved fishing right to have any practical meaning, it must include regulation of activities occurring outside the reservation which negatively impact that right." *Id.* The court concluded that the fact "[t]hat the fishing rights . . . arose through treaty rather than through statutory and executive authority does not affect the scope of the fishing right." *Id*. The court cited the implied-reservation-of-water doctrine in determining that non-treaty-based federally reserved fishing rights could be protected through off-reservation regulation. *Id*. (discussing *Winters*, 207 U.S. at 576; Arizona v. California, 373 U.S. 546, 599 (1963); *Walton*, 647 F.2d at 47)).

127. *Washington IV*, 694 F.2d. at 1384-85.

128. *Id*. at 1384.

sport fishermen.[129] The court determined that the interests of non-Native and Native fishermen were "inextricably linked," and that tribes should not be concerned about the depletion of their traditional fisheries, as such a depletion would adversely affect the State's interests as well.[130]

The court also pointed out that since 1960, Coho and Chinook salmon harvests had "increased dramatically."[131] Indeed, the court noted that the harvest of all salmon species in Washington, "while subject to fluctuation, has continued in comparative abundance from 1935 to 1970."[132] The court also found the production of hatchery-raised fish would help "substantial[ly]" mitigate any reduction in the natural fisheries.[133] The court found that the State, tribes, and the United States had "strong interest[s] in preserving and enhancing the fisheries."[134] The Ninth Circuit surmised that there could be no "theoretical or practical necessity" for tribes' independent right to habitat protection since the State was interested in preserving the fisheries, and there appeared to be no decline in fishery production.[135]

3. Unworkably Complex Standard of Liability

The Ninth Circuit further found that the implied right to habitat protection created a standard of liability that was "unworkably complex."[136] The district court created a duty that "require[d] the State to refrain from degrading the fish habitat to an extent that would deprive the Tribes of their moderate living needs."[137] The district court determined that to establish a violation of the implied right, "Tribes must shoulder the initial burden of proving that a challenged action will proximately cause the fish habitat to be degraded such that the future or current [fish]

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129. *Id*. at 1385.
130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*. at 1386.
134. *Id*.
135. *Id*. at 1384.
136. *Id*. at 1387.
137. *Id*. (discussing *Washington III*, 506 F. Supp. at 208). The Ninth Circuit stated that the district court's holding implied the tribes were allocated fifty percent of the take, that their needs could increase that percentage, and that they were entitled to historic fish levels. *Id*. at 1387-88. However, the district court correctly interpreted *Fishing Vessel* as capping tribes' allocation at fifty percent, a level which could only be reduced, and did not find that the right to habitat protection required the restoration of historic fish levels. *Washington III*, 506 F. Supp. at 208 (citing *Fishing Vessel*, 443 U.S. at 686-87).

runs will be diminished."[138] Once the tribe has made its showing, the burden would shift to the State to prove "that any degradation of the fish habitat proximately caused by the State's actions . . . will not impair the Tribes' ability to satisfy their moderate living needs."[139]

The Ninth Circuit was concerned, however, with "the difficult issue of causation," created in the district court's burden-shifting standard of liability.[140] The court found "[t]he remoteness in the causal chain between a potentially impairing project and the reduced fish harvest" was far too complex and cumbersome for both trial courts and litigants to ascertain.[141] The Ninth Circuit also noted the difficult position the State would be placed in by having to show what harvests would satisfy the tribes' moderate living needs and how a reduction would not violate tribes' moderate living needs.[142] The court opined that the standard of liability established by the district court would require state permit issuing agencies to review the impacts actions would have on the traditional fisheries.[143] The Ninth Circuit found that the Stevens Treaties did not "impose on the State the burden of . . . assur[ing] [the tribes'] 'moderate living needs.'"[144]

4. Disproportionately Disruptive Effect

The Ninth Circuit finally cautioned that the implied right would create a "servitude [that] affects *all* State or State-authorized activities affecting the environment, not just those involving appropriative consumption of water."[145] The court was concerned that the right could extend far beyond the purpose of the Stevens Treaties.[146] The Treaties, the court noted, were meant "to settle any and all Indian claims to land title . . . so that non-Indian settlers could develop their lands without conflict with the Indians."[147] The court also found that if the right required state permits "to place the highest priority on avoiding any potential impacts upon fisheries," the right would frustrate the State's "competing . . . interest in allowing various types of development in

138. *Washington IV*, 694 F.2d at 1388 (discussing *Washington III*, 506 F. Supp. at 208).
139. *Id*. (citing *Washington III*, 506 F. Supp. at 208).
140. *Id*.
141. *Id*.
142. *Id*.
143. *Id*.
144. *Id*.
145. *Id*. at 1388-89 (emphasis in original).
146. *Id*. at 1389.
147. *Id*.

different locations."[148] To avoid the undercutting of economic development and disputes between Indians and non-Indians, the court noted that the "right must be tempered by a reasonableness requirement."[149]

While the Ninth Circuit rejected the understanding that the Stevens Treaties implied a right to habitat protection, the court did not go so far as to hold that the State and the tribes "have no obligations to respect the other's rights in the resource."[150] Indeed, the court noted that the State and tribes must act "reasonably" in taking "compensatory steps to protect and enhance the fisheries."[151] In the court's view, these obligations did not arise, however, from an implied right within the treaties.

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

In an en banc rehearing, the Ninth Circuit affirmed the panel's reversal of the "environmental issue."[152] However, the en banc panel vacated the opinion of the three-judge panel and declared that its opinion would be the court's final decision.[153] The holding of the full panel, however, is squarely rooted in the reasoning of the three-judge panel's decision. The full panel stated that the district court could not announce new legal rules "when the subject parties and the court giving judgment are left to guess at their meaning."[154] The en banc panel stated, "[i]t serves neither the needs of the parties, . . . nor the interests of the public for the judiciary to employ declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension."[155] The court left open the possibility that under the right circumstances an environmental-based right might be found to exist, stating, "the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment . . . will depend . . . upon concrete facts which underlie a dispute in a particular case."[156] The court,

148. *Id*. at 1388.

149. *Id*. at 1389. The court did not state what the "reasonableness requirement" would look like, except that it was one "we have recognized." *Id*.

150. *Id*.

151. *Id*.; *see cf. Fishing Vessel*, 443 U.S. at 684-85.

152. United States v. Washington, 759 F.2d 1353, 1360 (9th Cir. 1985) (en banc) [hereinafter *Washington V*].

153. *Id*. at 1354.

154. *Id*. at 1357.

155. *Id*.

156. *Id*.

however, rejected the idea that the right to take fish imposed an affirmative environmental duty on the State. Instead, such a right would merely be reflexive, and could only be exercised in response to specific State actions that degraded traditional fisheries.[157]

IV. REESTABLISHING THE IMPLIED RIGHT TO HABITAT PROTECTION

In reestablishing the implied right to habitat protection, the treaty-reserved right to take fish can be used as a broadly applicable, yet precise, proactive tool for preventative ecological preservation, rather than merely a reflexive tool meant for ecological restoration. The enforcement of the reestablished implied right must be asserted with respect to particular projects and their particular environmental consequences. Enforcement of the implied right could be incorporated into environmental reviews under the National Environmental Policy Act ("NEPA")[158] and the Washington State Environmental Policy Act ("SEPA"),[159] or by challenging specific actions under the Administrative Procedures Act[160] and the Washington State Administrative Procedures Act.[161] To succeed in reestablishing the implied right, the Nation—or any tribe—must overcome each one of the Ninth Circuit's "four main objections."[162] First, the Nation must establish that the interpretation of the Treaty of Point Elliot implies a broader right to habitat protection is based in precedent. Second, the Nation must establish its practical and theoretical need for the implied right. Third, the Nation must show that while the standard of liability may be complex, it is nonetheless workable. Finally, the Nation must show that the effects of the implied right are not disproportionately disruptive to the economy and to the State.

