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MICHAEL C. BLUMM\* & JANE G. STEADMAN\*\*

# Indian Treaty Fishing Rights and Habitat Protection: The *Martinez Decision* Supplies a Resounding Judicial Reaffirmation

## ABSTRACT

*In the nineteenth century, the federal government convinced many Pacific Northwest tribes to enter into treaties that would facilitate white settlement. These treaties resulted in tribes ceding millions of acres of homeland in exchange for the right to take fish from all the usual and accustomed places. Although it was assumed that the salmon resource was inexhaustible at the time of the treaties, the salmon have been in precipitous decline since the late 1800s. This increasing scarcity bred conflicts, which forced the tribes to enforce their treaty fishing right in federal courts. This article explores the history of the treaty fishing right from 1905 to the present, tracing the evolution of the treaty fishing right in federal courts—from a right of access, to a right to a fair share of the salmon harvest, to a right of habitat protection. In particular, the article examines the 2007 Martinez Decision, which affirmed that the treaty fishing right prohibits habitat-damaging activities that prevent tribes from earning a moderate living through fishing. The article concludes that this decision is the logical progeny of over a century's worth of precedent, and that the result is consistent with common law principles of profits.*

## INTRODUCTION

In the 1850s, in order to facilitate white settlement of the Pacific Northwest,<sup>1</sup> the federal government's negotiators drafted and convinced

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\* Professor of Law, Lewis and Clark Law School. Thanks to David Cummings, Peter Monson, Michael O'Connell, John Sledd, and Fronda Woods for their assistance, none of whom have endorsed the views expressed nor the conclusions reached in this article. This article is dedicated to the memory of Tim Weaver, a vigilant defender of the rights of the Yakama Nation, which possesses Stevens' Treaty fishing rights.

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1. See MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 56 (2002) [hereinafter SACRIFICING THE SALMON] (indicating Congress passed a statute in 1850 authorizing treaty negotiations with the Northwest Tribes in response to white settlement of Oregon Territory); Kent Richards, *The*

numerous indigenous tribes to sign treaties ceding vast quantities of tribal lands, while assuring the tribes that they would retain “the right of taking fish at all usual and accustomed [places] in common with [white settlers].”<sup>2</sup> The tribes signing the treaties were, as one federal district judge determined, singularly dependent on salmon for their subsistence, economy, and culture.<sup>3</sup> The government’s chief negotiator, Isaac Ingalls Stevens, explicitly proclaimed to the natives at one treaty signing that “[t]his paper [the treaty] secures your fish.”<sup>4</sup> The tribes<sup>5</sup> that signed the

*Stevens Treaties of 1854–1855: An Introduction*, 106.3 OR. HIST. Q. 342, 342 ¶¶ 8–11 (2005), available at <http://www.historycooperative.org/journals/ohq/106.3/richards.html> (describing factors leading to need for treaties). See generally CHARLES F. WILKINSON, *MESSAGES FROM FRANK’S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY* (2000).

2. See, e.g., Treaty of Medicine Creak, U.S.-Nisqually, Puyallup, S’Homamish, Sa-heh-wamish, Squawskin, Squi-aitl, Stehchass, Steilacoom, T’Peeksin, art. 3, Dec. 26, 1854, 10 Stat. 1132, 1133. There were 10 other treaties with similar language. See Jack L. Landau, *Empty Victories: Indian Treaty Fishing Rights in the Pacific Northwest*, 10 ENVTL. L. 413, 417 n.26 (1980) (providing citations to all eleven treaties). In the treaties, the tribes ceded Indian title to the government. Indian (or aboriginal) title was a possessory right to historic territories, but it did not include the right to alienate to anyone other than the sovereign. See *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823) (denying rights of “chiefs” to convey clear title to land speculators and arguing that “[u]pon discovery, Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it”). One of us has described Indian title as the equivalent of a fee simple subject to a federal right of preemption. See Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 741 (2004).

3. See *United States v. Washington (Boldt Decision)*, 384 F. Supp. 312, 406 (W.D. Wash. 1974), *aff’d sub nom.* *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979). Due to the primacy of fish harvests to tribal culture, religion, diet, and economy, the treaty negotiators understood that protection of historic fishing rights was a precondition to the signing of any treaties. See *SACRIFICING THE SALMON*, *supra* note 1, at 62; Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 551–52 (1991) (describing significance of salmon to Indian tribes and circumstances of treaty negotiations); AMERICAN FRIENDS SERVICE COMMITTEE, *UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS* xxvi (1970) (“Fishing is more than a right, more than a way to make a living. It is a way of life—a part of life itself, an integral part of the whole artistic, religious, economic, and social life of the Northwest Coast Indians.”).

4. See U.S. DEP’T OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS, DIV. OF FORESTRY & GRAZING, *REPORT ON SOURCE, NATURE, AND EXTENT OF THE FISHING, HUNTING AND MISCELLANEOUS RELATED RIGHTS OF CERTAIN INDIAN TRIBES IN WASHINGTON AND OREGON* 348 (July 1942), available at [http://www.secstate.wa.gov/history/publications\\_view\\_pdf.aspx?i=sl\\_indianaffarisreport/SL\\_indianaffairsreport.pdf](http://www.secstate.wa.gov/history/publications_view_pdf.aspx?i=sl_indianaffarisreport/SL_indianaffairsreport.pdf). Stevens was not only the government’s

treaties relied on assurances like this in ceding some 64 million acres of land. The Stevens treaties, as they came to be called, facilitated one of the largest peaceful real estate transfers in the history of the world, in which the tribes retained only small reservations as homelands.<sup>6</sup> There was no need for large reservations, the government negotiators confidently informed the tribes, because the off-reservation fishing right would provide the tribes with the means to a livelihood at minimal cost to the government.<sup>7</sup>

When the treaties were signed, the universally shared assumption was that the salmon resource was inexhaustible.<sup>8</sup> But even before the end of the nineteenth century, northwest salmon runs were in precipitous

treaty negotiator, but also the governor of the Washington territory, the territory's superintendent of Indian affairs, and a surveyor of a potential transcontinental railroad. *SACRIFICING THE SALMON*, *supra* note 1, at 57. Stevens was "a young and ambitious politician . . . determined to facilitate rapid white settlement." *Id.* at 59.

5. Governor Stevens and his assistant, lawyer and ethnologist George Gibbs, organized bands of Indians into tribes for the purpose of negotiating the treaties, arbitrarily assigning some bands a subordinate or dominate role in the tribes they organized. They appointed friendly chiefs on the basis of whether they could speak Chinook jargon, a 300-word trade language that was the language of the treaty negotiations. *SACRIFICING THE SALMON*, *supra* note 1, at 59–60. To this day, the tribes regard the beginning of their political identity as the date of the treaty signings. *Id.* at 62.

6. *Id.* at 57 (noting the tribes ceded 64 million acres in nine treaties, retaining less than six million acres). In addition to retention of the right to fish at places and small reservations of land, the tribes received \$1.2 million in exchange for the 64 million acres. *Id.* See also Miller, *supra* note 3, at 552–55 (relating circumstances under which treaties were negotiated).

7. The federal government aimed to keep expenditures for the tribes at a minimum by allowing the tribes to maintain economic self-sufficiency through fishing. See *SACRIFICING THE SALMON*, *supra* note 1, at 5; *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166, at \*8 (W.D. Wash.) (quoting historian Richard White to the effect that "[w]hat Stevens and his negotiators explicitly promised in response to Indian objections was access to the usual places for procuring food and continued economic exchange with the whites. . . . By guaranteeing the Indians a right to their share of the bounty of the land, rivers, and Sound, the treaties would enable them to feed themselves at little cost to the government.").

8. See *Martinez Decision*, 2007 WL 2437166, at \*9 (quoting historian Joseph E. Taylor, "Indians had no reason to believe during the period of treaty negotiations that white settlers would interfere, either directly through their own harvest or indirectly through their environmental impacts, with Indian fisheries in the future. . . . Indians, like whites, assumed that their cherished fisheries would remain robust forever."); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (Passenger Fishing Vessel)*, 443 U.S. 658, 669 (1979) ("In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated . . . when it later became scarce."), *aff'g United States v. Washington (Boldt Decision)*, 384 F. Supp. 312 (W.D. Wash. 1974).

decline due to new harvest technologies (mostly employed by non-Indians), increased white population, and the demands of distant markets.<sup>9</sup> This scarcity bred conflicts and the tribes attempted to enforce their treaty rights in the courts. As a result of these adjudications, the treaty promise of the “right of taking fish” became the subject of numerous court opinions, including no fewer than seven U.S. Supreme Court opinions between 1905 and 1979.<sup>10</sup> In the last of these decisions, the Court affirmed District Judge George Boldt’s historic determination that the “in common with” language in the treaties guaranteed tribal fishers more

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9. Prior to the influx of white settlers from the east, “as many as 30 million wild salmon and [steelhead] may have returned to the rivers and streams of Washington annually.” PAUL WAGNER & PAUL SEKULICH, FISH PASSAGE TASK FORCE REPORT TO THE LEGISLATURE 6 (1997) [hereinafter FISH PASSAGE TASK FORCE REPORT]. The Columbia River likely supported 16 million salmon. *See id.* By the late nineteenth century, more efficient and devastating harvest technologies like fish wheels, drift nets, and weirs, fed ravenous cannery operations that sprung up along the Columbia River. SACRIFICING THE SALMON, *supra* note 1, at 5–6. These new techniques, as well as increased demand for canned salmon from the local white population and newly accessible eastern markets (primarily opened through new railroads) led to decimation of the salmon runs before the turn of the century. *Id.* In 1883, for example, the lower Columbia River harvest produced 43 million pounds of chinook, while just seven years later the amount was half that. *Id.* *See also* Manuel Nickel-Zueger, *Saving Salmon the American Indian Way*, PROP. & ENV’T RESEARCH CTR. POLICY SERIES, Nov. 2003, at 12–13 (describing how canning expanded the market for salmon), available at <http://www/perc.org/pdf/ps29.pdf>. More recently, dams, timber harvests, grazing, industrial pollution, and hatcheries (among other activities), diminished the already struggling salmon runs. *See, e.g.*, Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 409 n.5 (1998) (estimating annual Columbia Basin salmon runs at 10 to 16 million adult fish historically but below 1 million in 1994).

10. *United States v. Winans*, 198 U.S. 371 (1905) (finding that a treaty right guarantees tribes access across private property to reach their historic fisheries); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) (noting that the tribal access right burdens lands that a tribe did not expressly cede in its treaty, but which its members used historically); *Tulee v. Washington*, 315 U.S. 681 (1942) (finding that a state cannot burden the treaty fishing right by requiring tribal fishers to purchase state licenses); *Puyallup Tribe v. Dep’t of Game of Wash. (Puyallup I)*, 391 U.S. 392 (1968) (finding that a state can regulate tribal harvests in the interest of conservation if it is nondiscriminatory); *Dep’t of Game of Wash. v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973) (deciding that a state ban of net fishing in favor of hook-and-line fishing was not a nondiscriminatory regulation due to its effects on tribal fishing); *Puyallup Tribe v. Dep’t of Game of Wash. (Puyallup III)*, 433 U.S. 165 (1977) (upholding negotiated allocation of harvests between tribal and nontribal fishers, even after a lower court decision determined that the tribe’s reservation still existed); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n (Passenger Fishing Vessel)*, 443 U.S. 658 (1979) (finding that a treaty fishing right includes a right to harvest up to one-half the available harvest, subject to conservation needs). For a discussion of these cases that describes the Indian treaty fishing right cases in detail, see generally SACRIFICING THE SALMON, *supra* note 1, ch. 4; Blumm & Swift, *supra* note 9, at 457–59.

than an equal opportunity to fish alongside white fishers; instead, the treaties assured them up to half of the harvest.<sup>11</sup>

In the *Boldt Decision*—as it came to be called—originally filed in 1970, the tribes not only asked the court to declare that the treaties entitled them to a share of the salmon harvest, they also maintained that (1) their harvest share should include hatchery fish, and (2) their “right of taking fish” included the right to salmon habitat protection.<sup>12</sup> Judge Boldt deferred these two issues while he considered the allocation issue, and subsequently retired, thus leaving these two critical questions unanswered.<sup>13</sup>

Ensuing judges had little difficulty resolving the hatchery fish issue in the tribes’ favor,<sup>14</sup> but the habitat issue remained unresolved for some 37 years. Although a federal district judge, Judge William Orrick, concluded in 1980 that the treaties included a habitat protection right,<sup>15</sup> an en banc Ninth Circuit ultimately decided five years later that it was unwise to resolve the habitat issue in the absence of a concrete factual controversy.<sup>16</sup> For over two decades after that decision, the issue simmered as the tribes looked for a suitable concrete factual controversy that did not implicate the federal government, whose support the tribes wanted in the litigation.<sup>17</sup>

In 2001, the tribes, along with the federal government, finally initiated action against the State of Washington, alleging that the State’s construction and maintenance of highway and railroad culverts that block salmon migration violated the treaty fishing right.<sup>18</sup> After an unsuccess-

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11. See *Passenger Fishing Vessel*, 443 U.S. at 682, 686–87.

12. See *United States v. Washington (Boldt Decision)*, 384 F. Supp. 312, 328 (W.D. Wash. 1974), *aff’d sub nom. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 669 (1979); see also *United States v. Washington*, 459 F. Supp. 1020 (W.D. Wash. 1978).

13. On Judge Boldt, see *infra* note 74.

14. *United States v. Washington (Orrick Decision)*, 506 F. Supp. 187, 200–02 (W.D. Wash. 1980), *aff’d in part and vacated in part*, 759 F.2d 1353, 1358–60 (9th Cir. 1985).

15. *Orrick Decision*, 506 F. Supp. at 203–04, 208.

16. *United States v. Washington*, 759 F.2d at 1357 (worrying that articulating legal rules in the absence of concrete facts would produce results that would be “imprecise in definition and uncertain in dimension”).

17. The litigation was, after all, a continuation of the case filed in 1970, in which the lead plaintiff was the federal government. The State tried unsuccessfully to seek injunctive and declaratory relief against the federal government. *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*1 (dismissing the State’s counterclaims on basis that federal sovereign immunity was not waived).

18. Technically, the tribes initiated a sub-proceeding under the continuing jurisdiction of the original *United States v. Washington* case, which began in 1970. *Id.*

ful attempt to settle the case,<sup>19</sup> Federal District Judge Ricardo S. Martinez ruled that the treaties forbade the State from constructing and maintaining highway culverts that blocked salmon migration, which, in turn, impermissibly reduced the number of salmon available for harvest.<sup>20</sup> This short and uncomplicated 2007 decision is certainly the most important treaty fishing right decision since the Supreme Court's affirmation of Judge Boldt nearly 30 years ago.<sup>21</sup> The *Martinez Decision*, following the "common-sense" proposition that Judge Orrick recognized so long ago<sup>22</sup>—and with which several Ninth Circuit judges agreed<sup>23</sup>—suggested that the treaties protect the habitat of the salmon and that such protection is the central consideration of the treaties.<sup>24</sup> The decision not only promises to revolutionize culvert construction and maintenance in Washington, it may also equip the tribes with the ability to obtain judicial scrutiny of a number of salmon habitat-damaging activities, such as timber harvesting, grazing, and dam operations.

This article explains the treaty fishing right and its habitat protection dimension in light of the *Martinez Decision*. Part I begins with a brief exploration of the history of treaty fishing right litigation, beginning with the foundational case of *United States v. Winans* through the *Puyallup* trilogy. Part II examines the *Boldt Decision*, its affirmation by the Supreme

19. *See id.* (indicating that parties were unable to reach an agreement after six years of settlement discussions).

20. *Id.* at 12. Judge Martinez, a Seattle native and University of Washington graduate, was nominated to the federal district court for the Western District of Washington by President George W. Bush in 2003 and confirmed by the Senate in 2004. Wash. State Bar Ass'n, Hon. Ricardo S. Martinez, United States District Court Judge, Western District of Washington, <http://www.wsba.org/martinez.htm> (last visited Jan. 26, 2009).

21. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), is discussed in Blumm & Swift, *supra* note 9, at 455–59.

22. In the *Orrick Decision*, the court found:

The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. . . . [A]n 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. Thus, it is necessary to recognize an implied environmental right in order to fulfill the purposes of the fishing clause.

*United States v. Washington (Orrick Decision)*, 506 F. Supp. 187, 203–05 (W.D. Wash. 1980)

23. *See United States v. Washington*, 759 F.2d 1353, 1367–68 (9th Cir. 1985) (en banc) (Nelson, J., concurring in part and dissenting in part, and Norris, J., concurring in part and dissenting in part). *See also infra* notes 123 and 129 and accompanying text.

24. *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166, at \*10 (W.D. Wash.). Shortly after Judge Martinez's ruling, the parties entered settlement negotiations to decide upon the remedy, but the negotiations have failed. Email from Fronda Woods, Associate Attorney General, State of Washington Attorney General's Office, to Jane Steadman, Law Student, Lewis & Clark Law School (Oct. 9, 2008) (on file with authors). Consequently, the parties are preparing for trial on the remedy issue. *Id.*

Court, and the ensuing hatchery salmon decision. Part III explains the judicial evolution of the habitat protection issue during the late twentieth century. Part IV considers the effects of road culverts on salmon and the value of using culverts as the factual vehicle to crystallize the right to habitat protection. Part V, the heart of the article, analyzes Judge Martinez's decision and its implications. Part VI describes cases preceding the *Martinez Decision* that foreshadowed judicial affirmation of the right to habitat protection. Part VII considers a couple of crucial issues that the *Martinez Decision* did not resolve: (1) the role of the federal government in habitat protection and (2) the scope of the remedy that the court should prescribe. The article concludes that, if the *Martinez Decision* survives appeal, it will be the most important treaty fishing rights decision since the Supreme Court's affirmation of Judge Boldt. Given the federal government's duplicitous and ineffectual approach to salmon restoration,<sup>25</sup> the decision could be a vehicle to make the nineteenth-century treaty promises considerably more important to salmon restoration than the twentieth century Endangered Species Act listings.<sup>26</sup>

### I. TREATY FISHING RIGHTS FROM WINANS TO THE PUYALLUP TRILOGY: A BRIEF HISTORY

From the start, it was clear that the mere signing of treaties reserving the "right of taking fish in common" with white settlers would provide little protection to tribal members' ability to actualize that right.<sup>27</sup> Within 30 years of signing the Stevens treaties, conflicts between settlers and tribal members over fishing rights became frequent and fierce.<sup>28</sup> The natives came to understand that if they were to exercise their right to fish

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25. See generally Michael C. Blumm et al., *Practiced at the Art of Deception: The Failure of Columbia Basin Salmon Recovery Under the Endangered Species Act*, 36 ENVTL. L. 709 (2006).

