COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

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September 10, 2021

Jennifer Brundage
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW (Mail Code 3204A)
Washington, DC 20460

Via email Brundage.jennifer@epa.gov

RE: Protecting Tribal Reserved Rights in Water Quality Standards – Comments on Potential Revisions to the Federal Regulations

Dear Ms. Brundage:

Our natural resources, including our waters and sources of First Foods, are facing unprecedented challenges from the effects of global climate change. It is timely and necessary for the U.S. federal government to acknowledge and codify tribal treaty-reserved rights in resource protection, and specifically water quality protection. The Columbia River Inter-Tribal Fish Commission (CRITFC) supports EPA's efforts to include protections that sustain the exercise of treaty-reserved fishing rights in our nation's waters.

These actions are entirely consistent with EPA's existing legal obligations. Indeed, Congress explicitly intended for the CWA to restore the integrity of the nation's waters, and to provide "protection and propagation of fish, shellfish, and wildlife." The Act seeks to protect both human health and ecological resources, to maintain healthy waters, and to restore waters that are impaired. Water, especially clean water, is the source of life and a basic right for all humans. Tribes rely on fish and wildlife resources that depend on clean water. Synchronizing legal protections of water quality with tribal resource protection is a moral and legal imperative.

Treaties created a federal trust responsibility under which the United States and its federal agencies have a fiduciary obligation to safeguard the subject matter, i.e., treaty fisheries and other First Foods. Federal agencies, including EPA, must use their authorities in a manner that will protect and enhance – not degrade – the fish habitat that underlies treaty fishing rights. EPA has the legal responsibility to protect tribal treaty rights in all usual and accustomed places and to advance regulations for an environment of sufficient quality necessary to support these treaty rights.[1]

CRITFC's four member tribes all signed treaties with the U.S. in 1855, reserving the right for their members to take fish at all usual and accustomed areas. Tribal people have fished on the

[1] *See U.S. v. Adair*, 723 F.2d 1394 (9th Cir. 1983) (treaty rights to fish necessarily require enough water to maintain plants and fisheries). A more detailed legal discussion of the treaty fishing rights is attached.

Columbia and Snake rivers and their tributaries for subsistence, ceremonial, and commercial purposes since time immemorial. The Supreme Court of the United States has repeatedly recognized the significance of the treaty-reserved right to fish at off-reservation usual and accustomed places, holding that the right is "not much less necessary to the existence of the Indians than the atmosphere they breathed."[2] In 1977, the four sovereign treaty tribes of the Columbia Basin, the Nez Perce Tribe, the Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR), and the Confederated Tribes of the Warm Springs Reservation of Oregon, formed CRITFC to ensure that their treaty fishing rights are protected through their coordinated actions to protect and restore of their fisheries into perpetuity. To this point, CRITFC has been on the front lines working to improve water quality for the benefit of the treaty fisheries.

The ability to exercise treaty rights to fish is completely dependent upon clean water and healthy ecosystems. In implementing the CWA, EPA must consider their treaty-based obligations and harmonize them with state water quality standards as much as possible. These dual mandates, statutory and treaty-based, are not in conflict where the CWA is involved; they are and should be mutually supportive and reinforcing. State governments, in common with tribal governments, share a responsibility to future generations to improve the quality of shared waters as best they can today and should make policy choices to protect their citizens from the adverse health impacts of pollution.

Water quality standards are health-based standards. If a state's human health criteria do not protect both the right to safe harvest and the tribes that consume it, then EPA should have the authority to disapprove those water quality standards that do not protect the exercise of tribal treaty-reserved rights. EPA should ensure that a state's designated uses include subsistence fishing and that a state's target population for human health criteria equally considers tribal fish consumers and the general population. EPA should similarly ensure that states make appropriate policy choices that will result in a level of water quality that is adequate to allow the tribes to safely consume fish taken pursuant to their treaty-reserved rights. In this regard, fish consumption rates should be set at a level that allow tribal members to safely consume fish and cancer risk levels should not be less than the 95th percentile for tribal populations.

CRITFC believes in a future where the Columbia River fishery is once again free of harmful contaminants and is willing to work with states in the region to achieve this goal. If you have any further questions, please contact CRITFC Water Quality Coordinator, Dianne Barton, at 503-238-0667.

Sincerely,

Aja K. DeCoteau
Interim Executive Director
Attachment

[2] *Washington v. Washington State Comm'l Pass. Fishing Vessel*, 443 U.S. 658, 680, 99 S. Ct. 3055, 3071-3072 (1978), *quoting United States v. Winans*, 198 U.S. 371, 380 (1905).

The CRITFC Member Tribes' Treaty Fishing Rights

Since time immemorial the Columbia River and its tributaries were viewed by the Columbia River Basin tribes as "a great table where all the Indians came to partake."[1] More than a century after the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakima Nation, and the Nez Perce Tribe signed the treaties which created their reservations, the tribes' place at the table has been subordinated to energy production and other non-Indian water development. Today, the Columbia River treaty tribes struggle for a very small fraction of their reserved fishing rights. The treaties -- the supreme law of the land under the United States Constitution -- promised more.

The Columbia River treaty tribes reserved the right to fish at all usual and accustomed fishing stations "in common with" the citizens of the United States. The fishing right means more than the right of Indians to hang a net in an empty river.[2] However, Columbia River runs of sockeye, coho, and spring, summer, and fall chinook have declined drastically since the mid-1800's.[3] Where once the Columbia produced annual runs of at least 10-16 million salmon, its runs are now diminished to tens of thousands. The devastation of fish runs is inimical to Indian treaties and the United States' trust responsibilities tribes.

The United States stands in a trust or fiduciary relationship to the Columbia River treaty tribes.[4] The trust relationship is a legal doctrine that embodies the many promises made by the federal

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1 Seufert Brothers Co. v. United States, 249 U.S. 194, 197 (1919).

2 Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 679 (1979).

3 A run is the annual return of adult salmon and steelhead trout. Total runs include those fish that are harvested prior to reaching any dams. *See Generally,* U.S. COMPTROLLER GENERAL, HYDROELECTRIC DAMS: ISSUES SURROUNDING COLUMBIA RIVER BASIN JUVENILE FISH BYPASSES, H.R. Rep. No. 90-180, at 8 (1990).