A. Presence of a Basis in Precedent

The first hurdle in reestablishing the implied right is overcoming the Ninth Circuit's assertions that the implied right lacks a basis in

157. *Id.*

158. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as 42 U.S.C. §§ 4321-4347 (2012)).

159. WASH. REV. CODE §§ 43.21c.010-43.21c.914 (2009).

160. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as 5 U.S.C. §§ 551-559, 701-706, 1305, 3106, 3344, 4301, 5335, 5372, 7521 (2012)).

161. WASH. REV. CODE §§ 34.05.010-34.05.903 (2015).

162. *See Washington IV*, 694 F.2d at 1381.

precedent,[163] and that it is "imprecise in definition and uncertain in dimension."[164] Notably, the Ninth Circuit did recognize the logic of the district court's statement that the right to take fish required fish to exist.[165] Since the Ninth Circuit's three-judge panel and en banc decisions, a series of lower court decisions have established a line of precedent that is the foundation for the reestablishment of the implied right to habitat protection.[166] The lower court decisions have both "affirmed an implicit right to habitat protection," as well as "indirectly acknowledged the right . . . with injunctive relief."[167] While the cases do not explicitly establish the implied right, the "opinions are logically consistent with" the understanding that the right exists.[168]

Even before the *United States v. Washington* litigation, it had been "well established that the United States could be held liable for monetary damages if reserved Indian fisheries were harmed by . . . environmental degradation."[169] For example, in 1973, the United States District Court for the District of Oregon, in *Confederated Tribes of the Umatilla Indian Reservation v. Callaway*,[170] issued what scholars believe to be the first opinion "recogni[zing] that the treaties could be used to protect salmon habitat."[171] The district court ordered the United States Army Corps of Engineers ("Army Corps") and the Bonneville Power Administration to operate the Columbia River Power System in a manner that would not "'impair or destroy any fishing rights . . . secured by Treaty with the Indians.'"[172] In a continuation of the reasoning of *Calloway*, the district court, in *Confederated Tribes of the Umatilla Reservation v. Alexander*, issued a declaratory judgement stating that the constructing of a dam on Catherine Creek would "impair access to . . .

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163. *Id.*

164. *Washington V*, 759 F.2d at 1357.

165. *Washington IV*, 694 F.2d at 1381.

166. *See infra* notes 170-203, and accompanying text.

167. Ruth Langride, *The Right to Habitat Protection*, 29 PUB. LAND & RESOURCES L. REV. 41, 44-45 (2008).

168. Lewis, *supra* note 32, at 299.

169. Allen H. Sanders, *Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?*, 17 PUB. LAND & RESOURCES L. REV. 153, 173 n.116 (1996).

170. Confederated Tribes of Umatilla Reservation v. Calloway, Civ. No. 72-211 (D. Or. Aug. 17, 1973).

171. Michael C. Blumm & Brett M. Swift, *The Indian Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 464 (1998) (discussing *Calloway*, Civ. No. 72-211).

172. *Id*. (quoting *Calloway*, Civ. No. 72-211, slip op. at 7); *see also* Sanders, *supra* note 170, at 173 n.116.

traditional [fishing] stations" by covering them in 200 feet of water, and "prevent all wild fish from swimming upstream."[173] Importantly, the court concluded, "the treaty right to fish at all the usual and accustomed stations will be destroyed."[174] The court determined that had Congress "expressly and specifically" nullified the treaty rights to allow the construction of the dam and allow for such an increase in water levels, the Army Corps would not have violated the treaty rights of the Umatilla when it flooded their traditional fisheries.[175]

In a series of decisions in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, the Ninth Circuit ultimately upheld the district court's determination requiring the Watermaster at the Cle Elum Dam in Washington to take steps to ensure adequate water levels over salmon spawning grounds.[176] Initially, the Ninth Circuit found that the parties to the Yakima Nation's treaty "'bear a duty to refrain from actions interfering with either the Indians' access to fishing grounds or the amount of fish present there.'"[177] While the final en banc opinion found it unnecessary to "decide the scope of fishing rights reserved to the Yakima Nation," the Ninth Circuit upheld the district court's order protecting the spawning habitat.[178]

In 1988 the Western Washington District Court, in *Muckleshoot Indian Tribe v. Hass*, enjoined a project that proposed to build a small craft marina in Elliot Bay.[179] The proposed marina was to be located within one of the traditional fishing grounds of the Muckleshoot Indian Tribe and the Squamish Nation.[180] The district court enjoined the construction of the marina, finding that the "elimination of a portion of the usual and accustomed fishing ground . . . [would] deny the Tribes access to their usual and accustomed fishing ground, and the loss to the Tribe [would] be substantial."[181] The court rejected the Army Corps's argument that only a portion of the traditional fishery would be impacted,

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173. Confederated Tribes of Umatilla Reservation v. Alexander, 440 F. Supp. 553, 555-56 (D. Or. 1977).

174. *Id*.

175. *Id*.

176. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1034-35 (9th Cir. 1985).

177. Blumm & Swift, *supra* note 172, at 465-66 n.282 (quoting Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., No. 80-3505, slip op. at 5 (9th Cir. Sept. 10, 1982)).

178. *Kittitas Reclamation Dist.*, 763 F.2d at 1034-35 n.5.

179. Muckleshoot Indian Tribe v. Hass, 698 F. Supp. 1504 (W.D. Wash. 1988).

180. *Id*. at 1510.

181. *Id*. at 1515-16.

thus allowing the tribes to still access enough of the fishery to satisfy their moderate living needs.[182] The elimination of even a portion of the tribes' usual and accustomed fishing grounds, the court concluded, would constitute a "substantial" loss.[183]

In 1996, the Western Washington District Court upheld the Army Corps's denial of a permit to construct a fish farm in the waters of Rosario Straight, next to Lummi Island, as it "would interfere with the treaty fishing rights of the Lummi Nation."[184] In upholding the Army Corps's denial of the permit, the court, in *Northwest Sea Farmers v. United States Army Corps of Engineers*, held that the federal government "owe[d] a fiduciary duty to ensure that the Lummi Nation's treaty rights are not abrogated or impinged."[185] The court found there was no need to show that the fish farm would impact the number of fish available for harvest.[186] Instead, noting the "'geographical' component" of the Treaty of Point Elliot, the court found that the "entire area" where fishing was contemplated by the treaty "would be obstructed to tribal members."[187] By finding that the obstructions caused by the fish farm would so substantially affect the traditional fishery, the court "effectively preserved productive fish habitat" for the Nation.[188]

Most significant is the Western Washington District Court's 2007 decision in *United States v. Washington*, known as the *Culverts Case*.[189] The issue before the court was "whether the Tribes' treaty-based

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182. *Id*. Citing the British Columbia Supreme Court, the district court noted that the treaties "protected the Indians' right to the *whole* fishery, not just some part." *Id*. (citing Saanichton Marina Ltd. v. Claxton (1987), 43 D.L.R. (4th) 481, at para 13 (B.C.S.C.), *aff'd in part, rev'd in part*, (1989) 57 D.L.R. (4th) 161 (B.C.C.A.)) (emphasis added).

183. *Id*. at 1515-16.