26. See *id.*

27. Conflicts between landowner settlers and tribal fishers were commonplace throughout the Columbia Basin in the years following the Civil War. For some of the details, see Michael C. Blumm & James Brunberg, "Not Much Less Necessary. . . Than the Atmosphere They Breathed": *Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of United States v. Winans and Its Enduring Significance*, 46 NAT. RESOURCES J. 489, 506–16 (2006) (noting "violent friction ensued between Indians and the first wave of settlers" upon Governor Stevens's announcement of available lands ceded by the Indians shortly after the treaties were signed). See also JOSEPH C. DUPRIS ET AL., *THE SI'LAILO WAY: INDIANS, SALMON AND LAW ON THE COLUMBIA RIVER* ch. 4 (2006) (describing conflicts between Indians and non-Indians over access to fisheries).

28. See, e.g., DUPRIS ET AL., *supra* note 27, at 59–60 (noting the landowners' use of "lock-outs" to preclude Indian access to fisheries forcing the Indians to resort to the self-help remedy of break-ins to gain access); Miller, *supra* note 3, at 555 (indicating a "minor land rush" followed Stevens's opening of lands post-treaty signing, which led to a war between Indians and non-Indians); Blumm & Brunberg, *supra* note 27, at 504–05 (explaining that

at all, they would need the help of the courts to enforce it.<sup>29</sup> Litigation over the meaning of the treaty fishing right began in 1884 and continues to present.<sup>30</sup> Over the years, courts identified a trinity of rights implicit in the treaty fishing clause—a right of access, a right to a fair share of the harvest, and a right to habitat protection.<sup>31</sup> This section explores the chronology of cases explicating the access right.

The first major legal battle involved the question of whether the treaty fishing right included a right of access to historic fishing grounds.<sup>32</sup> Each of the Stevens treaties reserved for tribal members the right to take fish at “all usual and accustomed places.”<sup>33</sup> By the late nineteenth century, many homesteaders had begun fencing off land with river access in an effort to exclude Indians from the ceded land or from the historic fisheries.<sup>34</sup>

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“violent friction ensued between Indians and the first wave of settlers” upon announcement by Stevens of the availability of lands ceded by the Indians).

29. See Blumm & Brunberg, *supra* note 27, at 505, 524.

30. See *id.* at 506 n.89.

31. See O. Yale Lewis III, *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, 283 (2002–2003).

32. See Blumm & Brunberg, *supra* note 27, at 506 n.89 (2006) (indicating “[t]he first recorded case involving treaty-fishing access” involved the “Tumwater” fishery, which was decided in 1884) (citation omitted)).

33. DUPRIS ET AL., *supra* note 27, at 8–9 (describing inheritability of fishing sites). It has also been noted:

Ownership of fishing sites meant more than merely the right to fish in that place. Robert Higgs . . . explains that “what the Indians owned was *not* simply a claim on certain quantities of fish. Rather, the Indians’ property rights ensured them the opportunity to take the salmon normally returning—that is, returning without human interception.” Other people could not rob the fish by catching them before they arrived at established fishing sites. . . . Families and individuals who had exclusive rights to certain fishing sites had an incentive to invest time and resources to make the sites as productive as possible.

Nikel-Zueger, *supra* note 9, at 5–7 (emphasis in original).

34. An early source of conflict arose from landowners precluding access to Indians’ usual and accustomed fishing sites through such tactics as fencing, charging access fees, and threatening physical violence. One account suggested the clashes between Indians and non-Indians over access to fishing grounds arose out of a fundamental conflict between the fishing servitude established by the treaties and the unrestricted rights of the holder of land in fee simple absolute established in federal land grants to white settlers. DUPRIS ET AL., *supra* note 27, at 58–59. Recounting the settlers’ restriction of Indian fishing access, the historians wrote:

Thus, by the latter half of the nineteenth century, the Indian fishing grounds on the Columbia were quickly enclosed by private non-Indian ownership. Co-ownership became a myth. Indian access to usual and accustomed fishing locations became a fictional and distorted thing. In hun-

The first significant decision was from the Washington Territorial Court in 1887, which, relying heavily on property law principles, ruled that landowners could not preclude tribal members' access to historic fishing grounds.<sup>35</sup> Nonetheless, contrary to the ruling, landowners con-

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dreds of confrontations, the Indians met land owners who hadn't heard of the fishing "servitude" or who didn't believe in it; who knew for sure that access was not here but over there; who let the gates down for only a small and reasonable fee; who insisted the fishery was a private one; who advised that discards or eels from the fish wheels or fish-heads from the cannery were preferable fare to fish freshly caught. The Indians encountered the fences and road closures and padlocks and abutments and signs and guards and dogs and firearms that were among the law-sanctioned "pleasures" of all fee-simple property owners. Thus, the "supreme law of the land" [i.e., the treaty right to fish in common with white landowners] was thrashed thoroughly by the common law of property possession.

*Id.* See also Blumm & Swift, *supra* note 9, at 436 (describing early conflicts).

35. The first case to challenge the fencing practice was *United States v. Taylor*, 13 P. 333, 335 (Wash. Terr. 1887). On behalf of R.H. Milroy, a federal Indian agent, and the Yakama Tribe, the United States filed suit against Frank Taylor, a farmer who had enclosed his land in order to protect crops from trampling during the Indian's yearly seasonal fishing encampment. Blumm & Brunberg, *supra* note 27, at 517-19; Blumm & Swift, *supra* note 9, at 436. Historically, Yakama tribal members used Taylor's newly acquired land in order to get to and from the Tumwater, the fishing grounds at Celilo Falls on the Columbia River. *Taylor*, 13 P. at 334. They also fished from the shore, cured fish, erected temporary dwellings, and allowed their ponies to graze on what became the Taylor homestead. *Id.* The Yakama Nation's treaty with the United States, in conformity with the other Stevens treaties, reserved to the tribe the "right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them." Treaty with the Yakamas, art. III, June 9, 1855, 12 Stat. 951. At the same time, Taylor's patent from the federal government contained no mention of the federal treaty right. Blumm & Brunberg, *supra* note 27, at 518-19; Blumm & Swift, *supra* note 9, at 436. On behalf of the tribe, the federal government argued that the Indians reserved the right to fish in their usual manner at their usual and accustomed grounds, while Taylor maintained that the right was a grant from the federal government ensuring only that the Indians had fishing opportunities equal to those of the whites. *Taylor*, 13 P. at 334. In 1887, the Washington Territorial Supreme Court held that Taylor and other settlers could not impinge on the access of tribal fishermen to their usual and accustomed fishing grounds. *Id.* at 335. First, the Territorial Court relied on the familiar canon of construction in Indian law that "a treaty . . . is to be liberally construed in favor of the Indians; and that . . . construction be adopted which will best subserve the object which the Indians, at the time the treaty was made, would have been most likely to have desired and understood." *Id.* See also *Worcester v. Georgia*, 31 U.S. 515 (1832) (foundational case for interpretation of treaties made between U.S. government and Indian tribes).

The *Taylor* court sided with the tribe, explaining that the language of the treaty suggested a reserved right because it concerned "certain ancient fisheries which had for generations been used . . . [by members] who had certain well-defined habits and methods connected with such use." *Taylor*, 13 P. at 334. The court indicated that a settler took a patent to federal land "subject to" any "easement or servitude impressed upon it," and that the treaty fishing right constituted such a servitude. *Id.* at 335. This decision marked the

tinued to exclude tribal fishers from the Columbia Basin. Nearly a decade after the territorial court's decision, in the mid-1890s, Indian agents convinced the government to file a test case involving access to the most important Indian fishing ground,<sup>36</sup> Celilo Falls, on the lower Columbia.<sup>37</sup> The federal district court, after issuing a preliminary injunction against white fencing and then sitting on the issue for some seven years,<sup>38</sup> finally decided that the tribes' treaty rights entitled them only to equal treatment with whites.<sup>39</sup> Since white fishers could be fenced out by landowners, so could tribal fishers.<sup>40</sup>

Nearly a decade after the case was originally filed, the Supreme Court reversed in *United States v. Winans*.<sup>41</sup> Justice Joseph McKenna observed, in a memorable, poetic, and enduring decision rooted in first

first interpretation of the treaty fishing right language, and it employed reasoning later adopted by the Supreme Court in a seminal case on Indian access to fisheries. See Blumm & Swift, *supra* note 9, at 436–37 (indicating the Supreme Court relied on the same language in *United States v. Winans*).

At core, *United States v. Taylor* was a property rights decision. One of us once wrote:

The servitude imposed a duty on Taylor to manage his land in such a way as to preserve the Indians access to their historic fisheries. . . . The *Taylor* court relied on property law fundamentals to deny a farmer the right to exclude the tribes from access to the resource by fencing his property. The same principles should mean a fee owner cannot deny access by dewatering streams for irrigation purposes or polluting streams by pesticide and sediment runoff.

*Id.* at 438. These basic property principles continue to shape the contours of the treaty right to habitat protection, as discussed *infra* in Parts III and IV.

36. On the role of Indian agents in *Winans* and its predecessor cases, see Blumm & Brunberg, *supra* note 27, at 511–18, 522–24. The test case involved the obstructionist activities of Audubon and Linnaens Winans. The Winans brothers owned a large fish wheel at Celilo Falls, aggressively excluding tribal access to the lucrative fishery through intimidation, assaults, and destruction of temporary shelters. *Id.* at 524.

37. Celilo Falls was the heart of tribal fishing in the Pacific Northwest, representing not just a renowned sustainable fishery but also an important trading place and sacred ground for the First Salmon Ceremony. See DUPRIS ET AL., *supra* note 27, at ch. 1. In March of 1957, the Army Corps of Engineers closed the gates at Dalles Dam, allowing the falls to be inundated by the mighty Columbia River. *Id.* at 18.

38. See Blumm & Brunberg, *supra* note 27, at 525–28 (describing Judge Hanford's machinations, including dissolving his seven-year old injunction against fencing without explanation in 1903).

39. *United States v. Winans*, Memorandum Decision on the Merits, Feb. 23, 1903, discussed in Blumm & Brunberg, *supra* note 27, at 528–29.

40. See *id.*

41. 198 U.S. 371 (1905). For extensive discussion of the case, see Blumm & Swift, *supra* note 9, at 440–45; Blumm & Brunberg, *supra* note 27, at 532–36.

principles of property law and treaty interpretation,<sup>42</sup> that the right to fish at usual and accustomed grounds “was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.”<sup>43</sup> Recognizing that the tribes had reserved this paramount right to fish,<sup>44</sup> McKenna concluded the reserved “right of taking fish” created “a servitude upon every piece of land as though described therein.”<sup>45</sup> Further, this “right in the land” burdened not only the federal government that agreed to it, but also its grantees, like states and private landowners.<sup>46</sup> In other words, the Court concluded that the reserved treaty fishing right was a piscary *profit à prendre*—“the right to go on another’s property and take and remove a natural resource.”<sup>47</sup> This 1905 decision has been the foundation of treaty fishing rights for over a century.

In the ensuing decades, the Supreme Court continued to protect the tribes’ piscary profit from physical and economic barriers to access. Just 13 years after *Winans*, the treaty fishing rights issue was back before the Court, which decided that the piscary profit applied to lands that a tribe did not explicitly cede but which it had used historically.<sup>48</sup> A generation later, in *Washington v. Tulee*,<sup>49</sup> the Court held that the State of Washington could not charge tribal fishers license fees because the fees were not indispensable to conservation of the salmon resource.<sup>50</sup> Another generation later, in the *Puyallup* trilogy of decisions that occupied the Court’s attention for a decade, the Court began to confront and strike

42. See generally Blumm & Brunberg, *supra* note 27, at 536–44 (concluding that the *Winans* legacy included: (1) construing treaty language as tribes would understand; (2) laying the foundation of the reserved rights doctrine; (3) treating treaty rights as property rights; and (4) rejecting state arguments that the “equal footing” doctrine trumped treaty rights).

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

44. *Id.* (“[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”).

45. *Id.*

46. *Id.* at 381–82 (indicating the servitude burdened both “the United States and its grantees as well as against the State and its grantees”).

47. See Blumm & Swift, *supra* note 9, at 445 n.183–184 (describing common law of piscary profits *à prendre* and various courts’ description of treaty fishing rights as such). See *infra* note 213 (comparing the remedies available to cotenants with those available to profit-holders).

48. *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) (refusing to use technical legal rules to disadvantage tribal fishers when the rules would produce a result conflicting with the treaties intention of preserving the tribes ability to fish at their historic sites).

49. *Tulee v. Washington*, 315 U.S. 681 (1942).

50. *Id.* at 684 (concluding that the state license fee had both regulatory and revenue-generating purposes and that the regulatory purpose could be achieved through less burdensome alternatives).

down discriminatory “conservation” regulation of tribal harvests promulgated by the Pacific Northwest states.<sup>51</sup> The Supreme Court decided that a state could regulate tribal harvests if in the interest of a neutral conservation purpose,<sup>52</sup> and neutral conservation measures could allocate both on-reservation and off-reservation tribal harvests.<sup>53</sup> However, a state ban on net fishing (which the Indians exclusively practiced on the river in question) was not a neutral conservation measure, since it saddled all conservation costs on tribal fishers.<sup>54</sup>

Thus, by 1973, when the Supreme Court handed down its final *Puyallup* decision—more than half a century after *Winans*—the tribes had won significant judicial victories. The Supreme Court had ruled that the treaties recognized that the tribes possessed an affirmative easement to access their traditional fishing grounds regardless of land ownership,<sup>55</sup> determined that this right burdened lands not expressly granted in a treaty if the tribe historically used those lands,<sup>56</sup> announced that the State could not charge fees for the exercise of the treaty fishing right,<sup>57</sup> and decided that while the State could regulate the exercise of the tribal right

51. By the mid-twentieth century, the states had imposed strict conservation regulations and harvest restrictions, reflective of the fact that the rivers were producing salmon populations at a tiny fraction of their historic levels. Although the salmon runs were already severely depleted, the salmon population plummeted after construction of the Dalles Dam, which forever inundated the sacred Celilo Falls. See ROBERTA ULRICH, *EMPTY NETS: INDIANS, DAMS, AND THE COLUMBIA RIVER* 116 (1999) (describing depleted fish runs and resulting regulation).

52. *PUYALLUP TRIBE V. DEP'T. OF GAME OF WASHINGTON (Puyallup I)*, 391 U.S. 392, 398 (1968) (ruling, in confusing fashion, that the treaty fishing right “may, of course, not be qualified by the state,” but that “the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the state in the interest of conservation, provided the regulation . . . does not discriminate against the Indians”). Professor Ralph Johnson perceptively warned that this decision gave the state more discretion than it could use in a nondiscriminatory fashion. See Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 232–35 (1972).

53. *PUYALLUP TRIBE, INC. V. DEP'T OF GAME OF STATE OF WASHINGTON (Puyallup III)*, 433 U.S. 165, 176–77 (1977) (upholding the allocation, which state courts had approved, even though between *Puyallup II* and *Puyallup III* the Ninth Circuit held that the fishing site in question was an on-reservation site, not an off-reservation site, as the state court had assumed in *Dep't of Game v. Puyallup Tribe*, 496 F.2d 620 (9th Cir. 1974)). On the *Puyallup* trilogy, see Blumm & Swift, *supra* note 9, at 449–53.

54. *DEP'T OF GAME OF WASH. V. PUYALLUP TRIBE (Puyallup II)*, 414 U.S. 44, 48 (1973) (“There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely pre-empted by non-Indians, is allowed.”).

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

56. *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198–99 (1919).

57. *Washington v. Tulee*, 315 U.S. 681, 684 (1942).

for fish conservation purposes,<sup>58</sup> the State could not single out the tribes for an unfair portion of that conservation burden.<sup>59</sup> Although the final decision in the *Puyallup* trilogy rejected an exclusive on-reservation tribal salmon fishery,<sup>60</sup> whether the treaties entitled the tribes to a harvest share remained unclear. Fortunately, a case was already underway that would resolve this question.

## II. THE *BELLONI* AND *BOLDT* DECISIONS: RECOGNIZING A MEANINGFUL TRIBAL HARVEST SHARE

At first, treaty rights claims appeared in court as defenses to state criminal prosecutions enforcing alleged conservation regulations.<sup>61</sup> But, in 1968, 14 members of the Yakama Nation broke this pattern by filing suit against the State of Oregon's fish agencies, claiming that the State's conservation regulations interfered with their treaty-protected "right of taking fish."<sup>62</sup> The State argued that it need not give separate recognition or protection to the treaty right in its conservation regulations, and that those regulations could restrict treaty fishing so long as they did not dis-

58. *Puyallup Tribe v. Dep't. of Game of Washington (Puyallup I)*, 391 U.S. 392, 398 (1968).

59. *Dep't of Game of Wash. v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44, 48 (1973).

60. *PUYALLUP TRIBE, INC. v. DEP'T OF GAME OF STATE OF WASHINGTON (Puyallup III)*, 433 U.S. 165, 176-77 (1977).

61. *See, e.g., Tulee v. Washington*, 315 U.S. 681, 685 (1942) (holding that the State of Washington could not charge Yakama tribal member a fee for fishing); *Makah Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951) (holding that the state failed to demonstrate conservation necessity); *Maison v. Confederated Tribes of the Umatilla Reservation*, 314 F.2d 169, 173-74 (9th Cir. 1963) (overturning a state ban designed to protect non-Indian fisheries). *See Johnson, supra* note 52, at 209-10. Some Indians and historians have charged that the states imposed and enforced harvest regulations much more strictly against Indians than whites. *See, e.g., ULRICH, supra* note 51, at 118-22 (describing stringent regulation of Indian harvest and arrests). *See also Blumm & Swift, supra* note 9, at 435 n.135, 452-453 n.218 (describing a series of decisions in which the Washington state courts upheld earlier regulations limiting tribal harvests).

62. *See Sohapp v. Smith (Belloni Decision)*, 302 F. Supp. 899, 903 (D.Or. 1969). Under the influence of Assistant Regional Solicitor of the Department of the Interior George Dy-sart, the federal government filed a separate suit on behalf of itself and several tribes, captioned *United States v. Oregon*, which was consolidated with the tribal suit for trial. *See id.* at 904; Charles F. Wilkinson, *CROSSING THE NEXT MERIDIAN: LAND WATER, AND THE FUTURE OF THE WEST* 204-205 (1992). Today, 40 years later, the federal district court of Oregon retains jurisdiction over *United States v. Oregon*, one of the longest running federal cases in history. *See, e.g., United States v. Oregon*, No. 68-513-KI, 2008 WL 1711525, at \*1 (D.Or. April 8, 2008) (representing most recent case under continuing jurisdiction); Fronda Woods, *Who's in Charge of Fishing?*, 106 OR. HIST. Q. 412, ¶ 52 (2005).

criminate against tribal fishers.<sup>63</sup> Judge Robert Belloni sided with the tribes, stating that the State's equal protection argument "would not seem unreasonable if all history, anthropology, biology, prior case law, and the intention of the parties were to be disregarded."<sup>64</sup>

Instead, Judge Belloni ruled that the treaty fishing right ensured a right to a "fair share" of the fish harvest for tribal fishers.<sup>65</sup> He subsequently ordered the State to recognize the federal rights of the tribes as a fishery distinct from the non-Indian fishery<sup>66</sup> and required the State to protect the treaty fishing as a "regulatory policy co-equal with the conservation of fish runs for other users."<sup>67</sup> The *Belloni Decision*, as the case came to be called, revolutionized salmon management in the Columbia Basin, eventually resulting in a negotiated comprehensive management plan, which the court oversaw.<sup>68</sup> Following the decision, Judge Belloni

63. See *Sohappy*, 302 F. Supp. at 907 ("There is no support . . . [in the case law] for any such narrow interpretation of the state's authority to distinguish between the regulation of Indian treaty-protected fishing and that of fishing by others.").