4 United States v. Mitchell, 463 U.S. 206 (1983); Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981); Morton v. Ruiz, 415 U.S. 199, 236 (1974); United States v. Mason, 412 U.S. 391 (1973); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 47 (1946); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); Tulee v. State, 315 U.S. 681 (1942); United States v. Santa Fe Pac. Ry., 314 U.S. 339 (1941); Shoshone Tribes v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295, 103 (1935); United States v. Candelaria, 271 U.S. 432 (1926); United States v. Panye, 264 U.S. 446, 448 (1924); Cramer v. United States, 261 U.S. 219 (1923); United States v. Nice, 241 U.S. 591 (1916); United States v. Pelican, 232 U.S. 442 (1914); United States v. Sandoval, 231 U.S. 28, 45-46 (1913); Choate v. Trapp, 224 U.S. 665, 675 (1912); Heckman v. United States, 224 U.S. 413, 437-38 (1912); Tiger v. Western Investment Co., 221 U.S. 286 (1911); Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 305 (1902); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890); United States v. Kagama, 118 U.S. 375 (1886); Fellows v.

government to Indian tribes. The promises include but are not limited to protection of: tribal sovereignty and self-government; tribes from state interference; and, the protection of tribal people and tribal natural resources. The trust doctrine governs all aspects of federal government actions that in any way affect the tribes.

The trust doctrine sets limits on the exercise of federal power over Indian people.[5] Treaty language, which often speaks in terms of "securing" to tribe's lands and resources while promising to promote and improve tribal well-being, exemplifies the constraints on the exercise of federal power over Indian affairs.[6] Treaties made with Indian tribes (and that fact that treaties were made at all) are proof of the federal government's recognition of tribal sovereignty.[7]

Federal trust obligations are frequently analogize to common law trust principles.[8] Under common law trust principles, the trustee has a duty to administer the trust property solely in the interest of the beneficiary.[9] The Supreme Court has stated that the federal trustee has the "duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."[10] The United States has a duty to account to the tribes for its performance of treaty obligations.[11] If the federal trustee is negligent in its dealings with the tribes' property, it is liable for any losses.[12]

Canons of construction unique to Federal Indian law are manifestations of the federal government's trust relationship with Indian tribes. Courts rely on the canons of construction when interpreting treaties, executive orders, and statutes pertaining to tribes and in reviewing federal actions affecting Indian people. The following is a summary of the primary cannons of Federal Indian law:

Blacksmith, 60 U.S. (19 How.) 366 (1856); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

5 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT at 4-5 May 17, 1977.

6 *See e.g.,* Treaty with the Tribes of Middle Oregon, June 25, 1855.

That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians; and at all other usual and accustomed stations, in common with citizens of the United States, and of erecting suitable houses for curing the same; also the privilege of hunting, gathering roots and berries, and pasturing their stock on unclaimed lands, in common with citizens, is secured to them.

7 Worcester v. Georgia, 31 U.S. (6 Pet) 515, 538 (1832).

8 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 127 May 17, 1977.

9 *See* Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (citing Restatement (Second) of Trusts § 170(1) (1959)).

10 United States v. Mason, 412 U.S. 391, 398 (1973), citing A. Scott, Trusts § 1408 (3rd ed. 1967). *See also* Coast Indian Community v. United States, 550 F.2d 639, 652-53 (Ct. C. 1977); Covello Indian Community v. FERC, 895 F.2d 581, 585 (9th Cir. 1990) (citing Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1982)).

11 Navajo Tribe of Indians v. United States, 624 F.2d 981, 990 (Ct. C. 1980).

12 Coast Indian Community, 550 F. 2d at 653.

1. Indian treaties must be interpreted so as to promote their central purposes;[13]

2. Treaties are to be interpreted as the Indians themselves would have understood them;[14]

3. Indian treaties are to be liberally construed in favor of the Indians;[15]

4. Ambiguous expressions are to be resolved in favor of the Indians;[16] and

5. A treaty is not a grant of rights to the Indians, but a reservation of those rights not granted away.[17]

The canons of construction reflect judicial recognition of the federal government's obligation to protect and enhance the tribal rights. Similarly, the canons provide guidance to federal agencies involved in the co-management of the Columbia River tribes' treaty fishery and water resources.

APPLICATION OF TRUST PRINCIPLES

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

14 Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 676 (1979); Choctaw Nation v. Oklahoma, 347 U.S. 620, 630 (1970); Tulee v. Washington, 315 U.S. 681, 684 (1942); Jones v. Meehan, 175 U.S. 1, 11 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Seufert Bros. v. United States, 249 U.S. 194, 198 (1919); United States v. Winans, 198 U.S. 371 (1905). *See generally* FELIX S. COHEN, FEDERAL INDIAN LAW 221-225 (1982).

15 Or phrased slightly differently, treaties must be read, not in isolation but in light of the common notions of the day and the assumptions of those who drafted them. Passenger Fishing Vessel Association, 443 U.S. at 676; Antoine v. Washington, 420 U.S. 194, 199 (1975); Choctaw Nation v. United States, 318 U.S. 423 (1943); Tulee v. Washington, 315 U.S. 681, 684 (1942); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918).

16 McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Carpenter v. Shaw, 280 U.S. 363 (1930); Fleming v. McCustain, 215 U.S. 56, 59-60 (1909); Winters v. United States, 207 U.S. 564 (1905). In *Winters* the Court stated:

> By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determining between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relation to the government, it cannot be supposed that the Indians intended to exclude by formal words every inference which might militate against and defeat the declared purpose of themselves and the government, even it could be supposed that they had the foresight to foresee the "double sense" which might some time be urged against them.

207 U.S. at 576-577.

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

The federal government and its agencies are subject to the United States' fiduciary responsibilities to tribes.[18] All federal actions and the implementation of federal statutory schemes affecting Indian people, land or resources must be "judged by the most exacting fiduciary standards."[19] The United States' trust obligations extend to all federal agencies that manage fisheries, water projects, hydroprojects, and federal lands.[20]

One of the more significant cases applying the trust doctrine to the management of tribal fishery and water resources is *Pyramid Lake Paiute Tribe v. Morton*.[21] In *Pyramid Lake,* the Paiute Tribe sought and obtained a federal court order enjoining diversions from the Truckee River upstream from Pyramid Lake, a desert lake located totally within the Paiute's reservation and fed only by the Truckee River.[22] The upstream diversions threatened the lake's quality and the upstream spawning of two species of fish upon which the tribe historically depended.

The Paiute Tribe's challenge arose in response to the Secretary of Interior's proposed regulation, which called for massive diversions from the Truckee River. The court found that the Secretary's self-described "judgment call" regarding the quantity of water to be diverted was an abuse of discretion. The court stated that the Secretary:

> misconceived the legal requirements that should have governed his action. A `judgment call' was simply not legally permissible.... The burden rested on the Secretary to justify any diversion of water from the Tribe with precision. It was not his function to attempt an accommodation.[23]

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[18] *See e.g.*, Pyramid Lake Paiute Tribe of Indians v. United States Department of the Navy, 898 F.2d 1401, 1411 (9th Cir. 1991); Covello Indian Community v. FERC, 895 F.2d 581, 584 (9th Cir. 1990); Nance v. EPA, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981).