184. Nw. Sea Farmers v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1522 (W.D. Wash. 1996).

185. *Id*. at 1520. In litigation over an irrigation project connected to the Klamath River, the Ninth Circuit noted that water management in the Klamath River Basin was "especially difficult" because "[s]everal tribes in the area ha[d] treaty rights to Klamath River fish." Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1085-86 (9th Cir. 2005). Much like the district court in *Northwest Sea Farmers*, the Ninth Circuit iterated that the federal government owed a "fiduciary duty to *maintain* these resources." *Id*. at 1086 (emphasis added).

186. *Nw. Sea Farmers*, 931 F. Supp. at 1522

187. *Id.* at 1521-22.

188. Lewis, *supra* note 32, at 299.

189. United States v. Washington, 20 F. Supp. 3d 828 (W.D. Wash. 2007) [hereinafter *Culverts Case*]; *see also* United States v. Washington, 20 F. Supp. 3d 986 (W.D. Wash. 2013) (enforcing the decision in the *Culverts Case* in response

right of taking fish imposed upon the State a duty to refrain from diminishing fish runs by constructing or maintaining culverts that block fish passage."[190] In finding that the State did owe such a duty, the district court conducted an exhaustive analysis of the *United States v. Washington* decisions on the implied right to habitat protection.[191] The district court concluded that the Ninth Circuit's en banc opinion could not "be read as rejecting the concept of a treaty-based duty to avoid specific actions which impair salmon runs."[192] The court noted that in Phase II, the Ninth Circuit "clearly presume[d] some obligation on the part of the State" to maintain fish habitats.[193] Similar to the district court's analysis in 1980, which found the existence of the implied right, the district court in the *Culverts Case* determined that at the time the treaties were signed, "[i]t was . . . the government's intent, and the Tribes' understanding, that they would be able to meet their own subsistence needs forever."[194] The court held that the treaties did impose a duty on the State not to construct or maintain culverts that blocked fish from passing up or down stream.[195] The district court specifically curtailed the scope of its decision, noting that it was "not a broad 'environmental servitude' . . . , but rather a narrow directive."[196] In reference to the en banc opinion in Phase II, the district court reiterated that the "Tribes . . . presented sufficient facts . . . to justify a declaratory judgement."[197]

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to the State's slow response to remedy barrier culverts: "[a]n injunction is necessary to ensure that the State will act expeditiously in correcting the barrier culvers which violate the Treaty promises." *Id*. at 1022). The appeal of the district court's permanent injunction requiring the State to remove or fix culverts blocking fish passage is currently pending before the Ninth Circuit. Oral arguments were held on October 16, 2015. *See infra* note 225. Within the series of litigation concerning the *Culverts Case*, the district court emphasized that "[t]he State's duty to maintain, repair or replace culverts . . . does not arise from a broad environmental servitude." United States v. Washington, No. CV 70-9213, 2013 WL 1334391, at *24 (W.D. Wash. Mar. 29, 2013).

190. *Culverts Case*, 20 F. Supp. 3d at 892.

191. *Id*. at 893-95.

192. *Id*. at 894 (discussing *Washington IV*, 759 F.2d at 1357).

193. *Id*. at 893-94 (discussing *Washington IV*, 759 F.2d at 1357).

194. *Id*. at 897 (discussing *Fishing Vessel*, 443 U.S. 658).

195. *Id*. at 899.

196. *Id*. Importantly, the district court did not cite a single case outside the Phase I progeny. The court tailored its opinion as narrowly as it could to avoid the ultimate conclusion this paper attempts to make: that there is sufficient precedent to find support for a generally applicable right to habitat protection that indeed places an "environmental servitude" on traditional fisheries.

197. *Id*.

While the court's determination in the *Culverts Case* does not impose an affirmative duty on the state to avoid specific actions that would degrade specific tribal fisheries, it does provide tribes with a tool to challenge those actions that degrade the fisheries.[198] The *Culverts Case* imposes a duty on the State to remedy actions that are specifically shown to degrade tribal fisheries.[199] While this decision falls short of the broad environmental duty envisioned by the district court in Phase II of *United States v. Washington*, it nonetheless lays the foundation upon which the broader implied right can be reestablished. Indeed, the court repeatedly referenced the State's obligations not to degrade the fisheries. If the State bears a duty to remedy actions that degrade specific fishery habitats when tribes can show that such actions harmed the fisheries, its duty logically extends to avoid harming the traditional fishers in the first place by taking steps to protect them. A proactive duty to avoid harm and protect traditional fisheries is exactly the scope of the implied right the district court in Phase II understood the Stevens Treaties to impose.

The line of cases outlining the scope of fishing rights, read together with the most recent iteration of *United States v. Washington*, lays a sufficient basis for courts to find that the right to take fish implies a right to habitat protection, which imposes an environmental duty on the State to refrain from degrading the fisheries. Indeed, the dissent to the en banc opinion rejecting the implied right found that such a right certainly existed.

> I agree with the district court that the Tribes have an implicit treaty right to a sufficient quantity of fish to provide them with a moderate living, *and the related right not to have the fishery habitat degraded to the extent that the minimum standard cannot be met*. I also agree that *the State has a correlative duty to refrain from degrading or authorizing others to degrade the fish habitat* in such a manner.[200]

United States Circuit Judge Dorothy Wright Nelson, in her dissent, stated that imposing a duty on the State to refrain from degrading fishery "'habitat to the extent that would deprive the Tribes of their moderate

198. *Id.*

199. *Id.*

200. *Washington V*, 759 F.2d at 1367 (Nelson, J., dissenting) (emphasis added). Indeed, the district court in the *Culverts Case* relied heavily on Judge Nelson's dissent in crafting its opinion. *See* 20 F. Supp. 3d at 894 n.5.

living needs' by no means represents an extraordinary limitation of State authority."[201]

Since the Ninth Circuit's Phase II decisions in *United States v. Washington*, lower courts have laid the necessary foundation to take the logical step from defining the right to actually harvest fish under *Fishing Vessel*, to understanding that the treaties preserve the right to actually harvest fish by impliedly reserving the right to habitat protection.[202] The Ninth Circuit's worry that the right lacks an "absence of basis in precedent" is clearly alleviated.

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201. *Washington V*, 759 F.2d at 1366 (Nelson, J., dissenting) (quoting *Washington III*, 506 F. Supp. at 208).

202. *See also* No Oilport! v. Carter, 520 F. Supp. 334 (W.D. Wash. 1981) (an issue of fact existed "as to whether sedimentation caused by burying the pipeline across rivers will adversely affect spawning beds such that the rearing or production potential of the fish will be impaired or the size or quality of the run will be diminished." *Id*. at 372. Summary judgment was denied and the tribes were "allowed the opportunity to attempt to satisfy their burden" of showing the pipeline would degrade the fishery. *Id*.); *Walton*, 647 P.2d 42 (the implied-reservation-of-water doctrine reserved to the tribe the "right to the quantity of water necessary to maintain the Omak Lake Fishery . . . and to permit natural spawning of the trout." *Id*. at 48); *Adair*, 723 F.2d 1394 (the court determined that the treaty-reserved right to hunt and fish was "one of the 'very purposes' of establishing the Klamath Reservation [and] to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." *Id.* at 1409. Citing "the 'moderate living' standard enunciated in *Fishing Vessel*," the Ninth Circuit "affirm[ed] . . . that the Klamath Tribe [was] entitled to a reservation of water . . . sufficient to support [the] exercise of treaty hunting and fishing rights. *Id*. at 1415 (citing *Fishing Vessel*, 443 U.S. at 686)); *Anderson*, 591 F. Supp. 1 (the treaty establishing the reservation "insure[d] the Spokane Indians access to fishing areas and to fish for food," such that the court required sufficient in-stream flows to maintain an adequate level of water flow and temperature. *Id*. at 7-10); *see contra* Ground Zero Ctr. for Nonviolent Action v. Dep't of the U.S. Navy, 918 F. Supp. 2d 1132 (W.D. Wash. 2013) (the court held that the Navy's construction of a wharf did not infringe upon the Suquamish Tribe's treaty rights. *Id.* at 1151-52. The Tribe argued that the proposed wharf "would reduce fish and shellfish populations and impair the Tribe's ability to exercise its treaty rights north of the Hood Canal Bridge," and would impact its ability to access its tradition fisheries. *Id.* at 1152. (internal quotation omitted). The court concluded that it "ha[d] difficulty finding evidence that the Tribe's fishing will be impacted," and emphasized that the tribe had "fail[ed] to present any argument suggesting that the Navy's mitigation measures w[ould] be ineffective." *Id*. While the case focused on access, rather than habitat degradation, the court noted the extensive studies the Navy conducted on the wharf's impact and the mitigation measures it planned on implementing. *Id.* at 1151-54).