64. *Id.* at 905.

65. *Id.* at 911. Judge Belloni interpreted [*Puyallup I*] "to mean that the state cannot so manage the fishery that little or no harvestable portion of the run remains to reach the upper portions of the stream where the historic Indian places are mostly located." *Id.* Notwithstanding his articulation of the "fair share" principle, Judge Belloni did not define what an equitable allocation might be. This question would be answered by a different judge in a ground-breaking opinion that would become one of the most contentious in Pacific Northwest history. See *infra* notes 86–91 and accompanying text (describing strife between Indian and non-Indian fisherman in the wake of the *Boldt Decision*).

66. *Id.* at 912. See also *id.* at 910–11 ("Oregon recognizes sports fishermen and commercial fishermen and seems to attempt to make an equitable division between the two . . . . If Oregon intends to maintain a separate status of commercial and sports fisheries, it is obvious a third must be added, the Indian fishery."). In addition, Judge Belloni held that when the State undertook to regulate the treaty-protected "right of taking fish at all usual and accustomed places," it did not have "the same latitude in prescribing the management objectives and the regulatory means of achieving them" as when regulating a non-Indian fishery. *Id.* at 908. Instead, the State could use its regulatory authority "only to the extent necessary to prevent the exercise of [the treaty fishing] right in a manner that will imperil the continued existence of the fish resource." *Id.* Judge Belloni's articulation of the state agencies' authority is characteristic of the lack of judicial deference to agency authority in cases alleging treaty rights violations.

67. *Id.* at 911.

68. See Penny H. Harrison, *The Evolution of a New Comprehensive Plan for Managing Columbia River Anadromous Fish*, 16 ENVTL. L. 705 (1986); Blumm & Swift, *supra* note 9, at 454 (discussing the manner in which *Sohappy* changed salmon management). In an interview with an oral historian from the Oregon Historical Society, Judge Belloni described his decision to retain continuing jurisdiction over the case and the 12-year span in which he supervised allocation decisions on the Columbia River. Judge Belloni noted:

I . . . required the parties to get together and come up with a plan to which they could all agree. . . . [A]fter I decided the case I realized that it wouldn't operate by itself. Someone in authority had to see that it was

also established standards for the State to follow in achieving the “co-equal” status of the tribal fishery, including requiring “meaningful” tribal participation in the development of harvest regulations and ensuring that the regulations were “the least restrictive regulations” consistent with ensuring conservation of the salmon.<sup>69</sup>

The year after the *Belloni Decision*,<sup>70</sup> as tribal members continued to be arrested, especially in Washington,<sup>71</sup> the federal government and numerous tribes in western Washington filed suit in federal court in Washington, asking for an allocated share of Puget Sound Basin salmon.<sup>72</sup> Actually, the plaintiffs sought three remedies: (1) a harvest share, (2) inclusion of hatchery fish in that harvest share, and (3) recognition that the treaty protected the fish at the center of the treaty from

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enforced, implemented, changed, if need be so I took continuing jurisdiction of the case. The case didn't end with my ruling. Whenever disputes arose under the system, they'd come to me after filing the proper papers and have it decided. I operated in that capacity for twelve years, I was more or less fishmaster of the Columbia River for that length of time.

Interview by James Strassmaier, Oregon Historical Society, with Judge Belloni (May 31, 1989), available at <http://www.ohs.org/education/oregonhistory/search/index.cfm> (search “Judge Belloni”). [hereinafter Belloni Oral History].

69. *Sohappy v. Smith*, No. 68-409, slip op. at 2-3 (D.Or. Oct. 10, 1969) (unpublished judgment). See Timothy Weaver, *Litigation and Negotiation: The History of Salmon in the Columbia River Basin*, 24 *ECOLOGY L. Q.* 677, 680-81 (1997) (reprinting a portion of Judge Belloni's unpublished judgment).

70. Initially, Oregon did not appeal *Sohappy*, but when the judge adopted the equal sharing formula from the *Boldt Decision* and its appeal, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), for the spring chinook run, the State eventually appealed to the Ninth Circuit, which affirmed. *Sohappy v. Smith*, 529 F.2d 570 (9th Cir. 1976).

71. During the summer of 1970, activists conducted armed “fish-ins” on the Puyallup River. Federal agents raided a “fish-in” encampment only weeks before the filing of *United States v. Washington*. See ULRICH, *supra* note 51, at 133 (indicating “[d]iscrimination against treaty Indian fishing . . . actually increased” immediately after *Sohappy*); Woods, *supra* note 62, at ¶ 54.

72. *United States v. Washington (Boldt Decision)*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd sub nom. Washington v. Wash. State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 669 (1979).

habitat destruction.<sup>73</sup> Judge George Boldt<sup>74</sup> deferred acting on the latter two requests until settling the first.<sup>75</sup>

After nearly four years of proceedings,<sup>76</sup> Judge Boldt issued a decision on February 12, 1974, that invalidated Washington's harvest regulations as discriminating against tribal fishing.<sup>77</sup> In this historic and lengthy decision, Judge Boldt determined the state regulations restricted and sometimes prohibited tribal fishing at historic fishing grounds while "permitting [non-Indian] fishing for salmon elsewhere on the same runs of fish."<sup>78</sup> Moreover, despite the State's claims of Indian overharvests, during more than three years of taking evidence, Judge Boldt found that the State failed to produce "any credible evidence showing any instance, remote or recent, when a definitively identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish."<sup>79</sup> In fact, at the time of trial the tribes harvested just 2 percent of the total harvest.<sup>80</sup> In short, the State was hardly discriminating against tribal harvests in the interest of conservation of fish. Instead, it was discriminating against the tribes to conserve fish for competing non-Indian harvesters.<sup>81</sup>

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73. See *id.* at 328. See also SACRIFICING THE SALMON, *supra* note 1, at 80.

74. Judge Boldt, who was a named partner in both a Seattle and a Tacoma law firm from 1928 until 1953 and also served as a state Assistant Attorney General in 1940 and 1950, was appointed to the federal bench in 1953 by President Eisenhower, becoming Chief Judge of the Western District of Washington in 1971. *Biographical Note: Guide to Papers of George H. Boldt, 1971-73*, George H. Boldt Papers, Archives and Special Collections, Maureen and Mike Mansfield Library, The University of Montana-Missoula, <http://nwda-db.wsulibs.wsu.edu/findaid/ark:/80444/xv35913> (last visited Jan. 27, 2009). Judge Boldt retired in 1979 and died on March 18, 1984. See Woods, *supra* note 62, at ¶ 80; Paul Shukovsky, *Alzheimer's Strikes Indians Through Judge Boldt Had Disease When He Issued Ruling*, SEATTLE POST-INTELLIGENCER, June 11, 1992, at A1, available at <http://seattlepi.nwsource.com/archives/1992/9206110030.asp> (last visited Jan. 27, 2009) (describing Judge Boldt's battle with Alzheimer's beginning in 1979).

75. See *United States v. Washington (Boldt Decision)*, 384 F. Supp. 312, 328 (W.D. Wash. 1974) (noting the court would decide at a later time "claims for relief concerning alleged destruction or impairment of treaty right fishing due to state authorization of, or failure to prevent, logging and other industrial pollution and obstruction of treaty right fishing streams").

76. After three-and-a-half years of pre-trial proceedings, Judge Boldt conducted a three-week trial, with 49 witnesses and hundreds of documents admitted. Woods, *supra* note 62, at ¶¶ 54-59.

77. *Boldt Decision*, 384 F. Supp. at 403-404.

78. *Id.* at 393.

79. *Id.* at 338 n.26.

80. See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (Passenger Fishing Vessel)*, 443 U.S. 658, 676-77 n.22 (1979) (citing *United States v. Washington*, 459 F. Supp. 1020, 1032 (W.D. Wash. 1978)).

81. As accurately predicted by Professor Johnson, *supra* note 52, at 208-09.

Since the available salmon were insufficient to supply both Indian and non-Indian needs, like Judge Belloni before him, Judge Boldt decided that the treaties required a fair allocation of harvests.<sup>82</sup> Judge Boldt, however, broke new ground by quantifying what that fair allocation should be.<sup>83</sup> He construed the treaty language “in common with” to mean “by dictionary definition and as intended and used in the . . . treaties[,] . . . sharing equally the opportunity to take fish.”<sup>84</sup> Consequently, he directed the State to limit the non-Indian share to 50 percent of the total harvest.<sup>85</sup> This directive altered salmon harvests dramatically and, by 1977, the tribes were harvesting 43 percent of Puget Sound harvests.<sup>86</sup>

But change did not come without widespread resistance. The *Boldt Decision* provoked a wave of public outrage and dissidence unlike any the region had seen before, prompting the Ninth Circuit later to

82. *United States v. Washington (Boldt Decision)*, 384 F. Supp. 312, 343 (W.D. Wash. 1974).

83. See Brian E. Schartz, *Fishing for a Rule in a Sea of Standards: A Theoretical Justification for the Boldt Decision*, 15 N.Y.U. ENVTL. L.J. 314, 332 (2007) (“[N]o prior decision had gone so far as to derive a clear, bright-line rule from the Stevens treaties.”). Judge Belloni viewed the 50 percent formula articulated by Judge Boldt as an improvement:

In his opinion [Judge Boldt] followed mine exactly. In fact, he quoted verbatim I think about five pages of my opinion in his. He made one change which I thought was a good one. . . . Judge Boldt clarified [the fair and equitable share concept] and he said that fair and equitable share will be 50% of the fish.

Belloni Oral History, *supra* note 68.

84. *Boldt Decision*, 384 F. Supp. at 343.

85. *Id.* Judge Boldt excluded from the equal sharing formula (1) fish harvested by tribes on-reservation, (2) fish not destined to pass the tribe’s historic fishing grounds, and (3) fish caught outside Washington waters. See *Passenger Fishing Vessel*, 443 U.S. at 687–89.

86. See Brief of Respondent Indian Tribes, at 59; *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n (Passenger Fishing Vessel)*, 443 U.S. 658 (1979) (Nos. 77-983, 78-119, and 78-139), 1979 WL 199417. However, given the exclusions in Judge Boldt’s, see *supra* note 85, formula the tribes actually harvested only 18 percent of the total Washington harvest in 1977. Brief of Respondent Indian Tribes, *supra*, at 59. Notwithstanding the definitive answer to the apportionment question, the habitat degradation question remained unanswered. *United States v. Washington (Boldt Decision)*, 384 F. Supp. at 328. In part due to this deferral and his correct assumption that additional issues would arise from the allocation decision, Judge Boldt retained continuing jurisdiction “without limitation.” *Id.* at 347. See Woods, *supra* note 62, at ¶ 65. Over the next three decades, the tribes would seek redress on several more issues in the sub-proceedings of *United States v. Washington*, including the claimed right to habitat protection. See *infra* Parts III, V. Additionally, Judge Boldt’s 50 percent rule begged the question as to whether hatchery fish should be included in the 50 percent allocation. *United States v. Washington (Orrick Decision)*, 506 F. Supp. 187, 198–99 (W.D. Wash. 1980), *aff’d in part and vacated in part*, 759 F.2d 1353 (9th Cir. 1985). Judge Orrick, the successor to the *United States v. Washington* sub-proceedings answered this question in the affirmative. *Id.* at 202.

compare the resistance to that of the Southern states' defiance of school desegregation orders.<sup>87</sup> Although the Ninth Circuit affirmed Judge Boldt in 1975,<sup>88</sup> non-Indian harvesters engaged in widespread noncompliance with the federal court's orders.<sup>89</sup> The non-Indian harvesters also mounted a legal assault on Judge Boldt's decision in Washington's state court, and they succeeded in collaterally attacking the decision when the state supreme court ruled that the State lacked authority under state statutes and the state constitution to implement the equal-sharing formula.<sup>90</sup> Consequently, from 1977 to 1979, Judge Boldt managed the Puget Sound and coastal Washington fisheries himself, enforced via court orders, criminal contempt citations, and federal marshals.<sup>91</sup> In short, he became a judicial fishmaster.<sup>92</sup>

The conflict between state and federal courts induced a reluctant U.S. Supreme Court to wade into the morass of the Northwest salmon wars for the fourth time in little over a decade. In 1979, the Court, in a 6-

87. See *Puget Sound Gillnetters v. U.S. District Court*, 573 F.2d 1123, 1126 (9th Cir. 1978) ("Except for some desegregation cases the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.") (citation omitted); Scharz, *supra* note 83, at 332-33 (describing public outcry regarding the 50 percent rule and attributing the sentiment to the fact that Judge Boldt set out a bright-line rule arising from the Stevens treaties for the first time in their history); Woods, *supra* note 62, at ¶ 66.

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

89. SACRIFICING THE SALMON, *supra* note 1, at 81 (noting non-compliance and shooting threats). By the time Judge Boldt issued his opinion, harvest levels were already reduced due to seriously depleted salmon populations. Nikel-Zueger, *supra* note 9, at 14-15. Judge Boldt's 50 percent rule essentially reduced the harvest quota by half for non-Indian fisherman because the Indian take prior to the ruling made up only about 2 percent of the total harvest. *Passenger Fishing Vessel*, 443 U.S. 658, 676-77 n.22 (1979). Just three years after the *Boldt Decision*, the Indian harvest reached 43 percent of Puget Sound's total harvest (and about 18 percent of Washington's total harvest). See SACRIFICING THE SALMON, *supra* note 1, at 81. As a result, Washingtonians viciously hung Judge Boldt in effigy, sported bumper stickers urging citizens to "Can Judge Boldt—Not Salmon," and gathered 80,000 signatures supporting his impeachment. See Scharz, *supra* note 83, at 332.

90. *Wash. State Commercial Fishing Vessel Ass'n v. Tollefson*, 571 P.2d 1373 (Wash. 1977), *vacated*, 443 U.S. 658 (1979); *Puget Sound Gillnetters Ass'n v. Moos*, 565 P.2d 1151 (Wash. 1977), *vacated*, 443 U.S. 658 (1979). See also SACRIFICING THE SALMON, *supra* note 1, at 81.

91. See Woods, *supra* note 62, at ¶ 77.

92. In doing so, he became a cautionary example for other federal judges who balked at providing close judicial oversight of agencies managing other natural resources. See, e.g., *Natural Res. Def. Council v. Hodel*, 624 F. Supp. 1045, 1062-63 (D. Nev. 1985) (in which Judge Burns declined to assume the role of "rangemaster" of federal grazing lands in western Nevada). See *infra* note 273.

3 decision written by Justice John Paul Stevens, affirmed Judge Boldt.<sup>93</sup> The Court employed a canon of treaty construction—that treaty terms should be interpreted as the tribes would understand them<sup>94</sup>—to uphold the equal sharing principle.<sup>95</sup> Justice Stevens also observed the treaty right prevented tribal harvesters from being “crowded out” of their fishery; thus, neither party could harvest the other’s share of the resource.<sup>96</sup> According to the Court,

[t]he logic of the 50% ceiling is manifest. For an equal division—especially between parties who presumptively treated each other as equals—is suggested, if not necessarily dictated, by the word ‘common’ as it appears in the treaties. Since the days of Solomon, such a division has been accepted as a fair apportionment of a common asset, and Anglo-American common law has presumed that division when, as here, no other percentage is suggested by the language of the agreement or the surrounding circumstances.<sup>97</sup>

Judge Boldt’s equal sharing principle, therefore, withstood Supreme Court scrutiny.<sup>98</sup>

An enduring aspect of the Court’s affirmance was its adoption of a needs-based “moderate living” standard as a measure of the scope of the treaty right of taking fish. Clarifying that it meant the equal sharing principle to operate as a ceiling, the Court proclaimed that “the central principle here must be that Indian treaty rights to a natural resource that was once thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.”<sup>99</sup> Thus, under the “moderate living” standard, the tribal harvest share could be judicially reduced

93. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

94. *Id.* at 676 (“[T]he treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”).

95. In addition to tribes’ likely understanding of the treaty language, the Court affirmed the equal sharing formula by looking to contemporaneous usages of the word “common” and interpretation of treaties with Great Britain giving each nation an equal harvest share. *Id.* at n.23.

96. *Id.* at 676.

97. *Id.* at 687 n.27.

98. The Court did adjust the equal sharing formula in two ways: (1) it included on-reservation harvests as well as ceremonial and subsistence harvest in the 50 percent tribal share; and (2) it included in the non-tribal 50 percent only fish harvested by Washington citizens in state or federal waters. *Id.* at 688–89.

99. *Id.* at 686. See Blumm & Swift, *supra* note 9, at 458 n.246 (discussing criticism and applications of the moderate living standard).

below 50 percent if a tribe: (1) dwindled “to just a few members” or (2) found “other sources of support that lead it to abandon its fisheries.”<sup>100</sup> In almost 30 years since the Court’s decision, no evidence of either of these qualifications has appeared. With the moderate living qualification, the Supreme Court concluded the equitable apportionment era of litigation surrounding the treaty fishing right. The final frontier of litigation would involve an attempt to expand the number of salmon subject to apportionment.

### III. THE HABITAT RIGHT FROM 1970–2007: A LONG AND WINDING ROAD

By the time Judge Boldt issued his groundbreaking opinion, the salmon and steelhead fisheries had faced over a century of decline, which made the allocation issue extraordinarily contentious.<sup>101</sup> As a result, the next sub-proceeding of *United States v. Washington* (commonly referred to as “Phase II”) involved tribal efforts to expand the “pie” to be allocated.<sup>102</sup>

In 1970, when the tribes filed suit in Judge Boldt’s court, they not only sought a share of the salmon harvests, but they also sought the inclusion of hatchery fish in their harvest share and a declaration that the “right of taking fish” included protection of the habitat that allowed the fish to exist.<sup>103</sup> Judge Boldt resolved the harvest share question, but left the latter two issues unresolved.<sup>104</sup> By the time the Supreme Court de-

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100. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 687 (1979). Justice Thurgood Marshall’s papers revealed that the insertion of the “moderate living” standard into the opinion was a result of an effort by Justice Stevens to preserve a precarious majority. The three-member dissent, written by Justice Powell, worried that equal sharing would produce “an extraordinary economic windfall to Indian fishermen. . . .” *Id.* at 705–06 (Powell, J., dissenting). The moderate living language, as a ceiling on the tribal share, was a successful effort on the part of Justice Stevens to keep from losing his majority. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1637–39 (1996) (noting that Stevens thought that a 50 percent harvest share would yield only about 20 percent for tribal harvests, assuming—erroneously, it turned out—that the tribes would be unable to successfully argue that their treaty rights included harvests of hatchery fish). For the hatchery fish litigation, see *supra* note 14, *infra* notes 108–109 and accompanying text.