[19] Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). *See also* United States v. Mason, 412 U.S. 391, 398 (1973).

[20] *See e.g.,* Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981); Covello Indian Community v. Federal Energy Regulatory Commission, 895 F.2d 581 (9th Cir. 1990); Pyramid Lake Paiute Tribe of Indians v. United States Department of Navy, 898 F.2d 1410 (9th Cir. 1990); Assiniboine & Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782 (9th Cir. 1986); Cheyenne-Arapaho Tribes of Oklahoma v. United States, 512 F.2d 1390 (Ct.Cl. 1975).

[21] 354 F. Supp. 252 (D.D.C. 1972).

[22] At issue was the Secretary of Interior's "judgment call" in recommending a regulation allowing 378,000 acre feet of water to be diverted from the Truckee River for irrigation purposes. If not diverted, the water would flow into Pyramid Lake, located on the tribe's reservation and historically the tribe's principle source of livelihood. The extensive irrigation diversions severely impacted the lahontan cutthroat trout and cui-ui, fish which tribal members had historically depended on. These fish were placed on the federal threatened and endangered lists in 1975 and 1967 respectively. *See generally* Carson-Truckee Water Conservancy District v. Watt, 549 F. Supp 704 (1982).

[23] 354 F. Supp. at 256.

The court held that the Secretary of Interior violated his trust obligation to protect the Paiute Tribe's fishery.[24] Judge Gesell further held that a contract between the Secretary of the Interior and the Secretary of Agriculture that governed reservoir management could not be advanced as an obstacle to maintaining fish flows.[25] *Pyramid Lake* mandates that federal agencies both recognize and act in accordance with their fiduciary obligation to tribes.[26]

The obligations created by the trust doctrine extend to federal actions taken off reservation which impact life and resources on reservation. In *Northern Cheyenne Tribe*,[27] the federal district court of Montana declared that a "federal agency's trust obligation to a tribe extends to actions it takes off a reservation that uniquely impact tribal members or property on a reservation."[28] Not even the nation's need for energy development justified disregard of the federal government's fiduciary duty.[29]

The trust doctrine permeates every aspect of the federal government's relations with Indian tribes. The federal government and its implementing agencies owe a duty to not only recognize

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> The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result.... The Secretary's action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe. This also is an abuse of discretion and not in accordance with law. *Id.* at 256-57.

[24] *Id.*

> In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake. The United States, acting through the Secretary of the Interior, `has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.' (citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).

[25] *Id*. at 258. "The Secretary's trust obligations to the Tribe are paramount in this respect...."

[26] *Id.* at 257.

[27] Northern Cheyenne Tribe v. Hodel, 12 ILR 3065 (D.Mont., May 28, 1985) *aff'd on other grounds* 842 F.2d 224 (9th Cir. 1988).

[28] *Id.* at 3071.

[29] The court declared that:

> The Secretary's conflicting responsibilities and federal actions taken in the `national interest,' however, do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights. *Id.*

the impacts of their activities on the tribes, but also a duty to safeguard natural resources which are of crucial importance to tribal self-government and prosperity. In addition, the trust responsibility imposes an affirmative duty upon a federal agency to use its particular expertise to protect tribal resources.[30]

THE RIGHT TO TAKE FISH

The right to take fish is integral to the Columbia River tribes' subsistence, culture, religion and economy.[31] The Supreme Court recognized the importance of fish to the tribes early in the development of treaty interpretation:

> The right to resort to...fishing places...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.[32]

In 1855, separate treaties with the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakima Nation, and the Nez Perce Tribe were negotiated with representatives of the United States government.[33] Retaining the right to continue traditional fishing practices was a primary objective of the Columbia River tribes during treaty negotiations.[34] Each treaty contained a substantially identical provision reserving to the tribes the right take "fish at all usual

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30 Mitchell II, 463 U.S. 206 (1983).

31 NORTHWEST POWER PLANNING COUNCIL, COMPILATION OF INFORMATION ON SALMON AND STEELHEAD LOSSES IN THE COLUMBIA RIVER BASIN (March 1986).
A significant dependence upon salmon is the single feature that most of the aboriginal groups in the Columbia River Basin shared.... inter-group trade made salmon available to virtually all inhabitants of the Columbia Basin....The annual salmon runs were accompanied by religious rituals and ceremonial rites such as the First Salmon Ceremony, believed to ensure the continued return of the salmon. The salmon also played an important role in Indian folklore, art, music, and mythology. The timing and distribution of the runs were major determinants of yearly patterns of group movement, the organization of households, the division of labor, the size of local groups, and the nature of social interactions among groups. Although the cultural value of the salmon to the Columbia Basin Indians cannot be quantified or adequately characterized, undoubtedly much of what is distinctive about the aboriginal cultures can be attributed to their relationship to the salmon. *Id.* at 29.

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

33 Treaty with the Yakima Tribe, June 9, 1855, 12 Stat. 951; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribes, June 9, 1855, 12 Stat. 945; Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957.

34 Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

and accustomed places in common with citizens of the United States."[35] The fishing clause is the heart of the Columbia River tribes' treaties.[36]

The Columbia River tribes' treaty fishing rights were explicitly reserved. They are property rights and thus, if abrogated, require compensation under the Fifth Amendment of the United States Constitution.[37] Fishing rights are the communal property of the tribes.[38] The Columbia River tribes each reserved the right to take fish (l) within their respective reservations,[39] (2) at all usual and accustomed fishing sites on lands ceded to the United States government,[40] and (3) at all usual and accustomed fishing sites outside the reservation or ceded areas.[41]

OFF-RESERVATION TREATY FISHING RIGHTS AND TRADING

In negotiating their treaties, the Columbia River tribes reserved the right to access ceded aboriginal lands for a variety of reasons including the right to fish at their "usual and accustomed places."[42] The treaty right to fish off-reservation preceded the statehoods of Oregon,

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35 Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963, Article I.

36 United States v. Washington, 443 U.S. 658, 664-69 (1973) (discussing the importance of reserving the right to access usual and accustomed fishing sites on and off reservation to the tribes during treaty negotiations).

37 United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Menominee Tribe v. United States, 391 U.S. 404 (1963); Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct.Cl. 1968); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D.Or. 1977).

38 Whitefoot v. United States, 293 F.2d 658, 663 (Cl.Ct. 1961)(holding that tribal fisheries are communal property vested in the tribe and that compensation under the Fifth Amendment must be paid to the tribe where fishing stations are destroyed or taken.), *cert. denied*, 369 U.S. 818 (1962); Kimball v. Callahan, 590 F.2d 768, 773 (9th Cir. 1979), *cert. denied,* 444 U.S. 826 (1979).