B. Necessity of the Right

The Ninth Circuit rejected the notion that either a theoretical or practical need for the right to habitat protection existed.[203] In doing so, the court pointed to relatively strong fishery levels in Washington, as well as the State's and the tribes' seemingly co-extensive interest in protecting the fisheries.[204] According to the Washington State Recreation and Conservation Office ("WSRCO"), however, wild salmon have disappeared from forty percent of their historic breeding grounds throughout the Pacific Northwest since 1999.[205] The United States Fish & Wildlife Service currently lists sixteen distinct Pacific Northwest salmonid runs as endangered or threatened under the Endangered Species Act ("ESA").[206] Throughout Washington, salmonids are listed as either threatened or endangered in nearly three-quarters of the State.[207]

According to numbers recorded by the National Marine Fisheries Service, in 1982, when the Ninth Circuit first found no practical or theoretical need for the right, commercial fishermen in Washington harvested 23,144.6 metric tons of salmon.[208] In 2014, by contrast, only 12,588.7 metric tons of salmon were harvested from Washington fisheries.[209] Chum harvests dropped 4.7 percent; Coho, 60.4 percent; and

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203. *Washington IV*, 694 F.2d at 1384.

204. *Id.* at 1385 (citing JOINT BIOLOGICAL STATEMENT, *supra* note 77, at 13-16). The Ninth Circuit identified Chinook, Chum, Pink, Coho, and Sockeye salmon in its opinion. *Id*. The Washington State Department of Fish & Wildlife identifies eight native "salmonids" in coastal waters, including Steelhead, Bull, and Coastal Cutthroat trout. *See* Wash. Dep't of Fish & Wildlife, *Salmon/Steelhead Species Information*, STATE OF WASH., http://wdfw.wa.gov/fishing/salmon/species.html (last visited Apr. 5, 2015).

205. Wash. State Recreation and Conservation Office, *Salmon Recovery in Washington*, STATE OF WASH., http://www.rco.wa.gov/%5C/salmon_recovery/index.shtml (last visited Apr. 5, 2015).

206. Wash. Dep't of Fish & Wildlife, *Washington State Species of Concern Lists*, STATE OF WASH., http://wdfw.wa.gov/conservation/endangered/list/Fish (last visited Apr. 5, 2015); *see* Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (1973) (codified as 16 U.S.C. §§ 1531-1544 (2012)).

207. Wash. State Recreation and Conservation Office, *supra* note 206.

208. *See* Nat'l Marine Fisheries Serv., *Annual Commercial Landings Statistics*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., OFFICE OF SCI. AND TECH., http://www.st.nmfs.noaa.gov/commercial-fisheries/commercial-landings/annual-landings (last visited Jan. 18, 2016) (under "SPECIES," enter "salmon"; under "YEAR RANGE," select "1982" under "FROM"; under "GEOGRAPHICAL AREA STATE/AREA," select "Washington"; under "OUTPUT FORM," select "TABLE"; finally, select "Submit Query").

209. *See id*.

Sockeye, 77.5 percent.[210] The Pacific salmon harvest, which was 686.2 metric tons in 1982, was all but eliminated by 2006.[211] The Puget Sound Partnership ("PSP"), the Washington agency charged with restoring the Puget Sound watershed, notes that of the thirty-seven historic Chinook runs in Washington, only twenty-two remain.[212] The remaining Chinook runs, the PSP cautions, are only at ten percent of their historic level, with some even lower than one percent.[213]

Of the leading factors the WSRCO has identified as contributing to the decline in state fisheries, most affect habitat: "[l]oss, fragmentation, and destruction of salmon habitat"; "[l]and uses that pollute waterways and degrade habitat"; "[d]ams"; "[f]luctuating marine conditions"; and "[c]limate change."[214] In an exposé by PBS Newshour in 2012, legendary Native American civil and fishing rights activist Billy Frank, Jr., warned that melting glaciers, attributable to climate change, would adversely impact Native fisheries.[215] Salmon depend on cold, glacier-fed mountain streams for spawning grounds and habitat for juvenile salmon.[216] Since 1920, the average temperature of streams in the North Cascades has risen 1.5 degrees Fahrenheit, and, by 2080, the average water temperature of these streams is predicted to rise above seventy degrees Fahrenheit—a temperature lethal to both juvenile salmon and salmon eggs.[217] Indeed, the Environmental Protection Agency has warned that between 2050 and 2100, up to at least fifty percent of stream habitat for trout and salmon will be destroyed by climate change.[218] While the impacts of climate change are likely to affect all fisheries, coastal tribes would be disproportionately affected as

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210. *See id*. In 2014 the commercial harvest of Chinook had risen by 3.9 percent, while the harvest of Pink had risen 433 percent. *See id*. Eighty pounds of Pacific salmon was harvested. *See id.*

211. *See id*.

212. Puget Sound P'ship, *Salmon Recovery in Puget Sound*, STATE OF WASH., http://www.psp.wa.gov/salmon-recovery-status.php (last visited Apr. 7, 2015).

213. *Id*.

214. Wash. State Recreation and Conservation Office, *supra* note 206. The WSRCO also identified over fishing, competition from hatchery-raised fish, and increased predation as contributing factors. *Id*.

215. Campbell & de Melker, *supra* note 10.

216. *Id*.

217. *Id*.

218. OFFICE OF POLICY, PLANNING AND EVALUATION, *supra* note 8, at 2-47, Exhibit 2-27.

substantial parts of their economic, cultural, and religious identities rely on fishing.[219]

In 1982, the Ninth Circuit could not envision a practical, or even theoretical, necessity for the right, as the State's interests in preserving fishery habitats, in the eyes of the court, were "identical" to those of the tribes.[220] Tribes' interests in preserving *their* traditional fisheries, however, are not co-extensive with the State's interests in preserving *its* fisheries. The treaties reserved for tribes' specific traditional fisheries, which are distinct from those of the State. Tribes' interests and goals in, and methods of, protecting their traditional fisheries are not the same as those of the State. Fishing is a way of life; it is a cultural and spiritual exercise, and it is a way to sustain life.[221]

State policies to preserve the habitat of its fisheries do not necessarily incorporate plans to preserve specific traditional fisheries, nor do they always aim to achieve the same goals. While State fisheries are all located within the waters of the State, tribes must prove that certain, specific fisheries are in "'location[s] where members of a tribe customarily fish[] from time to time.'"[222] In determining these usual and accustomed grounds, vis-à-vis the enforcement of treaty rights, courts must make an extensive factual determination that "tribal . . . fishing takes place in the . . . area."[223] Because the tribes have particularized interests in preserving the habitat of specific fisheries, their interests in and actions to preserve these fisheries and habitats are not co-extensive with the broader, more generally applicable State interests and actions. The State manages fisheries throughout State waters, and looks to broadly applicable management. The tribes, however, manages specific and discrete fisheries, where large-scale management does not apply.