101. See *supra* notes 82–91 and accompanying text.

102. See Lewis, *supra* note 31, at 297 (“The problem for Indians today is not their *piece* of the pie, it is the *size* of the pie. To address the size of the pie, some courts have considered the proposed habitat right.”).

103. See *supra* notes 73 and 75 and accompanying text.

104. *United States v. Washington (Boldt Decision)*, 384 F. Supp. 312, 328 (W.D. Wash. 1974), *aff’d sub nom. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 669 (1979).

cided that the treaties did indeed guarantee the tribes a harvest share in 1979,<sup>105</sup> Judge Boldt had retired and Judge William Orrick had replaced him on the case.<sup>106</sup>

Taking a common sense approach to the two issues left unresolved by Judge Boldt, Judge Orrick had little difficulty ruling, in 1980, that hatchery fish were included in the tribal harvestable share, and that the treaties protected fish habitat.<sup>107</sup> The State had argued that hatchery fish should be excluded from the equal sharing formula, encouraged by the Supreme Court concurrence in *Puyallup II*.<sup>108</sup> The State's arguments notwithstanding, Judge Orrick ruled that the hatchery fish were included in the equal sharing formula because hatcheries were the State's (and federal government's) overwhelming choice for mitigation of the adverse effects of aquatic developments, particularly dam construction and operation, on salmon.<sup>109</sup>

Concerning the habitat issue, Judge Orrick also ruled in favor of the tribes, concluding that the "right of taking" fish implied a right to protect the habitat necessary to sustain the salmon runs.<sup>110</sup> He did so on the ground that "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."<sup>111</sup> Orrick determined that the Supreme Court had found that the primary purpose of the trea-

105. See *supra* notes 93–100 and accompanying text.

106. See *supra* note 74 for biographical information on Judge Boldt. Judge Orrick, of the Northern District of California, joined his father's San Francisco law firm before serving in President John F. Kennedy's Justice Department. Larken Bradley, *Judge William Orrick, 87, A Stinson Beach Pundit* (obituary), POINT REYES LIGHT, Sept. 18, 2003, available at [http://www.ptreyeslight.com/stories/sept18\\_03/orrick\\_obit.html](http://www.ptreyeslight.com/stories/sept18_03/orrick_obit.html). President Richard Nixon appointed him to the federal bench in 1974. *Id.* When no members of the Western District of Washington wanted the notoriety that *United States v. Washington* had brought Judge Boldt, Judge Orrick was assigned the case. See Lewis, *supra* note 31, at 296. Judge Orrick died in 2003 at the age of 87. See Bradley, *supra*.

107. *United States v. Washington (Orrick Decision)*, 506 F. Supp. 187, 197–98, 208 (W.D. Wash. 1980), *aff'd in part and vacated in part*, 759 F.2d 1353, 1358–60 (9th Cir. 1985) (en banc).

108. In *Dep't of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973), the Court avoided ruling on whether the State could exclude hatchery fish from the equal sharing formula. *Puyallup II*, 414 U.S. at 49. A three-member concurrence, written by Justice White and joined by Chief Justice Burger and Justice Stewart, suggested that the equal sharing formula should not apply to hatchery fish, apparently on the theory that these fish were "created" by the state's labor. *Id.* at 49–50 (White, J., concurring).

109. *Orrick Decision*, 506 F. Supp. at 198–99. Judge Orrick concluded that hatchery fish were subject to the treaties because (1) the treaties reserved to the tribes "more than a share of the [treaty-time] harvests; they also reserved a right to all future runs;" (2) the state didn't own the hatchery fish once released to state waters; and (3) the state supplied "only a portion of the hatchery fish," as federal, tribal, private, and cooperative hatcheries accounted for nearly half of the hatchery fish. *Id.* at 200–02.

110. *Id.* at 203.

111. *Id.*

ties was to reserve fish in order to preserve an economic and cultural way of life.<sup>112</sup> Moreover, the treaty negotiators “specifically assured the tribes that they could continue to fish notwithstanding the changes the impending westward expansion would certainly entail.”<sup>113</sup> Since maintenance of fish habitat was a prerequisite to the survival of the salmon, he concluded that the treaties must be interpreted to protect that habitat for the reserved right of taking fish to have any value.<sup>114</sup>

Judge Orrick also observed that, given the compromised state of salmonid habitat, Washington could not degrade or allow activities that degrade habitat because they would impeded the tribes’ ability to make a “moderate living” through fishing.<sup>115</sup> Otherwise, the treaty right “would eventually be reduced to the right to dip one’s net into the water and bring it out empty,” rendering the efforts to establish the proper harvest allocation “nugatory.”<sup>116</sup> In other words, if the fish went extinct, the right to take half of the harvest would become “meaningless and valueless.”<sup>117</sup> The opinion marked a major advance for the tribes, but its effects would not be long-lasting.

The Ninth Circuit reviewed the *Orrick Decision* on three separate occasions. Initially, in 1983, a three-judge panel upheld, but significantly modified, Judge Orrick’s finding of an implied habitat right.<sup>118</sup> Whereas Judge Orrick required the State to avoid habitat degradation that would interfere with the tribes’ right to a “moderate living,” the panel replaced the standard with a reasonableness test, rejecting what the appellate court characterized as an “environmental servitude with open-ended

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112. *Id.* at 204.

113. *Id.*

114. *United States v. Washington (Orrick Decision)*, 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff’d in part and vacated in part*, 759 F.2d 1353, 1358–60 (9th Cir. 1985) (en banc).

115. *Id.* Judge Orrick held that this prohibition also ran against the federal government and private parties. *Id.* at 208. Note, however, the plaintiffs agreed to defer the question of whether the State of Washington had violated that duty and, if so, what the remedy would be. *Id.* at 194.

116. *Id.* at 203 (paraphrasing Justice Stevens’ statement in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979), that the treaty right entailed more than “merely the chance . . . occasionally to dip their nets into the territorial waters”).

117. *Id.* at 205.

118. *United States v. Washington*, 694 F.2d 1374 (9th Cir. 1983). This panel and each of the later en banc panels affirmed Judge Orrick’s decision that the State should include hatchery fish in the number to be allocated between Indians and non-Indians. *Id.* at 1380. With regard to Judge Orrick’s articulation of the habitat protection right, however, the three-judge panel lodged four primary objections: “[T]he 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.” *Id.* at 1381.

and unforeseeable consequences.”<sup>119</sup> Instead, the panel majority, in an opinion by Judge Joseph Sneed, held that both the State and the tribes had to “take reasonable steps commensurate with their respective resources and abilities to preserve and enhance the fishery.”<sup>120</sup> Further, Judge Sneed ruled, without explanation, that the treaty obligations did not run to private parties.<sup>121</sup> Judge Reinhart concurred in the majority’s holding, stating he saw little practical difference between the reasonableness standard and Judge Orrick’s articulation of the treaty right.<sup>122</sup> However, Reinhart minced no words in saying he thought the treaty right did, in fact, guarantee that the salmon supply would be safeguarded from severe habitat degradation.<sup>123</sup>

The tribes petitioned for rehearing, and an en banc panel of the Ninth Circuit agreed to reevaluate the case.<sup>124</sup> At first, the panel ruled that it did not have jurisdiction to review the case.<sup>125</sup> But the fractured en banc panel later withdrew its earlier opinion, vacated Judge Sneed’s opinion, and also vacated Judge Orrick’s decision as to the habitat right, in a per curiam opinion.<sup>126</sup> The court noted that declaratory relief should be reserved for cases amenable to “[p]recise resolution, not general admonition.”<sup>127</sup> According to the plurality, as a matter of judicial prudence, Judge Orrick should not have ruled on the environmental degradation issue without the benefit of a particularized factual dispute: “The legal standards that will govern the State’s precise obligations and duties under the treaty with respect to the myriad State actions that may affect

119. *Id.*

120. *Id.*

121. *Id.* at 1381 n.15. *See also* Blumm & Swift, *supra* note 9, at 417 n.43 (noting this holding was blatantly inconsistent with the *Winans* decision).

122. *United States v. Washington*, 694 F.2d at 1390 (Reinhart, J., concurring).

123. Judge Reinhart stated:

If it is inconceivable that the Indians would have agreed to be required to fish on the same terms as non-Indians, it is far more inconceivable that they would have allowed the State to permit the fishery to be destroyed altogether. . . . [T]he treaty guarantees that the Indians’ supply of fish must be safeguarded against pollution by every reasonable means.

*Id.* at 1391

124. *See* Blumm & Swift, *supra* note 9, at 417.

125. *Id.* (citing *United States v. Washington*, No. 81-3111, slip op. 5397 (9th Cir. Dec. 17, 1984) (en banc), *vacated*, 759 F.2d 1353 (9th Cir. 1985) (en banc)).

126. *United States v. Washington*, 759 F.2d 1353, 1354 (9th Cir. 1985) (en banc), *cert. denied* 474 U.S. 994 (1985) (*Phase II*). The en banc panel, like the initial Ninth Circuit panel, affirmed the lower court decision on the hatchery issue, determining that the issue was sufficiently particularized. *Id.* at 1357–60 (affirming Judge Orrick’s holding that hatchery fish must be counted in the tribe’s allocation, but noting the judge improperly concluded the 50 percent tribal share was a minimum share).

127. *Id.* at 1357.

the environment of the treaty area *will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case.*<sup>128</sup> Despite the vacatur, neither the *per curium* opinion nor any of the several concurrences and dissents indicated that any of the judges would reverse Judge Orrick's habitat holding on the merits.<sup>129</sup> Still, perhaps due to the uncertain scope of the habitat obligations, the court was unwilling to affirm without a concrete factual scenario.<sup>130</sup>

The Ninth Circuit's decision to not reach the merits left the tribes, in the spring of 1985, essentially in the same position regarding the habitat question as they were immediately after the *Boldt Decision* in 1974. The tribes declined, however, to accept the Ninth Circuit's invitation to present more particularized facts for almost two decades, pursuing negotiation and cooperative management options instead.<sup>131</sup> Eventually, the tribes recognized that their efforts failed to stem the de-

128. *Id.* (emphasis added).

129. *See generally id.* Judge Ferguson, joined by Judge Schroeder, thought that the plaintiffs' original complaint—with its request to enjoin eight specific state activities—"would have presented a justiciable controversy," but the procedural posture of the case did not allow the court to affirm because Judge Orrick decided the scope of the habitat right "as a pure issue of law divorced from any factual context" in a decision on a motion for summary judgment. *Id.* at 1360 (Ferguson, J., concurring). In dissent, Judge Nelson, joined by Judge Skopil, indicated that not only did the majority erroneously conclude a declaratory judgment was unripe at that juncture, but he would have affirmed Judge Orrick's decision on the merits of the environmental degradation issue. *Id.* at 1362–63, 1365–67 (Nelson, J., concurring in part and dissenting in part). Judge Norris dissented from the majority's vacatur, but, unlike Judge Nelson, would not reach the merits of the environmental degradation question because the plurality opinion had not. *Id.* at 1368 (Norris, J., concurring in part and dissenting in part). Judge Poole, in dissent, wrote that the Ninth Circuit had no business ruling on interlocutory rulings of the trial court until the remaining issues (i.e., the particular state actions that caused environmental degradation and the remedy) had been decided by the district court. *Id.* at 1370–71 (Poole, J., dissenting). *See also* Blumm & Swift, *supra* note 9, at 496 n.449 (indicating no Ninth Circuit judge has ever held the habitat protection right did not exist in this or any other case).

130. One of us has suggested that the en banc panel may have vacated Judge Orrick's ruling on the right to habitat protection due to erroneous concerns that it implied a "wilderness servitude," which could halt all development in the region and potentially require a return to 1855 habitat conditions. *See* Blumm & Swift, *supra* note 9, at 489–92.

131. *See id.* at 418 (describing tactics tribes pursued in the interim); SACRIFICING THE SALMON, *supra* note 1, at 251–52; Schartz, *supra* note 83, at 339–41. In the meantime (and even before the *Orrick Decision*), several court opinions seemed to accept an implied habitat right under the treaties without expressly addressing the question by enjoining certain habitat damaging activities based on the treaty fishing right. *See* Blumm & Swift, *supra* note 9, at 462–81 (describing cases involving dam operations and construction; pipeline, marina and fish farm development; and reserved water right adjudications); SACRIFICING THE SALMON, *supra* note 1, at 252–63; Lewis, *supra* note 31, at 298–99 (describing some of the same cases); *See also infra* Part VII.

cline of the salmon runs, and they turned to the culvert issue as their factual vehicle for deciding the habitat protection question.<sup>132</sup>

#### IV. CULVERTS: CRYSTALLIZING THE RIGHT TO SALMON HABITAT PROTECTION

Before turning to the *Martinez Decision*, a brief primer on culverts and their effects on salmon is in order. Most culverts were built at a time when few worried that various runs of Pacific salmon would go extinct, which resulted in culvert designs that failed to take into account fish migration habits.<sup>133</sup> But those times of plentiful salmon populations have long since passed, and today culverts' adverse effects on fish passage is well-known.<sup>134</sup>

A culvert is a pipe or arch, generally made from metal or concrete, used to allow water to flow underneath roads and railroad tracks where they cross waterways.<sup>135</sup> Culverts are often a cheaper alternative to

132. See, e.g., Lynda V. Mapes, *Another Potential Lightning Boldt*, SEATTLE TIMES, Jan. 17, 2001, available at <http://community.seattletimes.nwsourc.com/archive/?date=20010117&slug=culverts17m0> (last visited Dec. 19, 2008) (noting that in 2001 the tribes were catching the same amount of fish as in 1974 and quoting Phil Katzen, one of the tribes' attorneys, as saying "[t]he tribes have lost everything they gained in the Boldt decision"); Andrew Engelson, *Tribes Fight to Clear the Roads for Salmon*, HIGH COUNTRY NEWS, July 2, 2001, available at <http://www.hcn.org/issues/206/10611> (last visited Aug. 21, 2009) (indicating tribes took 500,000 fish in the early 1970s, increased the take to 5 million by the mid-1980s, but decreased take to 500,000 fish by 2000 due to declining salmon populations). The tribes thought that neither additional harvest limitations nor hatchery reforms would help salmon populations as habitat continued to be degraded or lost—in part due to passage-blocking culverts. See Billy Frank, Jr., Northwest Indian Fisheries Commission, *Being Frank: Culvert Ruling Benefits Salmon Everyone*, Sept. 4, 2007, available at <http://www.nwifc.org/2007/09/being-frank-culvert-ruling-benefits-salmon-everyone/> (last visited Aug. 21, 2009) ("Without good habitat, and access to that habitat, there will be no salmon recovery.").

133. See Engelson, *supra* note 132. See also Lynda V. Mapes, *Culverts Add Obstacles to Salmon, State, Politics*, SEATTLE TIMES, Jan. 24, 2008, available at [http://seattletimes.nwsourc.com/html/localnews/2004142062\\_culverts24m.html](http://seattletimes.nwsourc.com/html/localnews/2004142062_culverts24m.html) (noting culverts were "built with only one thing in mind: getting water down straight pipes, as cheaply as possible. No one was thinking about getting salmon back up them.").

134. Mapes, *supra* note 132. Fish passage is particularly important for anadromous fish due to their migratory life cycle. Anadromous fish are born in freshwater streams, grow as juveniles in freshwater streams, migrate to the ocean to mature, and return to their natal streams in order to spawn. See U.S. GENERAL ACCOUNTING OFFICE, RESTORING FISH PASSAGE THROUGH CULVERTS ON FOREST SERVICE AND BLM LANDS IN OREGON AND WASHINGTON COULD TAKE DECADES 4 (2001), available at <http://www.gao.gov/new.items/d02136.pdf> [hereinafter GAO REPORT]. Consequently, culverts that block access to freshwater habitat have "the potential to destroy these populations of wild fish." FISH PASSAGE TASK FORCE REPORT, *supra* note 9, at 6.

135. See GAO REPORT, *supra* note 134. Note that the General Accounting Office changed its name in 2004 to the Government Accountability Office. David M. Walker, *GAO Answers*

bridges that still allow water to follow its natural course and prevent road erosion and floods.<sup>136</sup> In spite of these benefits, culvert design flaws have created a serious impediment to anadromous fish access to spawning and rearing habitat.<sup>137</sup>

Poorly constructed or maintained culverts impede access to habitat in several ways.<sup>138</sup> First, if a culvert outlet is placed too high above a stream, it may exceed salmon's jumping capabilities, preventing anadromous fish from gaining access to upstream spawning and rearing freshwater habitat.<sup>139</sup> Second, improperly designed culverts may be too steep, which allows water to flow through them too swiftly for salmon to fight against the current.<sup>140</sup> Third, the depth of water inside culverts may be too shallow to allow fish passage.<sup>141</sup> Finally, culverts can become blocked with debris or sediment, obstructing access to upstream habitat and creating turbulence too great for fish to overcome.<sup>142</sup> Consequently, culverts render thousands of miles of prime spawning and rearing habitat inaccessible to salmonids, and impede other salmon recovery efforts.<sup>143</sup>

*the Question: What's in a Name?*, ROLL CALL, July 19, 2004, available at [http://www.rollcall.com/issues/50\\_8/guest/6262-1.html](http://www.rollcall.com/issues/50_8/guest/6262-1.html).

136. See *Lower Elwha Klallam Tribe Replaces Culvert in Creek*, NWIFC NEWS (Northwest Indian Fisheries Comm'n, Olympia, WA), Fall 2008, at 3, available at <http://www.elwha-scienceed.org/files/NWIFC-News>.

137. See EVA WILDER & MIKE BARBER, WASH. DEP'T OF TRANSPORTATION & WASH. DEP'T OF FISH & WILDLIFE, WSDOT FISH PASSAGE INVENTORY: PROGRESS PERFORMANCE REPORT 6 (2008), available at <http://wsdot.wa.gov/NR/rdonlyres/F9743AD2-B4DB-439E-91C5-B973CBF17506/0/WSDOTFishPassageRpt08.pdf> [hereinafter FISH PASSAGE INVENTORY]. For example, many culverts have a hatch at one end that opens with increased precipitation, but barely opens at normal flows, thereby prohibiting fish passage. Scharztz, *supra* note 83, at 315 n.2.

138. Salmon survival depends on the salmon's ability "to migrate to the sea, feed on its rich food resources, and return to spawn in the clean gravel and oxygen rich waters found in the state [of Washington's] 50,000 miles of streams." FISH PASSAGE TASK FORCE REPORT, *supra* note 9, at 6. For a detailed discussion of effects of culverts on salmonids, see WASH. DEP'T OF FISH & WILDLIFE, DESIGN OF ROAD CULVERTS FOR FISH PASSAGE MANUAL 9-13 (2003), available at [http://wdfw.wa.gov/hab/engineer/cm/culvert\\_manual\\_final.pdf](http://wdfw.wa.gov/hab/engineer/cm/culvert_manual_final.pdf) [hereinafter FISH PASSAGE MANUAL].