39 United States v. Winans, 198 U.S. 371, 381 (1905) (stating "There was an exclusive right of fishing reserved within certain boundaries"). *See also* Puyallup v. Department of Game, 391 U.S. 392 (1968) [hereinafter Puyallup I].

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

41 Seufert Bros. v. United States, 249 U.S. 194, 198-99 (1919).

42 *See, e.g.,* Treaty with the Yakima Tribe, June 9, 1855, 12 Stat. 951, Art. 3

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Washington and Idaho and was not subordinated to state law.[43] A state may not regulate treaty off-reservation fishing activity unless it can first demonstrate that the regulation is necessary for conservation of fish.[44] Furthermore, states may not restrict treaty fishing in a manner which favors non-treaty fishing or discriminates against Indians.[45]

In the seminal case *United States v. Winans,* the Supreme Court confirmed that the treaties made between Indians and the federal government preserved the tribe's right to fish at usual and accustomed places free from interference.[46] In *Winans*, a non-Indian obtained title from the state of Washington to lands bordering the Columbia River and including a usual and accustomed Yakama Nation fishing site.[47] The non-Indian denied a Yakama Indian access to his traditional fishing site by stationing a large fish wheel at the site. In a landmark decision, the Supreme Court held that a servitude existed providing a right of access to Yakama tribal members across the non-Indian's land.[48] This servitude, part of the tribe's immemorial right, superseded the non-Indian's fee simple title to the land.[49] The reserved fishing right "was intended to be continuing as against the United States and its grantees as well as against the state and its grantees."[50]

Winan's most significant contribution to Federal Indian law lies in its articulation of the reserved rights doctrine: "the treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted."[51] *Winans* stands as an explicit recognition that Columbia River tribes retain an aboriginal fishing right that has resided with these tribes since time immemorial.[52] The *Winans* reserved rights doctrine is the law today.[53]

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43 United States v. Winans, 198 U.S. 371, 383 (1905).

> By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only Government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and State, over all the Territories, so long as they remain in a territorial condition.

See also Sohappy v. Smith, 302 F.Supp. 899, 908 (D.Or. 1969); Holcomb v. Confederated Tribes of Umatilla Indian Reservation, 382 F.2d 1013, 1014 (9th Cir. 1967).

44 Sohappy v. Smith, 302 F.Supp. 899, 907 (D.Or. 1969).

45 Department of Game of Washington v. Puyallup Tribe, 414 U.S. 43 (1973)[hereinafter Puyallup II]; Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963); Sohappy v. Smith, 302 F.Supp. 899 (D.Or. 1969).

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

47 *Id.* at 372.

48 *Id.* at 381.

49 *Id.*

50 *Id.* at 381-82.

51 *Id.* at 381.

52 *See* Sohappy v. Smith, 302 F. Supp. 899, 906 (D.Or. 1969), *aff'd* 529 F.2d 570 (9th Cir. 1976). *Accord* United States v. Adair, 723 F.2d 1394 (9th Cir. 1984).

53 *See e.g.,* Passenger Fishing Vessel, 443 U.S. 658, 678 (1979); United States v. Wheeler, 435 U.S. 313, 327 (1978); United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1987).

Recently in *Washington State Department of Licensing v. Cougar Den, Inc.*, the Supreme Court considered the applicability of state law to tribal member activity outside of Indian country. [54] Relying upon a provision in the Yakama Nation's 1855 treaty, guaranteeing its members "the right, in common with citizens of the United States, to travel upon all public highway" [55] the Court found Washington State's application of tax on fuel imported via highway by a Yakama tribal member preempted by the treaty. The court reiterated the canons of construction and concluded that the Yakama understood the treaty right to travel as including "the right to travel with goods for purposes of trade" and that "to impose a tax upon traveling with certain goods burdens that travel." [56]

Specifically, the *Cougar Den* court pointed out that the understanding of the phrase in the treaty was already laid out in detail in *Yakama Indian Nation v. Flores*, which included "in common with" means use without restriction and "[t]ravel was woven into the fabric of Yakama life in that it was necessary for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes" and that "at the time, the Yakamas exercised free and open access to transport goods as a central part of a trading network running from the western coastal tribes to the eastern plains tribes." [57]

STANDARDS OF FISH ALLOCATION AND CONSERVATION

The Columbia River tribes continue to rely on their right take fish from the Columbia River system for commercial, ceremonial and subsistence purposes. Historically, tribal groups managed and regulated fishing along stretches of the river. Traditional authority groups evolved into regional committees. For example, the Celilo Fish Committee presided over treaty fishing between Celilo Falls and John Day Rapids. The Celilo Committee determined who could fish when and had the authority to punish violators.[58]

With the development of non-Indian commercial fishing at the end of the 19th Century, the tribal fisheries faced unprecedented competition. Fishery habitat was simultaneously impacted by non-Indian activities including hydroelectric development, logging, mining, grazing, irrigation, and pollution.[59] Compounding the threat posed by over-harvesting and environmental degradation was the failure of state fishing regulations to accommodate tribal needs or to recognize tribal

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54 Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S.Ct. 1000 (2019)

55 Treaty with the Yakama Nation, art. III, 12 Stat. 951, 953 (June 9, 1855, ratified Mar. 8, 1859, proclaimed Apr. 18, 1859)

56 139 S.Ct at 1012.

57 *Id.* at 1006, citing *Yakama Indian Nation v. Flores*, 955 F.Supp. 1229, 1247 (E.D. Wash. 1997).

58 Interview with Delbert Frank, Tribal Council Member, Confederated Tribes of the Warm Springs Reservation of Oregon (on tape at the Columbia River Inter-Tribal Fish Commission).

59 NORTHWEST POWER PLANNING COUNCIL, COMPILATION OF INFORMATION ON SALMON AND STEELHEAD LOSSES IN THE COLUMBIA RIVER BASIN 23, March 1986; WASHINGTON OFFICE OF PROGRAM RESEARCH, UNDERSTANDING ALLOCATION 5, August 1988.

authority over fishing at usual and accustomed places. Operating under the Columbia River Compact of 1918,[60] Oregon and Washington set the location, time, and harvest ceilings for commercial fisheries in the Columbia River. The states allowed most of the harvestable salmon to be taken by non-Indians.[61] The combination of the decline of the fishery resource and discriminatory state regulation made the interpretation of the treaty right to take fish critical for the Columbia River tribes.[62]