The impacts climate change, over-fishing, and development within Washington watersheds have had on the populations of salmon and the productivity of fisheries clearly establish a practical need for the implied right. Additionally, the implied right to habitat protection is necessarily simply because the right to take fish exists. The different goals, purpose, and implementation of preservation and restoration policies, as well as the distinction in specific fisheries and habitats that need protection emphasize the divergent interests between State and

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219. *See* NAT'L WILDLIFE FED'N, *supra* note 3, at 20; Fears, *supra* note 3; Campbell & de Melker, *supra* note 10.

220. *Washington IV*, 694 F.2d at 1385.

221. *See generally* WILKINSON, *supra* note 4, at 100.

222. *Nw. Sea Farmers*, 931 F. Supp. at 1521 (quoting *Boldt Decision*, 384 F. Supp. at 332).

223. *Id.*

tribal action, and reinforce the understanding that there exists a theoretical need for the right.[224] The enforcement of tribes' rights to protect their traditional fisheries and habitats cannot be contingent on the State satisfying its separate, albeit similar, interests.[225]

C. Workable Standard of Liability

The Ninth Circuit also found that the steps outlined by the district court setting forth the standard of liability and burden of proof required by tribes to enforce the implied right to habitat protection was "unworkably complex."[226] The Ninth Circuit worried that "[t]he remoteness in the causal chain between a potentially impairing project and a reduced fish harvest is . . . inevitable," and that pinpointing the effects of a specific project that was impairing the fishery would be "difficult."[227] The court also rejected the district court's burden shifting standard for establishing and disproving a claim made under the right.[228] As a solid line of cases have since shown, however, district courts have been well equipped to pinpoint the causal connection between a specific

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224. *E.g.*, during oral arguments before the Ninth Circuit in the State's appeal of a permanent injunction issued pursuant to the *Culverts Case*, the State all but conceded that its interpretation of the treaties would allow the State to fully destroy the fisheries by blocking upstream passage through the construction dams or other barriers. *USA, et al v. State of Washington, No. 13-35474*, at 17:39 to 18:46 (U.S. Ct. of Appeals for the Ninth Cir. oral argument Oct. 16, 2015), *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008307.

225. *See generally* NW. INDIAN FISHERIES COMM'N, UNDERSTANDING TRIBAL TREATY RIGHTS IN WESTERN WASHINGTON, *available at* http://nwifc.org/w/wp-content/uploads/downloads/2014/10/understanding-treaty-rights-final.pdf (last visited Jan. 13, 2016).

> "We, the Indians of the Pacific Northwest, recognize that our fisheries are a basic and important natural resource and of vital concern to the Indians of this state, and that the conservation of the natural resource is defendant upon effective and progressive management. We further belief that by unity of action, we can best accomplish these things, not only for the benefit of our own people, but for all of the people of the Pacific Northwest."

NW. INDIAN FISHERIES COMM'N CONST. pmbl., *in* NW. INDIAN FISHERIES COMM'N, TRIBAL NATURAL RESOURCES MANAGEMENT: A REPORT FROM THE TREATY INDIAN TRIBES IN WESTERN WASHINGTON 2 (2015), *available at* http://nwifc.org/w/wp-content/uploads/downloads/2015/01/NWIFC-Annual-Report-2015.pdf.

226. *Washington IV*, 694 F.2d at 1387.

227. *Id*. at 1388.

228. *Id.*

project and potential or actual degradation of fisheries.[229] The outline presented by the district court, establishing the required showings and shifting burdens of parties, does not, as the Ninth Circuit suggest, create a "contrary presumption" against state action, nor is it "unworkably complex."[230]

The district court's standard of liability is workable and straightforward. Plaintiff tribes must "shoulder the initial burden" by showing that the challenged actions, conducted either by the State or its permitee, would proximately cause the degradation of fish habitat so that the tribes would be unable to harvest enough fish to sustain their moderate living needs.[231] To satisfy their initial burden, tribes would be required to make three showings. First, tribes would have to establish a causal connection between the proposed action and the potential degradation of an identifiable fishery. Courts are well equipped to make the fact finding necessary to find a causal link between an action and its impact on habitat.[232] Second, tribes must establish that the identified fishery affected by the action is within their usual and accustomed fishing grounds. The tribes must develop an extensive record showing that the fishery is within "'location[s] where members of a tribe customarily fish[] from time to time.'"[233] Tribes do not need to prove the grounds are "the primary or most productive ones," only "that the site is fished by members . . . on more than an extraordinary basis."[234] This fact finding is the core of the *Boldt Decision* sub-proceedings, determining the range of usual and accustomed fishing grounds.[235] Third, tribes would

229. *See supra* notes 170-203, and accompanying text. These courts were able to show the casual link between specific state, or state-permitted, actions and the degradation of fisheries and their impingement and abrogation of treaty rights.

230. *Washington IV*, 649 F.2d at 1387-88.

231. *Washington III*, 506 F. Supp. at 208.

232. *See supra* notes 170-203, and accompanying text.

233. *Nw. Sea Farmers*, 931 F. Supp. at 1521 (quoting *Boldt Decision*, 384 F. Supp. at 332) (bracket in original).

234. *Id*.

235. *See, e.g.*, United States v. Washington, Case No. C70-9213 RSM, Subproceeding No. 05-04, 2013 WL 3897783 (W.D. Wash. July 29, 2013) (order on mots. for sum. j. and mot. for declaratory j.), *aff'd sub. nom*, Tulalip Tribes v. Suquamish Indian Tribe, 794 F.3d 1129 (9th Cir. 2015) (determining the usual and accustomed fishing grounds of the Suquamish Tribe and the Tulalip Tribes); United States v. Washington, Case No. C70-9213 RSM, Subproceeding No. 11-2, No. 2:11-sp-00002-RSM (W.D. Wash. July 17, 2015) (order on mots. for sum. j.) (determining the usual and accustomed fishing grounds of the Port Gamble S'Klallam Tribe, the Lower Elwha Klallam Indian Tribe, and the Lummi Nation); United States v. Washington, Case No. C70-9213 RSM, Subproceeding No. 09-01, No. 2:70-cv-09213-RSM (W.D. Wash. July 9, 2015) (findings of fact and

need to establish how much of the fish within the specific fishery are needed to satisfy their moderate living needs.[236] In *Fishing Vessel*, the Supreme Court held that it was within "the [d]istrict [c]ourt's exercise of its discretion" to determine the "equitable measure" of fish allocated from harvests within usual and accustomed grounds.[237] The tribes must show what percentage of the harvest from the specific fishery is required to satisfy their moderate livings needs. Such a showing must be based "upon proper submissions to the [d]istrict [c]ourt" and may vary "in response to changing circumstances."[238] This standard has never been found non-judiciable.[239] Contrary to the Ninth Circuit's insistence, the initial phase of litigation enforcing the implied right is not unworkably complex.

Once tribes have made their showing that a State action would affect their ability to satisfy their moderate living needs from a particular usual and accustomed fishing ground, the burden shifts to the State to rebut the tribes' evidence. As it is the State's burden to "demonstrate . . . that the tribes' needs may be satisfied by a lesser allocation, the State must also bear the burden . . . to demonstrate that any environmental degradation of the fish habitat proximately caused by the State's actions . . . will not impair the tribes' ability to satisfy their moderate living needs."[240] The State would be required to present significant scientific, economic, and cultural evidence to satisfy their burden.[241] However, as indicated before, such complex cases are not uncommon in federal court.[242] The Ninth Circuit noted that district courts would have the

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conclusions of law and mem. order) (determining the usual and accustomed fishing grounds of the Makah Indian Tribe, the Quileute Indian Tribe, and the Quinault Indian Nation).