139. See WASH. DEP'T OF TRANSPORTATION, FISH PASSAGE FACTS, <http://wsdot.wa.gov/Environment/Biology/FP/fishpassagefacts.htm> (last visited Dec. 19, 2008) [hereinafter FISH PASSAGE FACTS]. This type of culvert is known as a "perched" culvert.

140. *Id.*

141. *Id.*

142. *Id.* See also Mapes, *supra* note 132 (describing culverts' effects on fish passage).

143. FISH PASSAGE TASK FORCE REPORT, *supra* note 9, at 6 (noting that, as of 1997, Washington Department of Fish and Wildlife estimated barrier culverts blocked access to more than 3,000 miles of habitat and that that number should be "viewed as conservative"); See also FISH PASSAGE INVENTORY, *supra* note 137, at 9 (noting WSDOT-owned culverts block

Washington does not dispute the adverse effects of barrier culverts or the benefits of attending to them, but progress repairing or replacing culverts has been slow. In 1997, the state reported that more than 200,000 additional adult salmon would likely return to western Washington if it fixed its culverts, but indicated in 2001 that it would take up to 100 years to fix the 2,400 state-owned “barrier culverts” using existing funding sources.<sup>144</sup> By June 2008, the state had fixed only 218 barrier culverts since 1991 (roughly 9 percent), and 48 of those still required “additional work to meet current fish passage criteria.”<sup>145</sup> The 2008 Washington Department of Fish and Wildlife (WDFW) and Washington State Department of Transportation (WSDOT) culvert inventory estimated the number of state-owned culverts in fish-bearing streams at 3,185.<sup>146</sup> Of these, 1,859 block fish passage, and 1,440 of them are barriers that, if fixed, would result in “significant habitat gain.”<sup>147</sup> According to the state agencies, “significant habitat gain” means culvert repair will open fish access to at least an additional 200 meters of upstream habitat.<sup>148</sup> The state prioritizes these culverts for “near-term correction using dedicated fish passage barrier correction funds.”<sup>149</sup> In total, repair or replacement of these barrier culverts would open more than 3,000 miles of potential

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thousands of miles of potential salmonid habitat); FISH PASSAGE MANUAL, *supra* note 138, at 13 (“Barriers block the use of the upper watershed, which is often the most productive spawning habitat, considering channel size, substrate and available rearing habitats. Fish access to upper portions of the watershed is important; fry produced there then have access to the entire downstream watershed for rearing.”); Press Release, Northwest Indian Fisheries Comm’n, Questions and Answers Regarding the Tribal Culvert Case (Jan. 16, 2001), available at <http://blogs.nwifc.org/weblog/general/2001/01/> (last visited Dec. 19, 2008).

144. See Engelson, *supra* note 132 (“Barrier culverts” are those that exist in salmon-bearing streams and impede fish passage in some way).

145. See FISH PASSAGE INVENTORY, *supra* note 137, at 5; see also FISH PASSAGE FACTS, *supra* note 139 (noting the fixed 218 barrier culverts opened 486 miles of habitat).

146. FISH PASSAGE INVENTORY, *supra* note 137, at 5.

147. *Id.*

148. *Id.* at 6.

149. *Id.* Washington addresses culverts problems in three ways: (1) every two years, “the Legislature appropriates funds for stand-alone correction projects to address some of the highest priority barriers,” which are called “dedicated correction” projects and are part of the WSDOT Environmental Retrofit Program; (2) in highway safety projects, WSDOT requires correction of barrier culverts if the project requires a Hydraulic Project Approval (HPA) and evaluates whether barrier culverts should be corrected if no HPA is required; and (3) state agencies correct some barrier culverts through routine maintenance. *Id.* at 9. See also FISH PASSAGE FACTS, *supra* note 139 (describing the three-pronged approach to prioritization and factors used).

salmonid habitat.<sup>150</sup> However, over the 17-year period between 1991 and 2008, the state opened only 486 miles of habitat.<sup>151</sup>

This sluggish rate of improvement is largely a consequence of the fact that culvert replacement and repair is extraordinarily expensive.<sup>152</sup> Average estimates for culvert corrections vary widely, but range anywhere from \$250,000<sup>153</sup> to \$369,000 per culvert.<sup>154</sup> WSDOT reports that it has spent \$46 million on culverts since 1991—\$20 million on inventory efforts and \$26 million to correct some 218 culverts.<sup>155</sup> Using the latter figures, the state spent an average \$119,266 per culvert repair, which is the most conservative estimate available.<sup>156</sup> Accordingly, the total cost of fixing the thousands of state-owned culverts is in the hundreds of millions of dollars.<sup>157</sup>

Due to the prohibitive cost of culvert repairs, when the tribes broached the topic of the culverts' effect on the tribal salmon harvest with the state, the parties made little headway, despite several major at-

150. FISH PASSAGE INVENTORY, *supra* note 137, at 9. Several years might elapse before salmon actually use newly opened habitat even after culvert replacement. *Id.*

151. FISH PASSAGE FACTS, *supra* note 139.

152. See Tribal Brief in Opposition to State's Motion for Summary Judgment, at 22, United States v. Washington (*Martinez Decision*), 2007 WL 2437166 (W.D. Wash. 2007) (No. 70-9213) ("State witnesses concede that past repair funding has been inadequate, that increased funding is conditional on legislative commitment, that repair of all State barrier culverts may take several decades, and that repairs on State forest lands may not meet the regulatory deadline of 2016.") (citations omitted).

153. Mapes, *supra* note 132; Christopher Schwarzen, *Many Culverts Blocking Fish, 5-Year Study Finds*, SEATTLE TIMES, June 15, 2005, available at <http://community.seattletimes.nwsource.com/archive/?date=20050615&slug=culverts15e>.

154. Robert McClure, *Who Would Be a "Greener" Governor?*, SEATTLE POST-INTELLIGENCER, Oct. 15, 2008, available at [http://seattlepi.nwsource.com/local/383330\\_greengov16.html?source=rss](http://seattlepi.nwsource.com/local/383330_greengov16.html?source=rss) (indicating that, in Governor Christine Gregoire's first term, the state remedied approximately 70 culverts, at an average cost of \$369,000 per culvert).

155. FISH PASSAGE FACTS, *supra* note 139. Of course, the cost of each culvert depends on the design required. Washington state agencies follow Washington Department of Fish and Wildlife's *Design of Road Culverts for Fish Passage Manual* to determine the type of correction option to use at a particular site that will maximize fish passage. See generally FISH PASSAGE MANUAL, *supra* note 138.

156. Note, however, that 48 of the culverts repaired need further work. See FISH PASSAGE FACTS, *supra* note 139 (noting the 218 barrier culverts fixed opened 486 miles of habitat). Dino Rossi, Washington's 2008 Republican candidate for governor, seemed to estimate culvert repairs at about \$120,000 per culverts based on these numbers. *Dino Rossi: Q&A About the Environment*, SEATTLE POST-INTELLIGENCER, Oct. 14, 2008, available at [http://seattlepi.nwsource.com/local/383248\\_rossi14.html](http://seattlepi.nwsource.com/local/383248_rossi14.html). However, the *Seattle Post-Intelligencer* reported that the figure was very low in comparison to what the state has actually been spending on stream crossings (\$369,000 per culvert). McClure, *supra* note 154.

157. See Lynda V. Mapes, *Culvert Ruling Backs Tribes*, SEATTLE TIMES, Aug. 23, 2007, available at [http://seattletimes.nwsource.com/html/localnews/2003849269\\_culvert23m.html](http://seattletimes.nwsource.com/html/localnews/2003849269_culvert23m.html).

tempts to come to an agreement.<sup>158</sup> Eventually, the tribes determined they would need to seek judicial resolution of the issue.<sup>159</sup> If the Ninth Circuit thought a particularized fact scenario was necessary to evaluate the habitat right, the tribes could not have chosen a more ingenious set of facts to crystallize the implied right to habitat protection.

Unlike many other threats to salmon, barrier culverts present a very tangible threat to salmon populations because everything about them is quantifiable and observable.<sup>160</sup> The state owns a known number of culverts. Of those culverts, a certain percentage is blocked. Due to the blockages, a quantifiable length of stream miles is unavailable for spawning and rearing habitat. Because that habitat is unavailable, there is a calculable amount of fish unavailable for the tribes to harvest in order to make a moderate living. Moreover, through a variety of reports drafted by Washington state agencies, the state already had documented the serious consequences of culverts on salmonid populations and eliminated considerable uncertainty as to the numbers at issue.<sup>161</sup> In short, the tribes were in a very strong position as they again prepared to establish the habitat right in court.<sup>162</sup>

#### V. THE 2007 MARTINEZ DECISION: REAFFIRMING THE EXISTENCE OF THE HABITAT RIGHT

On January 17, 2001, the U.S. Department of Justice and 20 tribes filed suit against the State of Washington seeking a “Request for Determination” in Phase II, the sub-proceeding to *United States v. Washington*.<sup>163</sup> Although this request concerned only the state’s treaty obligation

158. See *Unplug the Culverts*, SEATTLE TIMES, Mar. 4, 2001, available at <http://community.seattletimes.nwsources.com/archive/?date=20010304&slug=culverted05> [hereinafter *Unplug the Culverts*] (“Three major attempts to settle this dispute, plus mediation, have failed. The state is hung up on budgeting particulars, and the tribe wants the state to acknowledge a treaty right to fix the culverts.”).

159. See *id.* (editorializing that tribes were forced into court because the state was bent on proceeding at its own speed).

160. In contrast, the effects of pollution or urbanization on salmon populations, for example, are much more difficult to document, and their effects on salmon populations are not as obvious as a culvert outfall raised six feet above a stream.

161. See *supra* note 144 and accompanying text. See also *infra* notes 171–74 and accompanying text.

162. See *Unplug the Culverts*, *supra* note 158 (“So everyone lurches back to federal court, where many years and many, many thousands of dollars later a judge will ask if the state bothered to read the Boldt . . . decision. . . .”).

163. *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166, at \*1 (W.D. Wash. 2007); Mapes, *supra* note 132. In addition, Columbia River tribes—the Nez Perce Tribe, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes of the Umatilla Indian Reservations—filed amicus

to minimize the effects of culverts under state roads on fish passage—a much narrower issue than the prior lines of cases—observers understood the significance of the case.<sup>164</sup> Lynda Mapes, a longtime reporter on salmon issues for the *Seattle Times*, entitled her article on the lawsuit's filing “Another Potential Lightning Boldt,” denoting its gravity.<sup>165</sup> From the outset, the case was potentially about much more than culverts<sup>166</sup>—the tribes sought to reestablish the right to habitat protection that slipped through the cracks when the Ninth Circuit vacated Judge Orrick's decision.<sup>167</sup>

This time the plaintiffs brought a case involving the type of particularized factual scenario the Ninth Circuit seemed to have in mind.<sup>168</sup> Not only did the tribes limit the habitat-degrading activity to culverts, they limited the scope of the lawsuit both by geography and culvert type. Geographically, the case only pertained to culverts north of the Co-

curiae brief in support of the plaintiff tribes' motion for summary judgment and in response to the State's cross-motion for summary judgment. See Brief for Nez Perce, Warm Springs and Umatilla Tribes as Amici Curiae Supporting Plaintiff Tribes, *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash.) (Case No. 70-9213).

164. See, e.g., Scharztz, *supra* note 83, at 316 (“[W]hen the case was first filed, Curt Smith, then the top salmon aide to the former governor of Washington, publicly characterized the culvert litigation as ‘Boldt II’ that could prioritize the rights of Indians above non-Indians.”).

165. Mapes, *supra* note 132.

166. See *id.* (“At its most potent, the case could establish a broader state duty to address any state-authorized activity that hurts salmon survival, from water use to timber practices and development.”); Engelson, *supra* note 132.

167. In 1980, the plaintiffs asked Judge Orrick to pass first on the legal question of “whether the tribes’ fishing right include[d] the right to have treaty fish protected from environmental degradation.” *United States v. Washington (Orrick Decision)*, 506 F. Supp. 187, 202 (W.D. Wash. 1980). They left the questions of whether the State had violated the treaty fishing right by permitting certain destructive activities, as well as what the remedy would be if it had, for another day did not come until the twenty-first century. *Id.* at 194.

168. See *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (en banc). See also *supra* notes 127–32 and accompanying text; Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, at 3, *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash.) (No. 70-9213) (“This sub-proceeding is brought in response to the direction of the Ninth Circuit to seek confirmation of the treaty right in a particular fact context.”). Culverts were not the first concrete factual scenario for which the tribes sought resolution of the habitat right, but the earlier disputes settled out of court and are not a matter of public record. Telephone Interview with Peter C. Monson, Attorney, U.S. Dep’t of Justice (Oct. 28, 2008) (notes on file with authors). Further, the tribes engaged in discussions with the state over culvert repair prior to filing the lawsuit, but the negotiations became deadlocked over a repair timetable and broke down “when the tribes insisted the state admit it had a treaty-mandated obligation to maintain salmon at harvestable levels, not just recover the fish listed under the Endangered Species Act.” Engelson, *supra* note 132.

lumbia River and west of the Cascade Mountains.<sup>169</sup> It also narrowly focused on “barrier culverts under state roads that affect salmon runs passing through the tribes’ usual and accustomed fishing areas.”<sup>170</sup>

The plaintiffs focused on quantifiable figures by concentrating on the numbers the state described in the 1997 WSDOT and WDFW report, which indicated numerous culverts under state roads in the case area needed repair or replacement.<sup>171</sup> Two hundred and sixty-eight culverts blocked significant amounts of habitat, including 249 linear miles of spawning and rearing habitat upstream of the blockages.<sup>172</sup> Thus, “more than 400,000 square meters of productive spawning habitat, and more than 1.5 million square meters of productive rearing habitat for juvenile fish” were cut off.<sup>173</sup> The state report concluded “removal of the obstacles presented by blocked culverts would result in an annual increase of 200,000 fish, many of which would be available for Tribal harvest.”<sup>174</sup>

In their opening brief, the tribes framed their arguments to underscore the effect of habitat degradation on the tribes’ ability to achieve the “moderate living” standard established by Justice Stevens in *Passenger Fishing Vessel*.<sup>175</sup> The tribes argued that because the State had constructed and maintained culverts in a manner that degraded fish habitat, adult fish production had declined, which, in turn, reduced the number of fish available for the tribal harvest.<sup>176</sup> According to the tribes, state actions that diminished the total number of harvestable fish impermissibly interfered with the tribes’ ability to earn a moderate living from their treaty

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169. See Mapes, *supra* note 157; Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 10 n.3 (indicating that the area roughly conformed to the State of Washington’s Northwest and Olympic regions).

170. See Press Release, *supra* note 143; Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 9–11.

171. Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 10.

172. *Id.* (indicating that the 1997 report initially identified 268 barrier culverts but, in its 2006 progress report, the state increased the number to 1,136 barrier culverts, which blocked eight times as many stream miles as originally estimated). These numbers reflected only the culverts that WSDOT maintained. *Id.* In addition, the tribes noted a partial inventory by the Washington State Department of Parks and Recreation (WDP) and the Washington State Department of Natural Resources (DNR) located another 750 barrier culverts on their lands within the case area. *Id.* at 10–11.

173. *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166, at \*2 (W.D. Wash.) (citing tribes’ Request for Determination).

174. *Id.*

175. See Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 2–5.

176. *Id.* at 3–4; *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*3.

fisheries.<sup>177</sup> In support, the tribes cited the long line of cases discussed in Section II of this article.<sup>178</sup> Although the tribes noted that the express treaty fishing right in the Stevens treaties made the existence of an implied habitat right even clearer, they also maintained that the reserved water rights doctrine (another implied reservation of rights) supported their position by analogy.<sup>179</sup> In addition, the tribes argued that the Ninth Circuit and other courts had long held that interference with the tribal fishing right through “degradation of or construction in salmon habitat” constituted a violation of the treaty fishing right.<sup>180</sup> Consequently, “[s]tate-owned culverts [that] result in the loss of hundreds of miles of fish habitat that would otherwise produce fish,” violated the Stevens treaties because, if not for the habitat disturbance, a portion of those fish

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177. Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 4. The federal government framed the right slightly more narrowly, indicating the remedy should “focus on those culverts that have more than a *de minimis* impact on the fishery.” Brief of United States in Response to Washington’s Summary Judgment Motion and Amici Counties Memorandum in Support Thereof, at 6, 18, *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash.) (No. 70-9213)

178. Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 12–17. The tribes’ brief also discussed cases that indirectly examined the habitat right. See *infra* Part VI.

179. Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 17–19. The tribes relied on three famous Supreme Court cases for the reserved rights argument. First, in *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court held that a treaty ceding vast areas of tribal land for white settlement in exchange for a reservation on which Indians would become self-sustaining farmers impliedly reserved the water necessary for farming, even though the treaty contained not a word about water. *Id.* at 17–18. Second, the Supreme Court ruled in *Alaska Pacific Fisheries Co. v. United States*, 248 U.S. 78 (1918), that reservation of the Annette Islands for Alaska Natives to become “civilized” through use of the fisheries resource impliedly reserved the water surrounding the island, thereby prohibiting non-Indians’ use of fish traps without tribal permission. *Id.* at 18. Finally, in *Arizona v. California*, 373 U.S. 546 (1963), the Supreme Court decided that reservations of land for tribal use necessarily included an implied right to water from the Colorado River sufficient to satisfy present and future needs of the animals and crops on which the tribes depended. *Id.* at 18–19.

180. Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 19–22 (citing *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1981) (enjoining construction of oil pipeline through Puget Sound region); *Umatilla v. Alexander*, 440 F. Supp. 553, 555 (D. Or. 1977) (declaring construction of dam was inconsistent with treaty fishing right); *Muckleshoot v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988) (enjoining construction of marina); *Nw. Sea Farms v. Army Corps of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash. 1996) (affirming Corps’ policy of denying in-water development permits where it would occupy treaty fishing grounds)). For a discussion of these cases, see also *infra* Part VI.; Blumm & Swift, *supra* note 9, at 462–81; SACRIFICING THE SALMON, *supra* note 1, at 252–63; Lewis, *supra* note 31, at 298–99.

would be available for the tribal harvest necessary to make a moderate living.<sup>181</sup>

As for relief, the tribes sought a declaratory judgment, a prohibitory injunction, and a mandatory injunction.<sup>182</sup> First, they wanted a declaratory judgment acknowledging that the treaty fishing right imposed a duty on the State to refrain from degrading habitat through building and maintaining passage-blocking culverts, and that the State of Washington had violated and continued to violate that duty.<sup>183</sup> Second, they requested an injunction prohibiting the State from building or maintaining any culverts that reduced the number of fish passing to or from the tribes' usual and accustomed grounds.<sup>184</sup> Finally, the plaintiffs asked the court to require Washington to:

(1) [I]dentify, within eighteen months, the location of all culverts constructed or maintained by State agencies, that diminish the number of fish in the manner set forth above, and (2) fix, within five years after judgment, and thereafter maintain all culverts built or maintained by any State agency, so that they do not diminish the number of fish [available for the tribe to make a moderate living].<sup>185</sup>

The State opposed the tribes' motion for partial summary judgment by asserting the tribes were not really concerned about culverts.<sup>186</sup> Instead, the State maintained that the tribes sought to establish an "environmental servitude," which the Ninth Circuit rejected in its first review of the *Orrick Decision* in 1982.<sup>187</sup> The State also contended that the tribes could establish no factual connection between reduced tribal harvest and culverts, pinning the blame for the tribes' inability to make a moderate

181. Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *supra* note 168, at 23.