CONSERVATION LIMIT ON TREATY FISHING RIGHTS

An early step in the definition of the Columbia River tribes' right to take fish occurred in 1963 when members of the Confederated Tribes of the Umatilla Indian Reservation sought declaratory relief from the state of Oregon's restrictions on tribal salmon and steelhead fishing on tributaries of the Columbia and Snake Rivers.[63] In *Maison*, the court held that the Umatilla's 1855 treaty reserved to them "those unimpeded fishing rights which their ancestors had long enjoyed before the treaty."[64] The right to take fish unimpeded was qualified only by the need to conserve the fishery resource.[65] In order to demonstrate the necessity of conservation, the state must show "that there is a need to limit the taking of fish ...[and]... that the particular regulation sought to be imposed is `indispensable' to the accomplishment of the needed limitation."[66] The court further limited the state's authority to regulate treaty fishing rights by indicating that restrictions on treaty fishing were indispensable only where conservation could not be accomplished through alternative conservation measures.[67]

Also in 1963, the State of Washington filed suit seeking to confirm its regulatory authority over tribal fishing in Commencement Bay at the mouth of the Puyallup River.[68] In *Puyallup Tribe v. Department of Game of Washington,* 391 U.S. 392 (1968) (*Puyallup I*), the Supreme Court found that the State may not regulate the actual treaty right to harvest fish but may regulate the manner of fishing, the size of the take, and similar matters in the interests of conservation, "provided the regulation meets appropriate standards and does not discriminate against the Indians." Id. at 398.

The Supreme Court later provided further guidance concerning its finding in *Puyallup I:*

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60 Columbia River Compact of 1918, ch. 47, 40a Stat. 515 (1918).
61 Passenger Fishing Vessel, 443 U.S. 658, 669 (1979).
62 *Id.* at 670.
63 Maison v. Confederated Tribes of Umatilla Indian Reservation 314 F.2d 169 (9th Cir. 1963).
64 *Id.* at 171.
65 *Id.* at 172 (citing Tulee v. Washington, 315 U.S. 681 (1942); United States v. Winans, 198 U.S. 371 (1905)).
66 *Id.*
67 *Id.* at 173.
68 Puyallup I, 391 U.S. 392 (1968).

> [A]lthough, these rights "may . . . not be qualified by the State, . . . the manner of fishing [and hunting], the size of the take, the restriction of commercial fishing [and hunting], and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." The "appropriate standards" requirement means that the State must demonstrate that its regulation is a reasonable and necessary conservation measure, . . and that its application to the Indians is necessary in the interest of conservation.

Antoine v. Washington, 420 U.S. 194, 207 (1975) (citing *Puyallup I,* 391 U.S. at 398) (emphasis added).[69]

The issues addressed by the *Antoine* Court concerning when it is appropriate for the government to regulate tribal treaty rights may be outlined as follows:

1. Is there a conservation need for the imposition of regulatory measures?

2. If so, do the proposed regulatory measures meet "appropriate standards?"

    a. Are the regulatory measures a reasonable and necessary conservation measure?

    b. Is the application of conservation measures to the Indians necessary in the interest of conservation?

3. If it is necessary to apply the regulatory measures to the exercise of tribal treaty rights, are they being applied in a discriminatory manner?

Point 2b in this outline is critical, because this is where the determination is made when and if regulation of tribal treaty hunting, fishing, and gathering activities is permitted. Several courts have addressed this point. The Ninth Circuit Court of Appeals stated the following:

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[69] Subsequent to Antoine, the Ninth Circuit determined that the exercise of tribal rights may be regulated in order to maintain a reasonable "margin of safety" against extinction. United States v, Oregon, 718 F.2d 299, 305 (9th Cir. 1983). See also United States v. Washington, 384 F. Supp. 312, 342 (W. D. Wash. 1974) (regulation limited to preventing demonstrable harm to actual conservation of fish, with conservation referring to species perpetuation), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), reh'g denied, 424 U.S. 978 (1976); Sohappy v. Smith, 302 F. Supp. 899, 908 (D.Or. 1969) (state can regulate only if existence of fish resource is imperiled).

Direct regulation of treaty Indian fishing in interests of conservation is permissible only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens under its ordinary police power jurisdiction.

U.S. v. Washington, 520 F.2d 676, 686 (9th Cir. 1975), *citing Antoine v. Washington*, 420 U.S. 194 (1975). In other words, the courts have stated as part of the conservation necessity principle that the regulation of Indian treaty activities is only permissible if it is not possible to achieve the conservation measures by imposing restrictions on non-treaty activities that impact the treaty resource. The above scheme also demonstrates that the requirement that a regulatory measure be a "reasonable and necessary conservation measure" is only one of several prerequisites clearly set out in federal case law that must be met before the exercise of tribal treaty rights may be limited.

Although many cases have addressed attempted state regulation of tribal treaty rights, the legal principles apply equally to federal regulation. In *United States v. Bressette,* 761 F. Supp. 658 (D. Minn. 1991), the court applied the "conservation necessity" principle articulated in the *Antoine/Puyallup* cases when it considered the application of the Migratory Bird Treaty Act (MBTA) to the treaty rights of the Chippewa Indian Tribe to sell migratory bird feathers. *Id*. at 664. Indeed, the federal government argued in this case that federal regulation pursuant to the MBTA met the requirements of *Puyallup. Id.*

Regarding ocean fisheries, a district court found that the "conservation necessity" principle is applicable to regulation by federal government. *Makah v. Brown,* No. 9213, Phase I Subproceeding No. 92-1, No. C85-1606R, slip op. (W.D. Wash. Dec. 29, 1993) (order on five motions relating to treaty halibut fishing). Regarding the applicable standard which the Secretary must use to determine allocations to treaty and non-treaty fishers, the court held:

> In formulating his allocation decisions, the Secretary must accord treaty fishers the opportunity to take 50% of the harvestable surplus of halibut in their usual and accustomed fishing grounds, and the harvestable surplus must be determined according to the conservation necessity principle.

Slip op. at 6 (citations omitted) (emphasis added).

The court in *Makah v. Brown* noted that the federal defendants did not disagree with the application of the "conservation necessity" standard in principle. The court explicitly rejected the argument that "only state and not federal regulatory agencies are bound by the conservation necessity principle." Id. at 6-7.

Since rights granted pursuant to treaties are rights granted to the United States from the tribes and the tribes reserve all those rights not granted, *United States v. Winans*, 198 U.S. 371, 381 (1905), treaty rights should be afforded the highest priority possible. Further, treaties and other agreements made with Indians are to be broadly construed and ambiguities resolved in favor of the Indians. *See, e.g., Tulee v. Washington,* 315 U.S.681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible . . . in a spirit which

generously recognizes the full obligation of this nation to protect the interests of a dependent people." (citations omitted)); *Carpenter v. Shaw,* 280 U.S. 363 (1930); *Winters v. United States,* 207 U.S. 564 (1908). The preservation of treaty rights is the responsibility of the entire federal government. *United States v. Eberhardt,* 789 F.2d 1354, 1363-64 (9th Cir. 1986) (Beezer, J., concurring) ("Cooperation among all agencies of the government is essential to preserve those Indian fishing rights to the greatest extent possible.").