236. *See Fishing Vessel*, 443 U.S. at 686.

237. *Id*. at 685, 687.

238. *Id*. at 687. Of course, no amount of fish found necessary to satisfy the moderate living requirement may exceed fifty percent of the fish harvested within the specific fishery. *Id*. at 686.

239. *See, e.g.*, Midwater Trawlers Coop. v. Dep't of Commerce, 282 F.3d 710, 718-21 (9th Cir. 2002) (affirming *Fishing Vessel* standard to determine the Makah Tribe's apportionment of Pacific whiting harvest); United States v. Washington, 873 F. Supp. 1422, 1445-46 (W.D. Wash. 1994), *aff'd in part, rev'd in part*, 157 F.3d 630 (9th Cir. 1998) (determining that the fifty percent allocation of sixteen tribes shellfish harvests did not need to be reduced under *Fishing Vessel* standard); United States v. Washington, 774 F.2d 1470, 1475-81 (9th Cir. 1985) (affirming district court allocation of salmon harvest based on *Fishing Vessel*).

240. *Washington III*, 506 F. Supp. at 208.

241. *See id.*

242. *See specifically Culverts Case*, 20 F. Supp. 3d 828.

difficult task of determining causation and finding facts.[243] District courts are not estopped from exercising jurisdiction over cases merely because fact finding in the particular case might be "difficult." While the determination of what satisfies the moderate living needs of a tribe might be difficult, courts have been charged with making such determinations, and have been able to do so.[244]

The standard of liability the district court established, and the litigation necessary to prove a violation of the right, is necessarily complex. The complexity of litigation, however, is not a bar to justice. District courts have been able to determine the causal connection between proposed state and state-permitted actions and habitat degradation in litigation concerning the right to take fish. Indeed, multiple district courts, in such cases as *Muckleshoot Indian Tribe*, *Northwest Sea Farmers,* and the *Culverts Case* have been able to weave their way though such "unworkably complex" standards of liability and render judgments on particular actions that degraded fisheries and infringed upon the treaty rights of tribes.

D. Non-Disproportionately Disruptive Effect

The Ninth Circuit's final objection to the implied right was its concern that the right to habitat protection would "potential[ly] . . .

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243. *See Washington IV*, 694 F.2d at 1388.

244. The Ninth Circuit also worried that the implied right would "impose upon the State the burden of providing to treaty Indians an income subsidy necessary to assure their 'moderate living needs.'" *Id.* While treaty-reserved hunting, fishing, and gathering rights are valuable property interests, *see* COHEN'S HANDBOOK, *supra* note 25, at §18.07[6], 1199; *cf. Winans*, 198 U.S. at 381, courts have routinely rejected the assertion that the treaties provide tribes with a cause of action for monetary damages for injury to treaty-protected fish runs. *See* Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994) (refusing, absent state cause of action, to establish a new federal cause of action for monetary damages for injury to treaty-protected fish runs. *Id*. at 813, 817); *see also* Skokomish Indian Tribe v. United States, 410 F. 3d 506 (9th Cir. 2005 (en banc) (rejecting the assertion that treaties conferred the Tribe "a right of action for equitable relief, let alone monetary damages." *Id*. at 514; *compare cf.* United States v. Pend Oreille Pub. Utility Dist. No. 1, 28 F. 3d 1544 (9th Cr, 1994) (upholding monetary award as appropriate for trespass damages to reservation lands from flooding caused by a dam. *Id*. at 1549-51. The court also dismissed the Kalispell Tribe's motion to amend its complaint to add damages to treaty-reserved fishing and water rights only because the motion was untimely. *Id.* at 1552-53). Scholars, nonetheless, have noted that *Idaho Power Co.* "is at odds with the weight of authority acknowledging that treaty. . . fishing . . . rights are property rights." COHEN'S HANDBOOK, *supra* note 25, at § 18.04[2][g], 1177 (discussing *Idaho Power Co.*, 847 F. Supp. 791).

disrupt the existing state regulatory network . . . severely."[245] The Ninth Circuit saw the right to habitat protection as extending an "environmental servitude" over "all State or State-authorized activities affecting the environment, not just those involving the appropriative consumption of water."[246] The court cautioned against "the prospect of frustrating permittee expectations under state law" if it were to "accep[t] an interpretation of the treaty embodying [such] an environmental servitude."[247] This objection to the implied right fails to hold water as treaties impose binding obligations on the State regardless of the hardships imposed, and because the State is already engaged in extensive habitat protection and restoration, disproving the argument that a treaty-based obligation to do so would be overly burdensome.

Treaties impose binding obligations on all the parties. The State, through its admission into the United States, is bound by the obligations of the Stevens Treaties.[248] It is not unreasonable, as an obligation under the Stevens Treaties, to require the State to add to its permitting process and environmental review an obligation to assess the impacts proposed actions would have on traditional fisheries and treaty rights, and to refrain from taking actions that would abrogate or impinge treaty-reserved fishing rights. Treaties are "the supreme Law of the Land," and unless they are abrogated, qualified, or rescinded by Congress, their obligations remain in full force and effect.[249]

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245. *Washington IV*, 694 F.2d at 1388.

246. *Id*. at 1388-89 (emphasis removed).

247. *Id*. at 1389.

248. *Boldt Decision*, 384 F. Supp. at 331. "'Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States."'" *Id.* (quoting Missouri v. Holland, 252 U.S. 416, 434 (1920) (quoting Baldwin v. Franks, 120 U.S. 678, 683 (1887))). "This Constitution, and the Laws of the United States . . . and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. "[The President] shall have the power, by and with the Advice and Consent of the Senate, to make Treaties." *Id.* art. II, § 2, cl. 2.

249. *Id.* art. VI, cl. 2; COHEN'S HANDBOOK, *supra* note 25, at § 5.01[2], 387-88; *see* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). In "dealing with the Indian Tribes by means of treaties, . . . of course, a moral obligation rested upon Congress to act in good faith in performing stipulations entered into on its behalf. But, as with treaties made with foreign nations . . . , the legislative power might pass laws in conflict with treaties made with the Indians. . . . The [congressional] power exists to abrogate the provisions of an Indian treaty." *Id.* at 565-66 (internal citations omitted).

In 1989, Washington and the twenty-six federally recognized tribes within the State signed the Centennial Accord, a commitment that the State and the tribes would strive to "build confidence . . . in the[ir] government-to-government relationship[s]," and to "work[] to resolve issues of mutual concern."[250] Under the Centennial Accord, each department of the State was required to issue its own implementation plan, and committed to improving their government-to-government relationships with tribes in Washington.[251] In 1999, the State and the tribes recommitted to the principles of the Centennial Accord by signing the Millennium Agreement.[252] Under the Millennium Agreement, the State and the tribes recommitted to, among other things, strengthening their government-to-government relationships, continuing to cooperate in developing "enduring channels of communication," developing consultation processes, addressing issues of mutual concern, and education.[253] Importantly, following the Millennium Agreement, the Washington State Department of Ecology ("DOE")—the agency responsible for permitting the Terminal—issued a revised Centennial Accord Implementation Plan, recommitting to strengthen its government-to-government relationships with tribes.[254] The Implementation Plan states that it is DOE's "objective . . . to provide early notification and an open invitation for consultation on all decisions that may affect tribal rights and interests."[255] The Implementation Plan outlines specific programs in which it has developed procedures to promote greater "coordination and consultation with tribes," including the "'Permit Assistance Handbook' which serves as a citizen's guide to environmental permitting requirements," and which "recognize[s] the unique jurisdictional status of Indian reservations."[256] Throughout the

250. Centennial Accord Between the Federally Recognized Indian Tribes in Washington State and the State of Washington art. III, IV, Aug. 4, 1989, *available at* http://www.goia.wa.gov/Government-to-Government/Data/CentennialAccord.htm [hereinafter Centennial Accord].