182. See *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166, at \*3 (W.D. Wash.).

183. *Id.* Specifically, the tribes asked the court to declare:

(1) the right of taking fish secured by the Treaties imposes a duty upon the State of Washington to refrain from diminishing the number of fish passing through, or to or from, the Tribes' usual and accustomed fishing grounds by improperly constructing or maintaining culverts under State-owned roads and highways; and that (2) the state has violated, and continues to violate, the duty owned the Tribes under the Stevens Treaties.

*Id.*

184. *Id.*

185. *Id.* at \*1-2.

186. Washington's Opposition to Plaintiff Tribes' Motion for Partial Summary Judgment, *United States v. Washington (Martinez Decision)*, at 1, 2007 WL 2437166 (W.D. Wash. 2007) (No. C70-9213) [hereinafter Washington Motion].

187. *Id.* See *supra* text accompanying note 119.

living from fishing on market prices and harvest reductions imposed by the Pacific Salmon Treaty.<sup>188</sup> In the end, according to the State, what the tribes wanted was veto authority over all State actions.<sup>189</sup>

Judge Ricardo Martinez, who presided over the so-called “Culverts Case,”<sup>190</sup> came down squarely on the side of the tribes and federal government. First, Judge Martinez evaluated the factual evidence presented to him. Notwithstanding the State’s arguments that the tribes could produce no evidence that culverts “affirmatively diminish the number of fish available for harvest,” the court came to the “inescapable” conclusion that culvert blockages were “responsible for some portion of the diminishment,” even if the tribes could not present an exact figure on the “missing” fish.<sup>191</sup> Thus, the court determined that it had a purely legal matter to resolve: whether the treaty fishing right required the state to avoid diminishment of the salmon runs through barrier culverts.<sup>192</sup>

The State insisted the Ninth Circuit had already answered the question in the negative when it vacated the *Orrick Decision*, but Judge Martinez felt this was a mischaracterization of the Ninth Circuit’s rulings.<sup>193</sup> The judge noted that although the 1982 three-judge panel reversed Judge Orrick on the environmental degradation question, it did not do so “as conclusively as the State suggests.”<sup>194</sup> Instead, the panel

188. Washington Motion, *supra* note 186, at 2–3, 5. On the Pacific Salmon Treaty, see SACRIFICING THE SALMON, *supra* note 1, at 161–72. In addition, Washington argued that the case law did not support an implied right to habitat protection. Washington Motion, *supra* note 186, at 8–20. First, the State claimed that the tribes misconstrued the “moderate living” language from *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979), which referred to an equitable remedy rather than a treaty right. Washington Motion, *supra* note 186, at 8–10. Second, the State claimed that tribes ignored or misunderstood applicable cases, including the real meaning of the reserved water rights doctrine cases that merely established a priority position for water in times of scarcity. *Id.* at 10–15. Finally, the State maintained that the tribes did not satisfy the Ninth Circuit’s requirement that they present a concrete factual scenario to evaluate the implied habitat right because the tribes could not define what a “moderate living” meant, meaning they “offer[ed] a legal rule completely untethered to the facts.” *Id.* at 15–17.

189. Washington Motion, *supra* note 186, at 20. The State also filed a cross-motion asking for injunctive and declaratory relief against the federal government for “placing a disproportionate burden of meeting the treaty-based duty (if any) on the State” and alleging mismanagement of federal land that created “a nuisance that unfairly burden[ed] the State.” *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*1. Judge Martinez dismissed the counterclaims based on the government’s argument that it had not waived sovereign immunity. *Id.*

190. This article also refers to the case as the *Martinez Decision*, in keeping with other significant dispositions under the *United States v. Washington* line of cases.

191. *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*3.

192. *Id.*

193. *Id.* at \*3.

194. *Id.* at \*4.

modified the habitat right from what it viewed as an “environmental servitude” to a duty to take “reasonable steps” to protect habitat.<sup>195</sup> Judge Martinez then noted that the en banc panel’s vacatur of both the 1982 panel’s opinion and the *Orrick Decision* “did not contain [the] broad and conclusive language necessary to reject the idea of a treaty-based [habitat] duty in theory as well as in practice.”<sup>196</sup> In the end, according to Judge Martinez, the Ninth Circuit merely held Judge Orrick did not have a sufficiently particular factual basis before him to decide the issue. The Ninth Circuit did not reject the “concept of a treaty-based duty to avoid specific actions which impair the salmon runs.”<sup>197</sup> In fact, the appellate court seemed to “presume” such a duty existed.<sup>198</sup>

Judge Martinez thought that this case presented precisely the type of specific factual situation the Ninth Circuit envisioned, and the tribes had presented the sort of evidence necessary to craft a narrow declaratory judgment.<sup>199</sup> The court did not buy into the State’s doomsday predictions of “environmental servitude” in the narrow context of a dispute over culverts.<sup>200</sup> Nor did Judge Martinez accept Washington’s argument that the term “moderate living” was ambiguous and unenforceable, since the Supreme Court coined the term,<sup>201</sup> not the parties to the treaties.<sup>202</sup> Therefore, the court could make use of well-established rules of treaty construction in reaching a decision concerning the state’s treaty obligations with respect to culverts.<sup>203</sup>

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195. *Id.* (quoting the panel decision to the effect that: “[W]e find on the environmental issue that the State and the Tribes must each take reasonable steps commensurate with the resources and abilities of each to preserve and enhance the fishery when their projects threaten then-existing harvest levels”).

196. *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*4.

197. *Id.* at \*4–5 (citing en banc panel’s holding, as well as the various concurrences and dissents).

198. *Id.* at \*5 (“The court’s language, however, clearly presumes some obligation on the part of the State; not a broad ‘general admonition’ as originally imposed by the district court, but a duty which could be defined by concrete facts presented in a particular dispute.”).

199. *Id.* (referencing harvest data and numbers of blocked culverts presented by the tribes).

200. *Id.* (“A narrowly-crafted declaratory judgment such as the one requested here does not raise the specter of a broad ‘environmental servitude’ so feared by the State.”).

201. See *supra* note 98–99 and accompanying text for a discussion of the “moderate living” phrase introduced by the Supreme Court in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n (Passenger Fishing Vessel)*, 443 U.S. 658 (1979).

202. *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*5–6 (“‘Moderate living’ . . . is neither a ‘missing term’ in the contract, nor a meaningless provision; it is a measure created by the Court. To the extent that it needs definition, it would be for the Court, not the Tribes, to define it.”).

203. *Id.* at \*6.

Employing a series of long block quotes from prior opinions in the line of *United States v. Washington* proceedings, Judge Martinez determined the treaty right to take fish included a right to habitat protection that the state had violated through its construction and maintenance of culverts that blocked fish passage.<sup>204</sup> Judge Martinez emphasized that the treaty fishing right was an essential element of the treaty bargain,<sup>205</sup> reiterating that the treaty fishing right secured not just an opportunity to fish but the right to *take* fish.<sup>206</sup> Since the tribes ceded vast expanses of land to the United States only on the condition that they would retain their historic fishing rights, the negotiators' "assurances would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource."<sup>207</sup>

Emphasizing that he was neither establishing a "broad 'environmental servitude' [n]or [imposing] an affirmative duty to take all possible steps to protect fish runs," Judge Martinez held, in light of the negotiators' assurances, that destructive practices like building culverts that blocked fish passage violated the treaty fishing right.<sup>208</sup> Following that reasoning, on August 22, 2007, he adopted the tribes' proposed language for the declaratory judgment in its entirety.<sup>209</sup>

204. *Id.* at \*10.

205. *Id.* at \*7 (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (Passenger Fishing Vessel)*, 443 U.S. 658, 675–77 (1979)).

206. *Id.* at \*7–8 (quoting *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (Passenger Fishing Vessel)*, 443 U.S. at 678–80, and Declaration of historian Richard White, Dkt. # 296, ¶¶ 8, 9, 11).

207. *Id.* at \*10 (quoting Declaration of historian Richard White, Dkt. # 298, ¶ 6). Moreover, since both the tribes and the government negotiators thought the fish runs were inexhaustible and would remain abundant forever, they did not think to include an express treaty provision protecting the resource from depletion. *See id.* at \*9–10.

208. *Id.* (indicating the holding was a "narrow directive to refrain from impeding fish runs in one specific manner" and stating the State's duty to refrain from constructing barrier culverts "arises directly from the right of taking fish that was assured to the Tribes in the Treaties, and is necessary to fulfill the promises made to the Tribes regarding the extent of that right").

209. The pertinent language was:

The Court hereby declares that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest. The Court further declares that the State of Washington currently owns and operates culverts that violate this duty.

*Id.*

Judge Martinez set the trial date on the remedy for September 24, 2007,<sup>210</sup> but the parties agreed to postpone the trial and negotiate a remedy on their own.<sup>211</sup> A year later, the parties were unable to agree upon a remedy.<sup>212</sup> Although the court has yet to determine a remedy, and an appeal to the Ninth Circuit is likely, the *Martinez Decision* represented a monumental step toward securing the right to habitat protection. While the reasoning of the decision could and should have been based on property rights principles,<sup>213</sup> the *Martinez Decision* is hardly an outlier in

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210. *Id.*

211. See Frank, *supra* note 132 (“Cooperation has long been the key to natural resource management in Washington. We look forward to sitting down together with the state to develop a comprehensive plan for fixing the culverts that can be put into action quickly. The salmon can’t wait much longer.”); Lynda V. Mapes, *Culverts: State, Tribes to Negotiate*, SEATTLE TIMES, Aug. 30, 2007, available at [http://seattletimes.nwsourc.com/html/localnews/2003859983\\_culvert30m.html](http://seattletimes.nwsourc.com/html/localnews/2003859983_culvert30m.html) (“[B]oth sides have agreed to settle the case by spring, after the next legislative session, when lawmakers will have to figure out a way to pay for culvert repairs.”).

212. Although the parties attempted to agree on a remedy for over a year, they remain deadlocked. Email from Fronda Woods, *supra* note 24; Stipulated Amended Pretrial Scheduling Order at 4, United States v. Washington (*Martinez Decision*), 2007 WL 2437166 (W.D. Wash. 2007) (No. 70-9213) (filed Dec. 1, 2008) (setting trial on the appropriate remedy for October 13, 2009). Although the communications in the settlement discussions are confidential, the talks likely stalled on the number of culverts to be fixed and the period of time allowed. Mapes, *supra* note 157. Given the budgetary woes the state currently faces, it is possible that the state simply cannot afford to fix culverts, even at the lethargic pace at which it has been pursuing repairs. The state’s best hope might be to seek reversal from the Ninth Circuit on appeal, thereby lightening its duties with respect to culverts.

213. We believe a property rights rationale would make the *Martinez Decision* more likely to survive appeals, particularly an appeal to the Supreme Court, which has suggested that tribal fishing rights are property rights, the termination of which would require constitutional compensation. See *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Professor Mary Wood has suggested that the treaty fishing right should be construed as analogous to a cotenancy, drawing on Ninth Circuit language its second affirmation of Judge Boldt in 1978. See also Mary Christina Wood, *The Tribal Right to Wildlife Capital (Part I): Applying the Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 38 (2000) (citing *Puget Sound Gillnetters Ass’n v. U.S. Dist. Court for the Western Dist. of Wash.*, 573 F.2d 1123, 1128 n.3 (9th Cir. 1978)). The analogy could invoke the doctrine of waste, which proscribes unreasonable behavior among cotenants that produces substantial reductions in value—although the application of the doctrine varies widely depending on applicable statutes and on whether the offending activity is classified as affirmative or permissive waste. See generally 8 RICHARD R. POWELL & MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY §56.05 (2008). See also *infra* note 254. However, when he was on the Ninth Circuit, Justice Kennedy cast doubt on the applicability of the cotenancy analogy. *Puget Sound Gillnetters*, 573 F.2d at 1134 (Kennedy, J., concurring). Given Justice Kennedy’s influence on the Court and his affinity to property rights, tribal advocates ignore Justice Kennedy’s sentiments at their peril. See Michael C. Blumm & Sherry Bosse, *Justice Kennedy and the Environment: Property, States Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 665 (2007).

treaty fishing rights jurisprudence. In fact, the decision is the logical result of a line of cases that followed Judge Orrick's 1980 decision first recognizing the habitat right.

## VI. THE MARTINEZ DECISION'S ANTECEDENTS: HABITAT PROTECTION IN OTHER CONTEXTS

This section discusses some of the judicial antecedents of the *Martinez Decision*. It then explains why the results of the case are fully consistent with property law principles governing non-possessory rights in land like *profits à prendre*. The section then proceeds to explore a number of reasons why the tribal right to habitat protection, properly understood, will neither threaten to establish an environmental servitude nor overwhelm the courts with numerous claims. Although the exact contours of the habitat right remain undefined and continue to be the subject of litigation,<sup>214</sup> the *Martinez Decision* confirmed the implicit assumption relied upon in several cases following the *Orrick Decision*: the notion that a corollary right to habitat protection is incorporated within the treaty right of taking fish. In these cases, although the habitat question was not squarely before the courts, the courts almost invariably relied on the treaty fishing right to enjoin specific habitat-damaging activities.<sup>215</sup> The

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We think that treaty fishing rights are clearly property rights, and that the cotenancy analogy may be useful given the "in common with" language of the treaties. See *supra* note 2 and accompanying text. But the basis of the property right in the treaties is in the "right of taking fish." Such a right is most closely analogous to a *profit à prendre*, actually a piscary profit. See Blumm & Swift, *supra* note 9, at 445 nn.183–84. See also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2 (2000) (collecting cases concluding that hunting and fishing rights are profits); JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND §1.12, at 1–32 (2009) (noting that hunting and fishing rights are commonly categorized as profits). Because the profit is shared "in common with" white settlers, the analogy to cotenancy is not inapt. Both cotenancy law and profit law are grounded on protecting the rights-holders against unreasonable interference with the exercise of the right. See RESTATEMENT (THIRD) OF PROPERTY, *supra*, § 4.12 (explaining the "no unreasonable interference" rule for profits and stating that "[i]n the event of irreconcilable conflicts in use, priority of use rights is determined by priority in time. . . ."); POWELL & WOLF, *supra*, § 56.05 (explaining the waste doctrine); 8 THOMPSON ON REAL PROPERTY § 70.03 (David A. Thomas, ed. 2005) (characterizing waste as unreasonable conduct causing permanent harm).

214. Tim Klass, *Tribes demand speed up culvert fixes for salmon*, SEATTLE TIMES, Oct. 13, 2009, available at [http://seattletimes.nwsource.com/html/localnews/2010057360\\_apwasalmonculverts1stldwritethru.html](http://seattletimes.nwsource.com/html/localnews/2010057360_apwasalmonculverts1stldwritethru.html). See also Stipulated Amended Pretrial Scheduling Order, *supra* note 212, at 4.

215. See SACRIFICING THE SALMON, *supra* note 1, at 252–71 (describing cases both preceding and following the *Orrick Decision* that affirmed the habitat protection element of the treaty fishing right).

results, therefore, are the logical forerunners of the *Martinez Decision*, helping to reinforce the fact that the decision is hardly an outlier.

A prime example of a case adumbrating the *Martinez Decision* was the 1980 case of *No Oilport! v. Carter*,<sup>216</sup> in which tribes challenged construction of a proposed pipeline that would have crossed Puget Sound and two rivers subject to treaty fishing rights.<sup>217</sup> Judge Belloni ruled that the project satisfied the requirements of environmental statutes, but he determined sedimentation from burying the pipeline under rivers covered by the treaties could adversely affect salmon populations.<sup>218</sup> Consequently, he ordered an evidentiary hearing as to whether the pipeline would cause the “fish habitat to be degraded such that the rearing or production potential of the fish will be impaired or the size or quality of the run diminished.”<sup>219</sup> If the project did have such an adverse effect, it could not go forward as planned. As it turned out, the State of Washington’s concerns over potential oil spills and fire prevented the project’s construction anyway.<sup>220</sup>

In 1985, the Ninth Circuit held the implied habitat component of the treaty fishing right included water levels needed to sustain fish habitat. In *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*,<sup>221</sup> the Yakama Nation, which had been barred from exercising its treaty fishing rights for some years due to low fish populations, challenged the Bureau of Reclamation’s plan to reduce flows from the Cle Elum Dam to begin winter storage at the end of the irrigation season.<sup>222</sup> The district court ordered measures to protect the nests of salmon eggs in accordance with the treaty fishing right, recognizing that the reduced flows would threaten salmon redds in the Yakima River with dewatering.<sup>223</sup> Despite three successive opinions of the Ninth Circuit, the district court’s order requiring the Bureau to undertake salmon habitat protection measures remained unscathed.<sup>224</sup>

Another case anticipating the *Martinez Decision* occurred in 1988, when the Muckleshoot and Suquamish Tribes challenged a dredge and

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216. *No Oilport! v. Carter*, 520 F. Supp. 334 (W.D. Wash. 1980).

217. *Id.* at 344, 373.

218. *Id.* See *supra* notes 63–69 and accompanying text noting that Judge Belloni also presided over the *Sohappy v. Smith* (or *United States v. Oregon*) proceedings.

219. *No Oilport!*, 520 F. Supp. at 372–73.

220. SACRIFICING THE SALMON, *supra* note 1, at 257.

221. 763 F.2d 1032 (9th Cir. 1985).

222. *Id.* at 1033–34. See also Blumm and Swift, *supra* note 9, at 465.

223. *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d at 1034 (describing the relief ordered by the district court judge in an unpublished opinion and affirmed by the Ninth Circuit).

224. See Blumm & Swift, *supra* note 9, at 466–67 (describing three different opinions of the Ninth Circuit, all of which affirmed the district court).

fill permit issued by the Army Corps of Engineers that would have allowed development of a large-scale marina in Elliot Bay.<sup>225</sup> The permitted activity would have destroyed prime salmon fishing habitat, as well as a usual and accustomed fishing area.<sup>226</sup> In a well-reasoned decision, Judge Thomas Zilly referred to the treaty fishing right as a “property right which may not be abrogated without specific and express Congressional authority.”<sup>227</sup> Judge Zilly recognized that the implied in the treaty fishing right were two discrete elements: (1) a right of access to particular geographic sites, and (2) a guarantee of a sufficient harvest of fish to meet moderate living requirements.<sup>228</sup> Even though the development would not necessarily affect the tribes’ moderate living needs, the court enjoined the marina permit because the proposed project would preclude access to usual and accustomed treaty fishing places.<sup>229</sup> In so doing, the court confirmed that the treaty access right could protect usual and accustomed grounds from habitat destruction.<sup>230</sup>

Nearly a decade later, in 1996, the Army Corps of Engineers, apparently learning from its prior experience, denied a permit for a fish farm operator to open a net pen fish farm in Puget Sound based on the treaty fishing right.<sup>231</sup> The agency determined that the net pen would have blocked access to a tribal fishing ground,<sup>232</sup> and a district court upheld the decision based on the federal government’s fiduciary obligation to account for the tribe’s treaty rights. The court rejected the permit applicant’s suggestion that the court “conduct a balancing test which views the right to access in relation to the supply of the proper portion of fish,” noting that the access and moderate living aspects of the treaty right must be satisfied separately.<sup>233</sup>

In many respects, these cases anticipated the *Martinez Decision* in that all of the judges enjoined habitat-damaging projects based on the treaty fishing right, although the opinions did not directly address the question of whether the treaty fishing right encompassed a right to

225. *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988).