Acknowledgement that treaty rights are to receive the highest protection possible leads to the conclusion that non-treaty impacts on treaty resources must be minimized to permit the fulfillment of treaty promises. In a decision concerning state regulation of off-reservation treaty fishing rights, the court noted that it must be demonstrated that the required conservation cannot be achieved by restrictions on non-treaty citizens, or other less restrictive methods. *Lac Court Oreilles Band of Indians v. Wisconsin,* 668 F. Supp. 1233, 1236-37 (W.D. Wis. 1987). Further, "To regulate Indian fishermen first, to apply the same regulations to them as to non-treaty fishermen, is to render the treaty rights nugatory." *United States v. Michigan,* 505 F. Sup. 467, 474-75 (W.D. Mich. 1980) (citations omitted). Finally, in *United States v. Washington,* the court stated:

> If alternative means and methods of regulation and necessary conservation are necessary conservation are available, the state cannot lawfully restrict the exercise of off-reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish.

384 F. Sup. at 342.

Thus, in cases decided subsequent to *Puyallup* and *Antoine,* courts have demanded a specific finding of necessity to regulate the Indians. If adequate conservation may be affected by regulating other users with lesser rights, it is not permissible to regulate a tribe's exercise of its reserved hunting and fishing rights. *See also State v. Tinno,* 497 P.2d 1386, 1397 (Idaho 1972) (McQuade, C.J., concurring specially) (treaty affords tribal members first priority to fish). When a treaty right is implicated, the specific impact of Indian activities under a treaty must be examined separately from activities of non-Indians. It is not appropriate to lump Indians and non-Indians together in a general assessment. Id. at 1396 (identical state regulation of non-Indians and Indians with treaty rights would provide essentially no treaty rights at all).

It is well-established that a key component of the tribes' right to take fish is their right to take fish at all their usual and accustomed fishing places. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 667 (1979). The rules governing the exercise of the right to take fish apply equally to the right to take fish at all usual and accustomed fishing places. *United States v. Oregon,* 718 F.2d 299, 304 (9th Cir. 1983).

TREATY RIGHT TO A FAIR SHARE

Federal district courts in Oregon and Washington assumed and retained continuing jurisdiction over two suits initiated in the wake of *Maison* and *Puyallup I.* In 1968, fourteen Yakima Tribal members filed suit to enjoin the state of Oregon's interference with their off-reservation fishing rights.[70] Judge Belloni held that the treaties gave the Columbia River tribes "an absolute right" to the fishery and thus to a "fair share of the fish produced by the Columbia River system."[71] Although the court recognized the conservation standard, the court held that treaty fishing rights should receive co-equal priority with conservation.[72] The court further defined the state's responsibility toward the tribes, holding that "restrictions on the exercise of the treaty right must be expressed with such particularity that the Indian can know in advance of his actions precisely the extent of the restriction which the state" may legitimately impose for conservation purposes.[73]

In subsequent proceedings, the court determined that a "fair share" meant a 50-50 division of the harvest.[74] The Ninth Circuit, in *United States v. Washington,* confirmed that "fair share" means a 50-50 division of the harvestable number of fish that may be taken.[75] Furthermore, the

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[70] Sohappy v. Smith, 302 F.Supp. 899 (D.Or. 1969)(Plaintiffs to the *Sohappy v. Smith* litigation included: Richard Sohappy, Aleck Sohappy, David Sohappy, Myra Sohappy, Clara Sohappy, James Alexander, James Alexander, Jr., Leo Alexander, Clifford Alexander, Henry Alexander, Andrew Jackson, Roy Watlamet, Shirley McConville, and Clarence Tahkeal. This case was consolidated with *United States v. Oregon,* Civil No. 68-513 (1969) initiated by the United States as trustee of tribes against the state of Oregon).

[71] *Id.* at 911.

[72] *Id.*

> In determining what is an `appropriate' regulation one must consider the interests to be protected or objective to be served. In the case of regulations affecting Indian treaty fishing rights the protection of the treaty right to take fish at the Indian's usual and accustomed places must be an objective of the state's regulatory policy co-equal with the conservation of fish runs for other users.

[73] *Id.*

[74] Sohappy v. Smith No. 68-409 (D.Or. August 20, 1975) (Preliminary Injunction Order); Sohappy v. Smith No. 68-409 (D.Or. May 8, 1974) (Order Dissolving Temporary Restraining Order)

> The Indian treaty fishermen are entitled to have the opportunity to take up to 50 percent of the spring Chinook run destined to reach the tribes' usual and accustomed grounds and stations. By "destined to reach the tribes' usual and accustomed grounds and stations," I am referring to that portion of the spring run which would, in the course of normal events, instinctively migrate to these places except for prior interception by non-treaty harvesters or other artificial factors. (emphasis added)

See also United States v. Oregon, No. 68-513 (D.Or. August 10, 1976) (Temporary Restraining Order).

[75] United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) [hereinafter Phase I]. (In 1974, following

allocation percentage includes hatchery reared fish.[76] There are several reasons to include hatchery fish in the tribes allocation, including: (1) the lack of state ownership of the fish once released; (2) the lack of unjust enrichment of the Tribes; (3) the fact that hatchery fish and natural fish are not distinguished for other purposes; and (4) the mitigating function of hatchery fish.[77]

After a decade of state defiance of federal court orders regarding Indian fishing rights, the United States Supreme Court granted certiori in the Washington state and federal cases to resolve the character of the Indian treaty right to take fish.[78] In *Passenger Fishing Vessel,* the Supreme Court endorsed the 50-50 allocation previously adopted in *Sohappy v. Smith* and *Phase I*.[79]

The Court explicitly rejected the Washington Game Department's suggestion that treaty fishermen be given only an "equal opportunity," to take fish with non-treaty fishermen.[80] The Court reasoned:

> That each individual Indian would share an `equal opportunity' with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations. Such a `right,' along with the $207,500 paid the Indians, would hardly have been sufficient to compensate them for the millions of acres they ceded to the Territory.[81]

In rejecting the Game Department's argument, the Court relied on the principals established in six of its prior decisions which addressed the Indian treaty right to take fish. The Court found that: (1) by treaty, Indians have rights beyond those held by other citizens;[82] (2) state regulations of treaty fishing are only sustainable if they are necessary for conservation;[83] and (3) regulations must not be imposed in a discriminatory manner.[84]

Phase I, Washington intervened as defendant in *United States v. Oregon.) See* United States v. Oregon, 699 F.Supp. 1456, 1459 (D.Or. 1988).

76 United States v. Washington, 759 F.2d 1353 (9th Cir. 1985).

77 *Id.* at 1359.