251. *Id.* art. IV.

252. Institutionalizing the Government-to-Government Relationship in Preparation for the New Millennium, Nov. 4, 1999, *available at* http://www.goia.wa.gov/Government-to-Government/Data/agreement.htm [hereinafter Millennium Agreement].

253. *Id.*

254. DEP'T OF ECOLOGY, STATE OF WASH., WASHINGTON STATE DEPARTMENT OF ECOLOGY CENTENNIAL ACCORD IMPLEMENTATION PLAN, *available at* http://www.goia.wa.gov/govtogov/pdf/department%20of%20ecology.pdf (last visited Oct. 5, 2015) [hereinafter IMPLEMENTATION PLAN].

255. *Id.* at 2.

256. *Id*. at 3-4.

Implementation Plan, the DOE reaffirms its commitment to working with tribes in fulfillment of its broader charges,[257] specifically, to "[p]rotect, preserve[,] and enhance Washington's environment for current and future generations."[258] The overarching duty imposed by the implied right to habitat protection does not prescribe an unreasonable burden on the State. Instead, it reaffirms and codifies the obligations and responsibilities already assumed by the State and articulated by the DOE, and provides the Nation, along with other tribes, with a mechanism to ensure the State fulfills its obligations.

Enforcing a treaty right obligating the State to review impacts of proposed actions on traditional fisheries is not unreasonable in light of the State's preexisting obligations to perform environmental reviews under the SEPA.[259] Incorporating an analysis of impacts on tribal fisheries into Environmental Impact Statements ("EIS") required under the SEPA would not "frustrate" the permitting process. Indeed, the SEPA requires State agencies to coordinate their environmental review with "any public agency [that] has jurisdiction by law or special expertise with respect to any environmental impact involved."[260] The duty imposed by the implied right to review the impacts of State actions on traditional fisheries and to refrain from actions that degrade the fisheries and abrogate the treaty right, would not significantly burden the operation of state agencies, especially when considered in light of the DOE's commitment to tribal consultation and consideration of tribal interests.

Furthermore, in recent years, the State has taken proactive steps to preserve and revitalize salmon habitat—including habitat in traditional fishing grounds.[261] The Nooksack River Watershed Recovery Plan, the State's guiding document for the recovery of the Nooksack River watershed, which covers much of the Nation's usual and accustomed

257. *Id*. *passim*.

258. Dep't of Ecology, *About*, STATE OF WASH., http://www.ecy.wa.gov/about.html (last visited Oct. 5, 2015).

259. *See* WASH. REV. CODE § 43.21C.030(c)(i)-(v).

260. *Id*. § 43.21C.030(d).

261. *See specifically* Puget Sound P'ship, *Watershed Recovery Plans*, STATE OF WASH., http://www.psp.wa.gov/salmon-watershed-recovery-plans.php (last visited Jan. 11, 2016). The State and the PSP have promulgated a watershed recovery plan for each major watershed in Puget Sound, as part of the Puget Sound Salmon Recovery Plan. *See* SHARED STRATEGY FOR PUGET SOUND, DRAFT PUGET SOUND SALMON RECOVERY PLAN, VOL. 1 (Dec. 2005), *available at* http://www.psp.wa.gov/salmon-watershed-recovery-plans.php (select "Download Puget Sound Salmon Recovery Plan (Volume 1)").

fishing grounds, was authored by the State and the PSP in conjunction with local municipalities and tribes, including the Nation.[262]

> The primary goals of [the Nooksack River Watershed Recovery Plan] are to protect properly functioning habitats and restore and maintain to within the range of natural variability the landscape processes that form habitats to which wild salmonid stocks are adapted.[263]

Work done by the State has set in motion the preservation of fish habitat throughout the Puget Sound watershed through the restoration of rivers, tidal flats and estuaries, and river deltas, as well as upland restoration projects. Recently, the Washington Department of Fish and Wildlife announced a sixteen million dollar project to remove levies and flood farmland on Fir Island—a previously diked and drained marshland that was once the delta of the Skagit River's confluence with Puget Sound—to restore salmon habitat.[264] The project will create 131 acres of salmon habitat, helping the State meet its goals in the 2005 Skagit Chinook Recovery Plan.[265] This project comes just years after the State completed work to restore the nearby Fisher Slough wetland to support healthy salmon habitat along the Skagit River.[266]

These and other projects' successes require the cooperation of a coalition of interested parties, including the federal government, the State, tribes, local municipalities, private landowners, business, and farmers. The stewardship in which the State is already engaged is proof that tribes' right to habitat protection would not impose an undue burden

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262. PUGET SOUND P'SHIP, WATER RESOURCE INVENTORY AREA (WRIA) 1 SALMONID RECOVERY PLAN Appendix E: Salmon Habitat Restoration Strategy, acknowledgements (June 10, 2005), *available at* http://www.psp.wa.gov/salmon-watershed-recovery-plans.php (under "Nooksack," select "chapter download zip") [hereinafter NOOKSACK RIVER WATERSHED RECOVERY PLAN].

263. *Id*. at Appendix E: Salmon Habitat Restoration Strategy, 2.

264. Kimberly Cauvel, *Fir Island Dike Setback Moves Forward*, SKAGIT VALLEY HAROLD (Mar. 23, 2015), *available at* http://www.goskagit.com/all_access/fir-island-dike-setback-moves-forward/article_53869974-d6d0-5dc0-8a9a-977361751a9a.html.

265. *Id*; *see* PUGET SOUND P'SHIP, SKAGIT CHINOOK RECOVERY PLAN 2005 (2005), *available at* http://www.psp.wa.gov/salmon-watershed-recovery-plans.php (under "Skagit," select "chapter download zip").

266. Kimberly Cauvel, *Fisher Slough: Successful Salmon Recovery Becomes a Community Effort*, SKAGIT VALLEY HERALD (Apr. 13, 2014), *available at* http://www.goskagit.com/all_access/fisher-slough-successful-salmon-recovery-becomes-a-community-effort/article_b2f30bcf-f64e-5b05-a617-5457f3b8287c.html.

on the State. Indeed, one of the "guiding principals" of the Nooksack River Watershed Recovery Plan is to "[a]dhere to the principles of . . . legal mandates pursuant to US v. Washington [sic] to ensure equitable harvest sharing opportunit[ies] among tribes, and among treaty and non-treaty fishers" and to "[e]nsure [the] exercise of treaty reserved tribal fishing rights."[267] While the Ninth Circuit cautioned of the right's "potential for disproportionately disrupting essential economic development" within the State, the burden of incorporating a right to habitat protection into the Stevens Treaties is in line with the conservation and restoration policies the State already has in place.