226. *Id.* at 1505. *See also id.* at 1515 (“No case has been presented to this Court holding that it is permissible to take a small portion of a tribal usual and accustomed fishing ground . . . without an act of Congress, or to permit limitation of access to a tribal fishing place for a purpose other than conservation.”).

227. *Id.* at 1512 (citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968)).

228. *Id.* at 1513.

229. *Id.*

230. *See SACRIFICING THE SALMON*, *supra* note 1, at 257. The tribes later reached a settlement with the developer, which allowed construction of a reconfigured marina. *Id.*

231. *Nw. Sea Farms v. U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515 (W.D. Wash. 1996).

232. *Id.* at 1518.

233. *Id.* at 1521–22.

salmon habitat protection. The *Martinez Decision* bridges that gap, employing the culvert as the factual vehicle demanded by the Ninth Circuit.<sup>234</sup>

At the heart of these cases is judicial recognition of a treaty-protected property right (that is, the piscary profit). As the Supreme Court first articulated in 1905 in *Winans*, by reserving for themselves the “right of taking fish,” the tribes created “a servitude upon every piece of land as though described therein.”<sup>235</sup> The tribes’ reservation of this profit was the linchpin of the Stevens treaties, facilitating one of the largest peaceful real estate transactions in history and allowing the Pacific Northwest to avoid the full-scale Indian Wars that engulfed so much of the rest of the country.<sup>236</sup>

In *Menominee Tribe of Indians v. United States*,<sup>237</sup> a case involving Great Lakes tribes’ reserved hunting and fishing rights, the Supreme Court reiterated that tribes’ reserved treaty rights constituted property rights that could only be abrogated by clear and plain legislation.<sup>238</sup> Moreover, the Court indicated that the government would owe compensation under the Fifth Amendment for destruction of the property rights retained by the tribes in a treaty.<sup>239</sup> Thus, the Stevens treaties, as the supreme law of the land, preclude significant habitat-destroying activities in the absence of explicit congressional authorization and accompanying compensation. Although Judge Martinez did not expressly discuss the property rights nature of the treaty fishing right, the decision reflects one of the essential features of the piscary profit—“a negative servitude ([or] restriction) limiting activities that jeopardize the supply of fish necessary to furnish the tribes a moderate living.”<sup>240</sup>

The habitat dimension of the treaty fishing right, however, is not without limits. At least one court has held the right does not protect salmon and shellfish habitat from *de minimis* interference.<sup>241</sup> In *Lummi Indian Nation v. Cunningham*, Judge John Coughenour determined, in an unreported opinion, that disposal of dredged spoil from the port of Bellingham’s shipping channel into Bellingham Harbor would have a negli-

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234. *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*4–5.

235. *United States v. Winans*, 198 U.S. 371, 381 (1905). See also *supra* notes 41–47 and accompanying text.

236. See *supra* notes 1–7 and accompanying text.

237. 391 U.S. 404 (1968).

238. *Id.* at 413.

239. *Id.*

240. SACRIFICING THE SALMON, *supra* note 1, at 258.

241. *Lummi Indian Nation v. Cunningham*, No. C92-1023C (W.D. Wash.) (last filing Nov. 30, 1992).

gible effect on salmon migration.<sup>242</sup> Since the dumping resulted in only a *de minimis* interference with treaty rights, the court refused to enjoin the project.<sup>243</sup> Judge Coughenour concluded that “[t]he plaintiff is correct in asserting that ‘determination of the violation of a treaty fishing right is not a balancing test.’ However, before the bright line test can be asserted, the interference with the treaty right must reach a level of legal significance.”<sup>244</sup> Consequently, interferences with treaty fishing rights must meet a “legal significance” threshold in order to be actionable.

Confining the treaty protection to only those habitat-degrading activities that satisfy a significance threshold makes sense in view of the purpose of the treaty fishing right and background principles of property law. As the Supreme Court established in *Passenger Fishing Vessel*, the Stevens treaties guarantee the tribes a right to make a moderate living through fishing.<sup>245</sup> Therefore, tribes can wield the habitat right only to the extent they can link a habitat degrading activity to tribal members’ inability to make a moderate living.<sup>246</sup> Using culverts as an example, tribes can restrain a state from constructing or maintaining fish-blocking culverts that deprive them of the opportunity to achieve a moderate living but they do not have veto power over all culverts.<sup>247</sup> Although the moderate living standard may “[lack] a degree of precision,” it is well-established Supreme Court precedent and has been repeatedly invoked by lower courts.<sup>248</sup> Moreover, the standard gives a judge considerable

242. *Id.* at \*4.

243. *Id.*

244. Note, however, that a handful of fish could meet the significance threshold if, for example, an upriver tribe wants spring chinook for ceremonial purposes, and only a few dozen fish from that run return each year.

245. *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 686 (1979). See *supra* notes 99–100 and accompanying text.

246. See Brief of United States in Response to Washington’s Summary Judgment Motion and *Amici* Counties Memorandum in Support Thereof, at 6, 18, *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash.) (No. 70-9213) (limiting enjoined actions to those producing more than *de minimis* injuries is also consistent with the federal government’s position).

247. Compare *id.* (“While tying the State’s obligations to fix fish-blocking culverts to the moderate living standard may not be ideal, there is . . . no better standard. . . . This language is intended to be completely clear that any remedy in this case should focus on those culverts that have more than a *de minimis* impact. . . .”), with Brief of Plaintiff Tribes in Support of Motion for Partial Summary Judgment, *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash.) (No. 70-9213) (“The equitable remedy should be shaped by appropriate equitable principles and by the facts presented by this particular dispute. The culverts at issue here are those that block fish passage.”).

248. Brief of United States in Response to Washington’s Summary Judgment Motion and *Amici* Counties Memorandum in Support Thereof, at 6, 18, *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash.) (No. 70-9213).

discretion in fashioning a remedy in cases involving the habitat right, thereby assuaging erroneous concerns that the habitat right is the equivalent of an environmental servitude that would confer an unfair windfall to tribes.<sup>249</sup>

Just as the moderate living standard affords judges the flexibility and discretion in fashioning a remedy that avoids establishing environmental servitudes, principles of property law limit judicial authority to restrain only those actions that constitute unreasonable interferences. As *Winans* and *Menominee Tribe* made clear,<sup>250</sup> the treaty fishing right is a protected property right, which we have described as a piscary profit.<sup>251</sup> The common law has long taught that holders of such property rights can restrain others from unreasonably interfering with the exercise of a *profit à prendre*.<sup>252</sup> An “unreasonable interference” in the context of the Stevens treaties is habitat degradation that results in decreased fish populations, which, in turn, prevents tribes from being able to make a moderate living from fishing.<sup>253</sup>

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249. See Blumm & Swift, *supra* note 9, at 489–90 (describing cases in which courts’ decisions seem to reflect a “judicial unwillingness to express the scope of the treaty fishing right in a manner that might require a restoration of conditions that existed at treaty time”); see generally Michael C. Blumm et al., *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449 (1999) (analyzing the flawed logic of the opinion in *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994), in which the court concluded that the tribe did not exercise a property interest over the fish, and thus, were not entitled to compensation for damages affecting its fishing activities). See also *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 213–14 (noting equitable considerations figure into the remedial stage of a case involving Oneida Nation’s claim that parcels purchased in historic homeland was free from state taxation).

250. *United States v. Winans*, 198 U.S. 371 (1905). See *supra* notes 41–47 and accompanying text. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). See *supra* notes 237–239 and accompanying text.

251. See *supra* text accompanying note 47.

252. See, e.g., *Keeble v. Hickeringill*, 103 Eng. Rep. 1127, 1128 (Q.B. 1707) (holding owner of duck pond had cause of action against person who drove away ducks with gunfire because “he that hinders another in his trade or livelihood is liable”); *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) (allowing action by commercial fishers against oil companies for damages resulting from an oil spill, as long as fishermen prove that the pollution decreased aquatic life resulting in reduced profits); *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES* § 4.9 (2000) (“[T]he holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.”); *id.* at § 1.1(1)–1.2(2) (“a servitude is a legal device that creates a right or an obligation that runs with land” and includes *profits à prendre*).

253. For a more detailed review of the probable scope of the habitat right, see Blumm & Swift, *supra* note 9, at 489–500.

Thus, only activities that restrict tribes' ability to earn a moderate living from fish unreasonably interfere with the tribes' piscary profit.<sup>254</sup> The courts' equitable discretion should mollify anxieties that tribes may seek to establish an "environmental servitude with open-ended and unforeseeable consequences,"<sup>255</sup> especially since judges may restrain only those actions that unreasonably interfere with the piscary profit in particularized fact scenarios.

Equitable considerations attendant to both the moderate living standard and the unreasonable interference limit foreclose the possibility of the feared environmental servitude. At the same time, the standards provide at least some guidance regarding the scope of the right for tribes seeking to enforce the habitat dimension of the treaty fishing right. Case law relying on the moderate living standard in the context of regulating non-tribal fishers is well-established,<sup>256</sup> and the principles of those cases can guide courts and litigants as to the scope of the treaty fishing right and appropriate remedies in regulating non-tribal harvest.<sup>257</sup>

## VII. THE UNRESOLVED ISSUES: THE FEDERAL ROLE AND THE APPROPRIATE REMEDY

Notwithstanding the important step Judge Martinez took by enunciating the habitat right, important questions remain unanswered.

254. *Cf.* *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975) (en banc) (suggesting a similar result for the Indians and non-Indians would be achieved through the doctrine of waste, which prohibits co-owners from unreasonable actions).

255. *United States v. Washington*, 694 F.2d 1374, 1381 (9th Cir. 1983) (expressing concerns at the scope of the treaty habitat right).

256. *See* *United States v. Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166, at \*5 (W.D. Wash.).

257. One of us has previously set forth relevant lessons from the treaty fishing rights cases that courts can apply in cases involving the habitat right. *See* Blumm, *supra* note 2, at 272–77:

There is an obligation to protect salmon habitat necessary to effectuate the treaty fishing right, but the treaties do not demand a return to the environmental conditions that existed at the time the treaties were signed. The treaty obligations run not merely to the federal and state governments but . . . to private parties as well. Private parties have no more authority than governments to exclude tribes from their fishing grounds, to deprive them of their fair share of the salmon runs, or to destroy treaty-protected fish. However, private parties requiring government approval for their developments may use the approval process to demonstrate compliance with treaty obligations.

*Id.* at 275. In addition, state or federal governments may not participate in or license activities that unreasonably interfere with exercise of the piscary profit. *Id.* at 275–76 (describing five requirements with which governments can comply in order to avoid unreasonable interference with the tribes' property right).

First, despite the fact that Judge Martinez issued his opinion in 2007, the remedy remains unresolved. Second, the case opened the door to other litigation opportunities for the tribes, including claims against the federal government—with whom the tribes have worked closely throughout the *United States v. Washington* proceedings. This section explores these issues.

### A. Fashioning a Remedy for the *Martinez Decision*

As previously mentioned,<sup>258</sup> the tribes asked Judge Martinez for an injunction “requiring Washington to identify and then to open culverts under state roads and highways that obstruct fish passage, for fish runs returning to or passing through the usual and accustomed grounds and stations of the plaintiff tribes.”<sup>259</sup> Despite a year’s worth of settlement discussions, the parties were unable to agree on an appropriate remedy.<sup>260</sup> Consequently, the questions of which culverts need repair or replacement and when they need to be replaced is again before Judge Martinez.<sup>261</sup>

Although the settlement discussions are confidential, the parties likely reached an impasse due to the cost of dealing with barrier culverts at a more rapid pace.<sup>262</sup> Washington has exhibited a willingness to repair and replace culverts over the years, but it has proceeded at a fairly slow speed.<sup>263</sup> At the time of the ruling, the state planned to devote \$69 million

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258. See *supra* notes 169–170, 176–177 and accompanying text.

259. *United States v. State of Washington (Martinez Decision)*, No. CV 9213RSM, 2007 WL 2437166, at \*2 (W.D. Wash.) (quoting Request for Determination, Dkt. #1, at 1). Specifically, the tribes asked that the inventory of problem culverts be completed within 18 months, and they wanted all barrier culverts to be fixed within five years. *Id.*

260. See Woods, *supra* note 62 and accompanying text.

261. Interview with Peter Monson, *supra* note 168. See also Krista J. Kapralos, *Tribes, State Will Return to Court over Salmon*, HERALDNET, Apr. 6, 2009, available at <http://www.heraldnet.com/article/20090406/NEWS01/704069910/-1/RSS02>.

262. See *supra* note 212 and accompanying text. See also Kapralos, *supra* note 261; Mapes, *supra* note 157 (suggesting that in addition to the “hundreds of millions of dollars” needed to fix the culverts, another stumbling block might have been the tribes’ unwillingness to “create a potential political liability in an election year for Gov. Christine Gregoire,” an ally on tribal gaming and social service issues).

263. See notes 146–151, *supra* and accompanying text. See also Robert McClure, *Tribes Win Ruling on Salmon*, SEATTLE POST-INTELLIGENCER, Aug. 23, 2007, available at [http://seattlepi.nwsource.com/local/328681\\_salmon23.html](http://seattlepi.nwsource.com/local/328681_salmon23.html) (noting that state has opened up only 480 stream miles of habitat since 1991); Editorial Board, *Salmon: State Doesn't Get It*, SEATTLE POST-INTELLIGENCER, Aug. 26, 2007, available at [http://seattlepi.nwsource.com/opinion/329098\\_salmoned.html](http://seattlepi.nwsource.com/opinion/329098_salmoned.html) (suggesting that state has a long history of “foot dragging,” writing Washington “just can’t seem to let go of its worn-out excuses about its expenses and oh-so-strenuous efforts. When the case began in early 2001, the refrain was the same, with then-

to fix state-owned culverts over 12 years.<sup>264</sup> This funding notwithstanding, the state faces a significant budgetary shortfall and it appears either unwilling or unable to accelerate that pace. Additionally, given the financial crisis enveloping the state, whether that low figure will even materialize is unclear.<sup>265</sup> The question remains as to whether Judge Martinez will proceed to establish barrier culvert priorities, a budget, and a repair schedule for cash-strapped state agencies.

Judge Martinez must also determine how he wishes to craft the remedy. Courts have great latitude in using their equitable powers to devise appropriate injunctive relief.<sup>266</sup> Judge Belloni understood the scope of this power when he retained continuing jurisdiction in *Sohappy v. Smith* (now *United States v. Oregon*).<sup>267</sup> Under his watchful eye, the current co-management systems involving both state and tribal manage-

Gov. Gary Locke and the attorney general, Gregoire, saying they were ‘disappointed’ that the tribes went to court”).

264. McClure, *supra* note 154. This figure was in addition to the \$26 million spent on fixing culverts since 1991, but far below the estimated “hundreds of millions of dollars” needed to fix all of the state-owned barrier culverts. Mapes, *supra* note 157.

265. Governor Christine Gregoire’s 2008 Budget called for just \$15.3 million to replace culverts impeding access to spawning grounds, which was an increase over the prior figure but well below the hundreds of millions required to fix the problem. Washington State Office of Financial Management, Gov. Gregoire’s Proposed 2008 Budget for Capital Construction, <http://www.ofm.wa.gov/budget08/highlights/capital/proposal.htm> (last visited Oct. 3, 2009). However, the Governor’s December 2008 budget for 2009–2011 made no specific reference to the total funds set aside for culvert repair and replacement. See Washington State Office of Financial Management, 2009–11 Budget Highlights, <http://www.ofm.wa.gov/budget09/highlights/> (last visited Oct. 3, 2009). An editorial in the *Seattle Times* indicated Governor Gregoire ordered state agencies to cut more than \$590 million and proposed to cut an additional five to six billion dollars in the next budget cycle. James N. Gregory, *As Olympia Wrestles with a Budget Crisis, Can It Avoid the Mistakes of 1931?*, SEATTLE TIMES, Dec. 5, 2008, available at [http://seattletimes.nwsource.com/html/opinion/2008474718\\_opin06gregory.html](http://seattletimes.nwsource.com/html/opinion/2008474718_opin06gregory.html) (last visited Oct. 3, 2009). With regard to private landowner restoration work, the Washington Salmon Recovery Funding Board awarded \$19.8 million in grants to private landowners for habitat restoration, including culvert replacement. See Press Release, Washington State Recreation & Conservation Office, *Gov. Gregoire Announces More than \$19.8 Million in Grants for Salmon Recovery*, Dec. 12, 2008, available at [http://www.rco.wa.gov/documents/Press\\_Releases/2008/gov\\_announces\\_millions\\_for\\_salmon\\_recovery.htm](http://www.rco.wa.gov/documents/Press_Releases/2008/gov_announces_millions_for_salmon_recovery.htm).

266. See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“The essence of equity jurisdiction has been the power of the [court] to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.”); *Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (“The district court has broad latitude in fashioning equitable relief when necessary to remedy an established wrong.”).

267. See *supra* notes 65–69 and accompanying text.

ment of harvest levels for the Columbia River came into being.<sup>268</sup> Requiring a similar level of cooperation between the State of Washington and the Puget Sound tribes might force the parties to come to an agreement on culvert prioritization and timetables. Another solution would be to appoint a special master to oversee the particulars of the culvert repair schedule and budget.<sup>269</sup> Such approaches to establishing an appropriate remedy in complex litigation are not unusual.<sup>270</sup>

Should the State prove unwilling to participate meaningfully in a cooperative arrangement under the court's continuing jurisdiction or to adhere to the conclusions of a special master, the court could take on the role of a judicial "fishmaster."<sup>271</sup> Under this scenario, the court would create a "consent decree structure whereby the states and tribes [would develop] a judicially supervised and enforceable plan" for culvert repair.<sup>272</sup> Indeed, in the context of treaty fishing rights in the *United States v. Washington* proceedings, Judge Boldt eventually used this authority, although as a last resort.<sup>273</sup> Given the criticism leveled at and resistance to

268. See, e.g., Blumm & Swift, *supra* note 9, at 460–62 (describing developments in co-management of salmon resources under the continuing jurisdiction of both Judges Belloni and Boldt); Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 16–17 (2000) (describing Judge Belloni's role in establishing the "innovative framework" for harvest regulation in Pacific Northwest).