> The hatchery programs have served a mitigating function since their inception in 1859. They are designed essentially to replace natural fish lost to non-Indian degradation of the habitat and commercialization of the fishing industry. Under these circumstances, it is only just to consider such replacement as subject to treaty allocation. For the Tribes to bear the full burden of the decline caused by their non-Indian neighbors without sharing the replacement achieved through the hatcheries would be an inequity and inconsistent with the Treaty.

78 Passenger Fishing Vessel, 443 U.S. 658, 662 (1979).

79 *Id.*

80 *Id.* at 682.

81 *Id.* at 657-58.

82 *Id.* at 681 (citing Seufert Brothers v. United States, 249 U.S. 194 (1918); Tulee v. State of Washington, 315 U.S. 682 (1942)).

83 *Id.* at 682 (citing Puyallup I).

84 *Id.* at 682-83 (citing Puyallup II).

In *Passenger Fishing Vessel,* the Court found that Indian tribes were guaranteed the right to harvest sufficient fish to ensure "a moderate living."[85] Moderate living needs are not being met.[86] Since 1964, the Columbia River tribes have not had a commercial fishery on summer chinook.[87] Since 1975, except 1977, the tribes have not had a commercial fishery on spring chinook.[88] Ceremonial and subsistence fisheries are currently a fraction of tribes' actual needs.[89] Such curtailment of tribal commercial, ceremonial and subsistence fisheries effectively undermines a tribe's opportunity to achieve a moderate standard of living.

In *United States v. Adair*, the Ninth Circuit stated that:

> Implicit in this "moderate living" standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time that they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living.[90]

Few could reasonably argue that the tribal harvest presently yields a moderate living.[91] If a moderate standard of living can only be achieved by the "same level of exclusive use and exploitation" as at the treaty time, then *Adair* suggests that exclusive use by Indians should be permitted.

Although this reading of *Adair* appears to conflict with the 50-50 allocation standard and "in common with" treaty language, it is nonetheless consistent with the federal government's

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85 *Id.* at 686
It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood--that is to say, a moderate living.

86 United States v. Washington, 506 F.Supp. 187, 208 (W.D.Wash. 1980).

87 TECHNICAL ADVISORY COMMITTEE, 1991 ALL SPECIES REVIEW COLUMBIA RIVER MANAGEMENT PLAN 2 (May 10, 1991).

88 *Id.* at 6.

89 *Id.*

90 United States v. Adair, 723 F.2d 1394, 1415 (9th Cir. 1984) (emphasis added).

91 The Northwest Power Planning Council offered a conservative estimate that in the early 1800s a population of 50,000 to 62,000 Columbia Basin aboriginal peoples caught approximately 5 to 6 million fish annually, almost 97 fish per individual. COMPILATION OF INFORMATION ON SALMON AND STEELHEAD LOSSES IN THE COLUMBIA RIVER BASIN at 74. In 1990, the Yakama Nation, Umatilla Confederated Tribes, Warm Springs and Nez Perce Tribe, whose members number approximately 16,000, took only 77,000 fish, or under five fish per person. TECHNICAL ADVISORY COMMITTEE, 1991 ALL SPECIES REVIEW COLUMBIA RIVER FISH MANAGEMENT PLAN (May 10, 1991).

responsibility to protect the treaty reserved right to take fish.[92] Arguably, because neither the government nor the tribes could have anticipated the dramatic decline in the fishery resource, strict interpretation of the "in common with" language is inappropriate. Indeed, in *Passenger Fishing Vessel*, the Court found that "neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce."[93]

Treaties must be construed as they would have been naturally understood by Indians.[94] There was no question at treaty time that Indians could harvest as many fish as they needed. The tribes' insistence during treaty negotiations that the treaties preserve their right to fish at usual and accustomed places is evidence of the tribes' intent to guarantee themselves and their future generations the right to harvest as many fish as they needed.[95]

Furthermore, tribes should not be asked to bear the burden of resource conservation when non-treaty development activities and fisheries are primarily responsible for the continuing diminishment of the fishery resource. Indian treaties must be liberally construed in favor of the Indians.[96] Thus, when state or federal actions threaten treaty fisheries, through environmental

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92 Tulee v. State of Washington, 315 S.Ct. 682, 683 (1942).

In *United States v. Winans,* ...this Court held that, despite the phrase `in common with citizens of the territory', [sic] Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their `usual and accustomed places' in the ceded area...It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.")(emphasis added)(citations omitted).

93 Passenger Fishing Vessel, 443 U.S. 658, 669 (1979).

94 *Id.* at 676.

95 *Id.* at 675-76.

A treaty...is essentially a contract between two sovereign nations...it is reasonable to assume that they negotiated as equals at arm's length...When Indians are involved, this Court...has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "The treaty must therefore be construed...in the sense in which [the words] would naturally be understood by the Indians." (citations omitted).

96 Tulee v. Washington, 315 U.S. 681, 684-85 (1942). *See also* Letter from Portland Area Director of Bureau of Indian Affairs to Merrit Tuttle of National Marine Fisheries Service (Sept. 10, 1991) (Discussing the listing of Snake River spring, summer and fall chinook.)

Because the diminishment of the tribes' treaty reserved fisheries in the Columbia Basin has occurred as a result of other land and water management actions, the Bureau of Indian Affairs urges the National Marine Fisheries Service to ensure that, in the event of a listing, the allocation of the conservation burden to protect the various

degradation, over-harvesting, or otherwise, those actions should be restricted before the tribal treaty harvest is reduced. As a party, the federal government is obligated under *United States v. Oregon* to protect and enhance tribal treaty fisheries. Likewise, courts have repeatedly recognized that states may assert their police power to regulate the non-treaty harvest given reasonable circumstances while regulation of treaty fisheries may occur only when indispensable to conservation purposes.[97]

THE ENVIRONMENTAL STANDARD

The right to take a fair share of fish as set forth in *U.S. v. Oregon* is meaningless if there are no fish to be taken. Fish runs passing through usual and accustomed fishing sites are threatened by the Columbia River hydro-electric system and environmental degradation, including thermal pollution and sedimentation. The Columbia River tribes bargained in good faith for a substantive fishing right when they ceded millions of acres to the United States. The Supreme Court characterized the Indians' right to fish as a "right to 'take' -- rather than merely the 'opportunity' to try to catch."[98] The tribes reserved more than the right to "occasionally ...dip their nets into the territorial waters."[99]

Treaty Right of Access Imposes a Servitude Upon Land

In *U.S. v. Winans*, the Court described the tribes' reserved treaty right to fish at their usual and accustomed places as a servitude upon the land.[100] As described in *Winans*, the treaties reserved and recognized Native Americans' aboriginal "right in the land -- the right of crossing it to the river -- the right to occupy it to the extent and for the purposes mentioned."[101] Commentators have also suggested that treaty fishing rights impose an environmental servitude upon state and federal governments.[102] It is clear that in the realm of treaty fishing rights, the states, federal government, and tribes share the responsibility created by treaty to enhance and protect fish habitat.[103]

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salmon runs does not further deprive the tribes of their treaty rights. In other words, NMFS must look to all other factors to protect the resource before regulating treaty fisheries and address those factors proportionately to the impacts they have caused.