As an example of how states can balance these competing interests and duties, on August 18, 2014, the Oregon Department of State Lands ("DSL") refused to issue the final fill permit necessary to construct the Coyote Island Terminal at the Port of Morrow on the Columbia River.[268] Among the top concerns emphasized by the DSL in its letter denying the permit was the impact that the proposed terminal would have on tribal fishing access and usual and accustomed fishing grounds.[269] The DSL found the traditional fishery located at the proposed terminal site was "more significant than the public benefits that may be derived from the proposed fill."[270] In light of the proposed terminal's impact on traditional fisheries, the DSL found that the proposed terminal was "[in]consistent with the protection, conservation[,] and best use of the water resource . . . and it would unreasonably interfere with the paramount policy of [Oregon] to preserve the use of its waters for

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267. NOOKSACK RIVER WATERSHED RECOVERY PLAN, *supra* note 263, at 240.

268. DEP'T OF STATE LANDS, STATE OF OR., FINDINGS AND ORDER: APPLICATION NO. 49123-RF, COYOTE ISLAND TERMINAL, LLC (Aug. 18, 2014), *available at* http://www.oregon.gov/dsl/PERMITS/docs/cit_findings.pdf [hereinafter FINDINGS AND ORDER]. The DSL's determination is currently under administrative appeal, and a contested case hearing will not be heard until sometime in late 2016. DEP'T OF STATE LANDS, STATE OF OR., FACT SHEET: COYOTE ISLAND TERMINAL PROJECT (PORT OF MORROW) REMOVAL-FILL PERMIT APPLICATION NO. APP0049123 3 (Nov. 23, 2015), *available at* http://www.oregon.gov/dsl/PERMITS/docs/fact_sheet_coyote_island_terminal.pdf.

269. FINDINGS AND ORDER, *supra* note 269, at 8; *see also* Letter from Brent H. Hall, Office of Legal Counsel, Confederated Tribes of the Umatilla Indian Reservation, to Charles P. Redon, Natural Res. Coordinator, Wetlands and Waterways Conservation Div., Or. Dep't of State Lands, *Re: DSL December 3, 2013 Request for Further Information Regarding Application No. 49123-RF, Coyote Island Terminal, LLC* (Mar. 28, 2014), *available at* http://media.oregonlive.com/opinion_impact/other/2014/06/april2letterfromdsl.pdf.

270. FINDINGS AND ORDER, *supra* note 269, at 3.

navigation, *fishing*[,] and public recreation."[271] While the decision of the DSL has no authority within Washington, it shows that states can give greater weight to the preservation of tribal fishing rights and the protection of traditional fisheries than to development projects that would impair them.

The implied right to habitat protection provides tribes with a mechanism by which they can enforce their treaty-reserved right to harvest enough fish to provide them with a moderate living, by ensuring that traditional fishery habitats are protected and continue to produce salmon for tribes' economic, spiritual, and cultural needs. As described by the district court in 1980, the implied right to habitat protection is consistent with—and carries out—State policy, while preserving and protecting tribal interests.

V. CONCLUSION

On May 9, 2016, citing the "potential impacts to the Lummi Nation's usual and accustomed . . . fishing rights," the Army Corps rejected the permit application for the construction of the Terminal.[272] A month earlier, on April 1, 2016, SSA Marine, the majority owner behind the Terminal project, suspended the environmental review of the project, pending the Army Corps's determination on whether the Terminal would adversely impact treaty fishing rights.[273] The Army Corps concluded that the Terminal "would have a greater than *de minimis* impact on the Lummi Tribe's access to its usual and accustomed fishing grounds for harvesting fish and shellfish."[274] The Army Corps's rejection of the permit application recognized the cultural importance of Xew'chi'eXen and fishing to the Nation—and other costal tribes.[275]

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271. *Id.* at 13 (emphasis added).

272. *Army Corps Halts Gateway Pacific Terminal Permitting Process*, U.S. ARMY CORPS OF ENG'RS (May 9, 2016), http://www.nws.usace.army.mil/Media/NewsReleases/tabid/2408/Article/754951/army-corps-halts-gateway-pacific-terminal-permitting-process.aspx.

273. *Puget Sound Coal Port Backers Pause Envronmental Review*, KUOW (Apr. 1, 2016), http://kuow.org/post/puget-sound-coal-port-backers-pause-envrinmental-review

274. U.S. ARMY CORPS OF ENG'RS, MEMORANDUM FOR RECORD: USUAL AND ACCUSTOMED DE MINIMIS DETERMINATION 31 (May 9, 2016), *available at* http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/160509MFRUADeMinimisDetermination.pdf (emphasis in original).

275. *Id.* at 26 ("[i]t is also important to note the Cherry Point area is known to the Lummi as Xwe'chi'eXen, which is part of a larger traditional cultural property. Fishing in this area is important to the Lummi *Schleangen*

The Army Corps's rejection of the permit application, in effect, ends the environmental reviews being conducted by the Army Corps, the DOE, and Whatcom County.[276] It had been the goal of each entity to publish draft EISs by spring 2016,[277] and final EISs by spring 2017.[278] In the Army Corps's EIS scoping document, the Army Corps had identified specific tribal treaty rights that may be impacted by the Gateway Pacific terminal, including "impacts to (1) access to usual and accustomed fishing grounds . . . , (2) *fish runs and habitat*, and (3) the Tribe's ability to meet moderate living needs."[279] The DOE's and the County's EISs would not have include an examination of the potential impacts of the Gateway Pacific export terminal on tribal treaty rights.[280]

In the intervening years since the Ninth Circuit's opinions revoking the interpretation of the Stevens Treaties to include an implied right to habitat protection, new precedent has established the foundation on which tribes may now push to reestablish the implied right. Over the course of thirty-three years, the stepping-stones missing in 1982 have been laid. The climate surrounding treaty-reserved fishing rights has changed, as have attitudes towards tribal involvement in policy decisions concerning fisheries protection and restoration. Over fishing, development within fisheries, pollution, and climate change are all pushing Washington's historic salmon runs to the brink of extinction. While the challenges confronting tribes in the face of the declining salmon fisheries are unique to tribes, the State can play a critical role in preserving traditional fisheries along with its own commercial ones. Existing State laws and policies concerning permitting, planning, and environmental review, restoration, and preservation, provide a platform on which the implied right can be incorporated.

(Way of Life), in addition to being part of the Lummi's U&A relied on for commercial or subsistence fishing") (internal citions omitted, emphasis in original).

276. *See EISs for the Proposed Gateway Pacific Terminal and Custer Spur Projects are Underway*, GATEWAY PAC. TERMINAL EIS, http://www.eisgatewaypacificway.gov (last visited Apr. 23, 2015).

277. *Id.*

278. Dep't of Ecology, *Gateway Pacific Terminal at Cherry Point Proposal*, STATE OF WASH., http://www.ecy.wa.gov/geographic/gatewaypacific/ (last visited Apr. 23, 2015).

279. U.S. ARMY CORPS OF ENG'RS, MEMORANDUM FOR RECORD, CENWS-OD-RG (July 3, 2013), *available at* http://www.nws.usace.army.mil/Portals/27/docs/regulatory/News/SCOPEMFRGATEWAYBNSF.pdf (emphasis added).

280. *See* WASH. STATE DEP'T OF ECOLOGY, FAQ ON SCOPE OF EIS STUDIES FOR GATEWAY PACIFIC TERMINAL/CLUSTER SPUR (GPT) 4 (Fed. 13, 2014), *available at* http://www.ecy.wa.gov/geographic/gatewaypacific/gpt-faq.pdf.

The climate is shifting, and momentum is swinging in favor of the reestablishment of the implied right. The reestablishment of the implied right will take tenacity, unwavering determination, and profound patience; yet, it would stand as a lasting testament to the generations who fought tirelessly for Native rights, treaty rights, and the preservation of Native culture.

"It is equally beyond doubt that the existence of an environmentally-acceptable habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless."[281]

281. *Washington III*, 506 F. Supp. at 205.