269. See *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n (Passenger Fishing Vessel)*, 443 U.S. 658, 686 (1979) ("[A]fter determining that at the time of the treaties the resource involved was necessary to the Indians' welfare, the Court typically ordered a trial judge or special master, in his discretion, to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met."). See also Alexis C. Fox, Comment, *Using Special Masters to Advance the Goals of Animal Protection Law*, 15 ANIMAL L. 87, 92 (2008) ("Unlike generalist judges who preside over formal court proceedings, special masters act as expert decision makers or judicial adjuncts who take a more active role in resolving specific issues in complex cases.") (internal citations omitted). The authority for use of a special master derives from Federal Rule of Civil Procedure 53. See Fed. R. Civ. P. 53. (describing limits to the use of special masters).

270. See Fox, *supra* note 269 (describing expansive use of special masters by judges at present); Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 WIDENER L. SYMP. J. 235 (1997) (explaining the rise of and critiquing legitimacy of special masters in complex litigation); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91, 116 (2009) (advocating for the use of special masters in adjudication of public trust violations).

271. See *infra* note 273 and sources cited therein.

272. See Wood, *supra* note 268, at 115 (describing the type of systems put in place by Judges Belloni and Boldt to deal with fish harvest allocations).

273. See *Puget Sound Gillnetters v. U.S. District Court*, 573 F.2d 1123, 1126 (9th Cir. 1978) ("The state's extraordinary machinations in resisting [Judge Boldt's] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees.") (citations omitted). See also *United States v. Washington*,

orders issued by judges who use the full scope of their authority, shrewd judges would use this option only when all else fails.<sup>274</sup> Still, taking on the role of “fishmaster” remains a viable option should the State of Washington and the tribes remain at loggerheads over remedial solutions.

## B. The Scope of the Treaty Right to Habitat Protection

When the tribes initiated the Culverts Case, the State of Washington immediately charged that the tribes’ intentions were broader than merely seeking a judicial resolution of the culvert issue.<sup>275</sup> If the *Martinez Decision* withstands appellate review, the State is potentially liable for a wide variety of habitat-damaging activities.<sup>276</sup> For starters, the tribes could seek resolution of the other destructive activities first presented to Judge Boldt some 40 years ago.<sup>277</sup> Although Judge Martinez expressly cautioned that he was not recognizing a “broad ‘environmental servitude,’” the tribes have established a winning strategy for addressing state or state-permitted activities that degrade salmonid habitat and im-

520 F.2d 676, 693 (9th Cir. 1975) (Burns, J., concurring) (“The record in this case . . . make[s] it crystal clear that it has been recalcitrance of Washington State officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the district court.”). In the context of Endangered Species Act litigation over the effects of the Columbia and Snake River hydropower systems on Pacific salmon populations, Judge James Redden has used his authority to institute a multisovereign consultation process. See *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 936–38 (9th Cir. 2008) (upholding Judge Redden’s use of 90-day status reports and a “failure report” requirement). See also Michael C. Blumm & Hallison T. Putnam, *Imposing Judicial Restraints on the ‘Art of Deception’: The Courts Cast a Skeptical Eye on Columbia Basin Salmon Restoration Efforts*, 38 ENVTL. L. 47, 55 (2008) (discussing injunctive relief Judge Redden ordered). Judge Martinez similarly required 60-day status reports throughout the negotiation process regarding the remedy in the Culverts Case, as well. Joint Status Report at 1, *United States v. Washington (Martinez Decision)*, 2007 WL 2437166 (W.D. Wash. 2007).

274. See *supra* notes 87–93 and accompanying text (describing Judge Boldt’s oversight and public reaction). Experiences like that of Judge Boldt have deterred some courts from using the full extent of their equitable authority. See, e.g., *Natural Res. Def. Council, v. Hodel*, 624 F. Supp. 1045, 1062–63 (D. Nev. 1985).

275. See *supra* notes 164–166 and accompanying text.

276. The State will almost certainly appeal the *Martinez Decision* once the remedy issue is settled, given the potential scope of the habitat right and the finances involved. Interview with Peter C. Monson, *supra* note 168.

277. The tribes claimed that logging, industrial pollution, and obstructions in fish-bearing streams violated the implied habitat component of the treaty fishing right. *United States v. Washington (Boldt Decision)*, 384 F. Supp. at 328. Presumably, “obstructions” referred to more than just culverts, potentially encompassing effects from dams. See also Lewis, *supra* note 31, at 284–86 (exploring opportunities for tribes to leverage the habitat protection right).

pede tribal members' ability to make a moderate living.<sup>278</sup> The strategy is simple: pick one of the myriad activities that degrade salmon habitat, connect the degradation to the depressed salmon populations through factual evidence, cite the prior treaty cases and the canons of treaty interpretation, and assert that diminished salmon numbers prohibit the tribal harvest from providing tribal members a "moderate living."

Beyond the broad implications of the State's obligation to protect fish habitats, the *Martinez Decision* raises the question of federal duties under the treaty habitat right.<sup>279</sup> The Supreme Court has never distinguished between the duties of the federal government, state governments, or private landowners (i.e., federal grantees) under the Stevens treaties.<sup>280</sup> Throughout the four decade-long *United States v. Washington* proceedings, the federal government and the tribes have been close al-

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278. *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*10 (W.D. Wash.). Nearly three decades ago, the *Orrick Decision* identified certain environmental conditions that must be satisfied in order to ensure the survival of salmonids: "(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." *United States v. Washington (Orrick Decision)*, 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd. in part and vacated in part*, 759 F.2d 1353, 1358-60 (9th Cir. 1985) (quoting the Joint Biology Statement between the U.S. Fish & Wildlife Service and the Washington Departments of Fisheries and Game). Judge Orrick proceeded to describe a number of human-caused impacts that resulted in the destruction of salmon spawning and rearing habitat, including "watershed alterations, water storage dams, industrial developments, stream channel alterations, and residential developments." *Id.* (quoting the Joint Biology Statement). Specifically, he determined that quality habitat was destroyed by the "urbanization and intensive settlement of the area, the rapid development of water power, lumbering and irrigation and the pollution of the watersheds. . . ." *Id.* (quoting the Joint Biology Statement). Each of these destructive activities represents a potential avenue to broaden the scope of the habitat right.

279. The tribes likely have other claims against local governments and private individuals. See *infra* note 280 and accompanying text. In the geographic area covered by the *Martinez Decision*, several local governments could be liable for barrier culverts. An Adopt-A-Stream Foundation study indicated about 58 percent of culverts in eight watersheds in North King County and Snohomish County blocked fish passage. Schwarzen, *supra* note 153. Most of the barrier culverts assessed in the study were on private property and failed to meet current state standards. *Id.* The tribes did not join these parties in the *Martinez Decision*, at least in part, because the introduction of private parties would create case management complications. See Email from John Sledd, Attorney, Kanji & Katzen, PLLC, to Jane Steadman, Law Student, Lewis & Clark Law School (April 21, 2009 09:17 PST) (on file with authors).

280. See Blumm & Swift, *supra* note 9, at 417, 442-43 (criticizing the initial Ninth Circuit panel because *United States v. Winans*, 198 U.S. 371 (1905) established the obligations under the treaty fishing provision ran to successors in interest). See *Winans*, 198 U.S. at 381-82 (indicating the treaty was enforceable both "against the United States and its grantees as well as against the State and its grantees").

lies,<sup>281</sup> but judicial affirmation of the implied right to habitat protection may very well encourage the tribes to tackle some of the many federal activities that inhibit salmon returns.

The most obvious federal habitat-destroying activity the tribes could pursue is the Bureau of Land Management (BLM) and the Forest Service's construction and maintenance of culverts on federal lands in the Pacific Northwest. The federal government manages over 41 million acres of land in Washington and Oregon, including 122,000 miles of roads that use culverts.<sup>282</sup> A 2001 General Accounting Office (GAO) report indicated that the Forest Service and BLM inventoried at least 2,600 federally-owned barrier culverts, but estimated up to 5,500 actually exist.<sup>283</sup> The report concluded that the salmon habitat blocked by the culverts represented "some of the best remaining habitat for salmon and other aquatic life, often serving as refuge areas for the recovery of listed species."<sup>284</sup> The GAO identified budgetary constraints, other priorities, lengthy federal and state project approval processes, and short seasonal "windows of opportunity" as factors delaying progress on the removal of fish passage barriers on federal lands.<sup>285</sup> However, the *Martinez Decision* certainly suggests the implied habitat protection right under the treaties would override these bureaucratic encumbrances.

As with the state duties, the federal duties likely go well beyond culverts. Virtually all the known causes of salmon decline could be the

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281. Indeed, throughout the entire post-Stevens treaty era, the federal government and tribes have teamed up against the states on multiple occasions, including in cases for which the tribes needed the participation of the federal government to allow them to pursue claims against the state due to the Eleventh Amendment. *See, e.g.*, *Nikel-Zueger*, *supra* note 9, at 13 ("The ensuing legal history was one between states, which attempted to deprive the Indians of the rights established under the Stevens' treaties, and the federal government, which tried to uphold those rights."); *United States v. Winans*, 198 U.S. 371 (1905); *Sohappy v. Smith (Belloni Decision)*, 302 F. Supp. 899 (D. Or. 1969); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd sub nom. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n (Passenger Fishing Vessel)*, 443 U.S. 658, 669 (1979). Compare *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281–88 (1997) (holding the Eleventh Amendment barred the tribe's suit for declaratory judgment that it owned the lakebed of Lake Coeur d'Alene, and that *Ex Parte Young* exception did not apply where case directly implicated state sovereignty), with *Idaho v. United States*, 533 U.S. 262 (2001) (holding that executive order creating Coeur d'Alene Reservation reserved submerged lands of Lake Coeur d'Alene to the tribe in a case in which federal government sued state as trustee for the tribe).

282. GAO REPORT, *supra* note 134, at 1.

283. *Id.* at 2, 5. *See also supra* note 134 (noting that the General Accounting Office changed its name to the Government Accountability Office in 2004).

284. *See id.* at 4.

285. *Id.* at 9.

target of a lawsuit under the treaty right to habitat protection.<sup>286</sup> For example, tribes could address the damage done by federally owned and operated dams to salmon habitat, which has been the subject of extensive Endangered Species Act<sup>287</sup> (ESA) litigation in the Pacific Northwest.<sup>288</sup> Unlike those cases, the tribes would not need to limit their claims to effects on listed species, nor would they be limited to the narrow “survival” and “recovery” constructs of the ESA.<sup>289</sup> Instead, any activities that degrade the habitat of any salmonid used by the tribes to pursue a “moderate living” would be fair game.<sup>290</sup> With the *Martinez Decision* as support, the tribes could target virtually any federally-permitted activities

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286. See, e.g., Jane G. Steadman, *Protecting Water Quality and Salmon in the Columbia Basin: The Case for State Certification of Federal Dams*, 38 ENVTL. L. 1331, 1332–35 (2008) (describing the negative effects of various human activities on salmon populations and detailing hydropower’s effects in particular).

287. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2000).

288. The tribes have been parties to much of this litigation. See generally Blumm et al., *supra* note 25 (providing detailed account of ESA litigation over the hydropower system in the Columbia and Snake basins). However, recent agreements between the Bonneville Power Administration, the Army Corps of Engineers, the Bureau of Reclamation, and several Columbia River treaty tribes—in what have come to be known as the “Columbia Basin Accords”—will foreclose some tribal involvement in litigation over the federal Columbia River hydropower system for at least 10 years. William Yardley, *Deal Gives Money to Tribes to Drop Role in Fish Lawsuits*, N.Y. TIMES, Apr. 8, 2008, available at <http://www.nytimes.com/2008/04/08/us/08dams.html> (last visited Feb. 9, 2009). In exchange for dropping out of the litigation, the Umatilla, Warm Springs, Yakama, and Colville tribes and the Columbia River Intertribal Fish Commission will receive over \$900 million, most of which will be put toward habitat improvement and hatchery expansion. See Memorandum of Agreement Among the Umatilla, Warm Springs and Yakama Tribes, Bonneville Power Administration, U.S. Army Corps of Engineers, and U.S. Bureau of Reclamation (April 4, 2008), available at [http://www.salmonrecovery.gov/Biological\\_opinions/FCRPS/2008\\_biop/ColumbiaBasinFishAccords.cfm](http://www.salmonrecovery.gov/Biological_opinions/FCRPS/2008_biop/ColumbiaBasinFishAccords.cfm) (last visited Oct. 4, 2009). Notably absent from the accords is the Nez Perce Tribe of Idaho, which reached an impasse in negotiations with the federal agencies in August 2008. Press Release, Nez Perce, Tribal Executive Committee, Nez Perce Tribe Maintains Stance in Hydro Litigation (Aug. 20, 2008) (on file with author). The tribe remains a plaintiff in the 2008 BiOp litigation, alongside several conservation groups, fishing groups, and the State of Oregon. *Id.*

289. The argument for removal of the Snake River dams, for example, would be much improved by this broader habitat right. See Lewis, *supra* note 31, at 284. See also Michael C. Blumm et al., *Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lower John Day Reservoir, and Restoring National River Flows*, 28 ENVTL. L. 997, 1045 (1998). For a discussion of the “survival” and “recovery” aspects of the ESA, see, e.g., *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441–42 (5th Cir. 2001) (defining “conservation” under the ESA as including not just survival, but also recovery). See also *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (“[T]he ESA was enacted not merely to forestall the extinction of species . . . , but to allow a species to recover to the point where it may be delisted.”).

290. Engelson, *supra* note 132; Press Release, *supra* note 143; Lewis, *supra* note 31, at 284.

that degrade salmon habitat, including steep-slope logging, public lands grazing, and floodplain development.<sup>291</sup> Given the sorry state of salmonid habitat in the Pacific Northwest, the litigation opportunities are immense.

### VIII. CONCLUSION: THE COMMON SENSE OF THE *MARTINEZ DECISION*

The *Martinez Decision* represents the most significant development in treaty fishing rights litigation since the Supreme Court's affirmation of Judge Boldt 30 years ago. Over the years, at least 20 federal judges have found a corollary right to protect salmon habitat from degradation that would preclude the tribes' ability to make a moderate living from fishing embedded within the treaty fishing right.<sup>292</sup> Although the *Martinez Decision* constitutes the first time a judge squarely addressed the question of whether habitat is protected by treaty fishing rights within a particularized factual scenario, the decision is consistent with dozens of cases stretching back to 1905. Thus, the *Martinez Decision* is not an outlier but is, in fact, the logical result of judicial antecedents beginning with the *Winans* decision in 1905.<sup>293</sup>

As the Supreme Court in *Winans* observed, the treaty fishing right is an important property right, which we have described as a piscary

291. Federal statutes like the Clean Water Act have proved ineffective with regard to grazing-related water quality problems. See Peter M. Lacy, *Addressing Water Pollution from Livestock Grazing after ONDA v. Dombeck: Legal Strategies Under the Clean Water Act*, 30 ENVTL. L. 617, 623–24 (2000). Tribes could use the treaty fishing right to address such habitat degradation. Similarly, although conservation groups have used the ESA to address habitat degradation resulting from rampant floodplain development, tribes could use the treaty fishing right to prevent development that impedes their ability to make a moderate living from fishing where unlisted runs exist. See Nat'l Wildlife Fed'n v. Fed. Emergency Mgmt. Agency, 345 F. Supp.2d 1151 (W.D. Wash. 2004) (holding that implementation of National Flood Insurance Program requires section 7 consultation under ESA). The same is true with respect to addressing logging in riparian areas, which can introduce sediment to salmon-bearing streams. See, e.g., Pacific Coast Fed'n of Fishermen's Assoc. v. Nat'l Marine Fisheries Serv., 71 F. Supp.2d 1063 (W.D. Wash. 1999), *aff'd in part, vacated in part*, 265 F.3d 1028 (9th Cir. 2001) (upholding and setting aside aspects of a New Mexico Forest Service biological opinion related to several federal timber sales on national forest land).

292. See *supra* notes 110–117, 118–130, 190–209, and 216–233, and accompanying text. Only one federal magistrate, whose opinion was adopted by the federal district court, has ever concluded the treaty fishing right did not require that habitat-degrading activity be enjoined. See *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp.791 (D. Idaho 1994). For a critique of this opinion and an explanation of the reasons why the opinion is inconsistent with prior treaty fishing opinions, see SACRIFICING THE SALMON, *supra* note 1, at 267–71.

293. *United States v. Winans*, 198 U.S. 371 (1905). See also *supra* Parts I, II, III, V, VI (describing history of treaty fishing rights litigation in Pacific Northwest, including explanation of treatment of habitat degradation).

profit.<sup>294</sup> Judge Martinez's decision is likewise consistent with common law principles of profit and waste law, which preclude unreasonable interference with the exercise of the profit.<sup>295</sup> The treaty fishing right thus prevents the state of Washington from constructing and maintaining culverts that block fish passage and unreasonably interfere with tribes' ability to earn a moderate living from fishing.<sup>296</sup>

Until the *Martinez Decision*, treaty fishing rights law required an allocation of a harvest share to the tribes that included both hatchery and wild fish, yet apparently countenanced destruction of this resource. The effect of the *Martinez Decision* will be to rectify this fundamental unfairness by providing tribes a judicial remedy for habitat damage that threatens their fishing livelihoods; a livelihood that they bargained to keep in return for ceding most of the Pacific Northwest for non-native settlement.

Through the *Martinez Decision*, the Puget Sound tribes have charted a path for all tribes with reserved fishing rights under the Stevens treaties to force meaningful salmon restoration efforts from the state and federal governments (and even from private parties) that will benefit both Indian and non-Indian salmon fishers. The tribes have exercised remarkable restraint over the past few decades, exploring negotiation and co-management strategies rather than litigation.<sup>297</sup> They have shown a willingness to accept budgetary practicalities and do not seem intent to "turn back the clock" to the relatively pristine habitat existing at the time of the treaties' signing.<sup>298</sup> After Judge Martinez issued his opinion, Billy Frank, Jr., longtime chairman of the Northwest Indian Fisheries Commission, said:

In order for us all to live together, we are not turning the lights off. But we have to do a better job at what we are doing. We have to have the leadership and the guts to make it happen, and we haven't had the political will for salmon in this state. . . . We need the political will to bring the salmon back and have a home when they get here.<sup>299</sup>

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294. *Winans*, 198 U.S. at 381. See also *supra* notes 44–47 and accompanying text; SACRIFICING THE SALMON, *supra* note 1, at 270–72, 276 (describing nature of piscary profit and the "no unreasonable interference" standard).

295. See generally *supra* notes 252–54 and accompanying text.

296. *United States v. Washington (Martinez Decision)*, 2007 WL 2437166, at \*6, 10 (W.D. Wash. 2007).

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

298. Mapes, *supra* note 157 (quoting Billy Frank, Jr.).

299. *Id.*

With Judge Martinez's decision, perhaps the tribes can leverage more of the political will the region needs to restore the salmon and fulfill the treaty obligations made so long ago.