97 Tulee v. Washington, 315 U.S. 681 (1942); Maison v. Confederated Tribes of Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963); Holcomb v. Confederated Tribes of Umatilla Indian Reservation, 382 F.2d 1013, 1014 (9th Cir. 1967).

98 Passenger Fishing Vessel, 443 U.S. 658, 678-679 (1979).

99 *Id.* at 678-679. *See also,* Michael C. Blumm, *Why Study Pacific Salmon Law?* 22 IDAHO LAW REVIEW 629 (1985-86).

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

101 *Id.*

102 *See e.g.,* Gary D. Meyers, *United States v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights,* 67 UNIVERSITY OF OREGON L. REV. 771, 784 (1988).

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

Non-Treaty Actors Must Not Impair or Destroy Habitat

In the *Confederated Tribes of the Umatilla Indian Reservation v. Callaway* settlement agreement,[104] the court ordered federal water managers not to manipulate the Federal Columbia River Power system (FCRPS) so as to inundate tribal fishing sites above the Bonneville Dam.[105] In addition to the threat to the tribal fishing sites, experts feared that the peaking proposal would adversely impact the migration of salmonid fish.[106] The court ordered the BPA and the Army Corps of Engineers to manage and operate the FCRPS's peak power system in a manner that did not "impair or destroy" the tribe's treaty fishing rights.[107]

Similarly, an Oregon federal district court enjoined the Army Corps of Engineers from constructing a dam and reservoir, despite Corps promises to mitigate the project's environmental impacts. In *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*,[108] the court found that a proposed dam on Catherine Creek, a tributary to the Grande Ronde River in Oregon, would nullify tribal treaty fishing rights by inundating the tribes' usual and accustomed fishing stations and by preventing fish from migrating upstream.[109] Recognizing that only Congress can abrogate treaty rights and to do so it must act expressly,[110] the court found no express intent to abrogate the tribe's treaty rights.[111] In fact, the court noted that Congress was not aware of the treaty fishing rights at that location when it authorized the dam's construction.[112]

In 1985, the Ninth Circuit affirmed a federal district court order which required water to be released from a dam order to protect 60 spring chinook salmon redds from destruction.[113] In *Kittitas Reclamation District,* the Ninth Circuit held that it was not an abuse of discretion for the district court to consider the Yakima Nation's treaty fishing rights in its interpretation of a consent decree regarding water rights to which the tribe was not a party.[114] The tribe's treaty fishing rights would have been violated unless the Department of Interior's Bureau of Reclamation released water from three of its irrigation dams. *Kittitas* makes clear that the water and hydro-power managers are under an obligation to provide sufficient instream flows to

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104 Confederated Tribes of the Umatilla Indian Reservation v. Callaway, No. 72-211 (D.Or. August 17, 1973).
105 *Id.* at 6.
106 *Id*.
107 *Id.* at 8.
108 Confederated Tribes of the Umatilla Reservation v. Alexander, 440 F. Supp. 553 (D.Or. 1977).
109 *Id.* at 555.
110 Menominee Tribe v. United States, 391 U.S. 404, 413 (1963).
111 Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F.Supp. 533, 555-556 (D.Or. 1977).
112 *Id.*
113 Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1035 (9th Cir.1985).
114 *Id.* at 1034.

protect treaty fisheries. To reduce instream flows below that which is necessary to preserve spawning grounds is inconsistent with the tribes' established treaty rights.

The issue of whether treaty fishing rights create an environmental right arose again, in *Muckleshoot Indian Tribe v. Hall*.[115] Pending trial on the merits, the Muckleshoot and Suquamish Indian Tribes sought a preliminary injunction to enjoin the construction of a marina which threatened usual and accustomed fishing sites in Elliott Bay Small Craft Harbor.[116] The tribes claimed that the Corps of Engineers had failed to adequately evaluate and mitigate the project's cumulative impacts on their treaty fishing rights.[117] However, District Court Judge Zilly found that it was unnecessary to decide the environmental issue.[118] Judge Zilly enjoined the construction of the marina finding it dispositive that the marina would substantially impair and limit tribal access to usual and accustomed treaty fishing sites.[119]

In *United States v. Washington (the Culverts Case)*, the court found Tribes understood that the Treaties would provide not only access to usual and accustomed fishing places, but also to sustainable salmon populations; thus, regardless of explicit language, the court of appeals would infer that promise.[120] The court recognized that the thousands of river miles not suitable for salmon habitat due to state culverts precluded sufficient salmon populations that would maintain a moderate living for the Tribes. [121] The court affirmed the district court's injunction requiring the state to remove or modify barrier culverts within a specified time frame. [122]

Tribal fishing rights are as valuable to the Columbia River treaty tribes as the air they breathe. In the Columbia River Treaties, tribes reserved to themselves a right they have practiced since time immemorial: the right to fish at all usual and accustomed fishing sites regardless of where these sites are located. The Supreme Court has determined that the tribes are entitled to fifty percent of each fish run destined to pass Indian fishing sites. This right is to be respected by the states and by the United States government as pursuant to the United States Constitution, the treaties with the tribes are the supreme law of the land.

The right to fish is meaningless if all or most of the fish are killed by the hydrosystem before they return to tribal fishing grounds. The Stevens' treaties off-reservation fishing and hunting rights is the principal component of the treaties to preserve a traditional way of life that is centered around the river and its resources. These treaties did not presume to reserve fishing and hunting rights, they guaranteed these rights both on and off the reservation along with regulatory control and co-management authority as established through the interpretation of the written word, otherwise known as the "canons of construction" and as further upheld in the courts.

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115 Muckleshoot Indian Tribe v. Hall, 698 F.Supp. 1504 (W.D. Wash. 1988).
116 *Id.* at 1504.
117 *Id.* at 1516.
118 *Id.* at 1517.
119 *Id.* at 1516.
120 United States v. Washington, 853 F.3d 946, 965 (9th Cir. 2017).
121 *Id*. at 966.
122 *Id*.

Indian treaties made under the authority of the United States "shall be the supreme Law of the Land; and Judges in every State shall be bound thereby...." U.S. Const. art. VI, cl.2 *construed in United States v. Washington,* 384 F. Supp. 312, 330 (W.D.Wash. 1974).