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Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties

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COMMENTS

TREATY FISHING RIGHTS: A HABITAT RIGHT AS PART OF THE TRINITY OF RIGHTS IMPLIED BY THE FISHING CLAUSE OF THE STEVENS TREATIES

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Abstract: The fishing right guaranteed by the fishing clause of the Stevens Treaties between the United States and the Indians of Western Washington should be considered a trinity of rights: a right of access, a right of equitable apportionment, and a habitat right. While seven different Supreme Court decisions and scores of lower court decisions examine the contours of the first two elements of the fishing right, the contours of the final element of the right remain unsettled. No appeals court has ruled on whether there is an implied habitat right. While some trial courts have skirted the issue, only one has addressed it directly, with the opinion vacated on appeal. This Comment examines the proposed implied habitat right and explains why courts should recognize it.

One of the most significant and long-simmering legal disputes in Western Washington entered a new phase in January 2001, when local Indian tribes filed a "Request for Determination"[1] in the context of *United States v. Washington*.[2] The Request for Determination is based on the fishing clause of the Stevens Treaties between the United States and the "fishing Indians" of what is now Western Washington.[3] It asks the court to impose a duty on

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1. Request for Determination, United States v. Washington, Civ. No. C70-9213 (W.D. Wash. 2001).

2. *United States v. Washington* spawned the original Judge Boldt decision allocating up to half the harvestable salmon to the Indians. *See* United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975). In subsequent rounds of *United States v. Washington*, the courts have allocated half the shellfish and any other marine species with commercial value to the Indians. United States v. Washington, 157 F.3d 630, 651 (9th Cir. 1998). The tribes have also litigated disputes among themselves about the boundaries of their respective usual and accustomed fishing places in the context of *United States v. Washington* and progeny. *See, e.g.*, United States v. Lummi Indian Tribe, 235 F.3d 443 (9th Cir. 2000).

3. The term "fishing Indians" refers to any of the Indians who lived from the Pacific

the State of Washington to construct and maintain culverts under state highways so that salmon and other fish have unobstructed passage between their spawning grounds and the sea.[4] According to three different studies by the State of Washington, improperly maintained culverts prevent anadromous fish[5] from accessing over 400,000 square meters of potentially productive salmonid spawning habitat.[6] If the culverts were fixed, salmon would regain access to this habitat, producing approximately 200,000 more adults per year.[7]

This Comment argues that courts should recognize the habitat right implicit in the tribes' Request for Determination. Without judicial recognition of a habitat right, anadromous fish populations will continue to perish and the treaty fishing right will become even emptier than it already is.[8] In today's world of polluted, riprapped,[9] channelized, unvegetated, and otherwise degraded streams, the Indians' fishing right is becoming an empty promise.[10] If the tribes had a habitat right, they could use it to make the fishing right meaningful, demanding that the state take simple, cost-effective steps to protect fish habitat, such as fixing the culverts.

Coast to the Cascade foothills, subsisting primarily on fish and seafood when they signed the Stevens Treaties in 1855. *See, e.g.*, Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 287 (2000).

4. *See* Request for Determination, *supra* note 1, at 1-2.

5. Anadromous fish spawn in freshwater, emigrate to the sea during the spring floods, spend their adult years in the ocean, then return to their natal streams to spawn. Salmon and certain species of trout and char are anadromous. *See generally* JOHN R. MAGNUSON (CHAIR), NAT'L RESEARCH COUNCIL, UPSTREAM: SALMON AND SOCIETY IN THE PACIFIC NORTHWEST 7-8 (1996).

6. The three reports are: WASH. STATE DEP'T OF TRANSP. & WASH. STATE DEP'T OF FISH & WILDLIFE, FISH PASSAGE PROGRAM PROGRESS PERFORMANCE REPORT FOR BIENNIUM 1991-1993; WASH. STATE DEP'T OF TRANSP. & WASH. STATE DEP'T OF FISH & WILDLIFE, FISH PASSAGE PROGRAM PROGRESS PERFORMANCE REPORT FOR BIENNIUM 1993-1995; and WASH. STATE DEP'T OF TRANS. & WASH. STATE DEP'T OF FISH & WILDLIFE, FISH PASSAGE PROGRAM DEPARTMENT OF TRANSPORTATION FINAL REPORT, 1997.

7. *Id.*

8. *See, e.g.*, Mason B. Bryant & Fred H. Everest, *Management Condition of Watersheds in Southeast Alaska: The Persistence of Anadromous Salmon*, 72 NORTHWEST SCI. 249-67 (1998) (discussing the importance of unadulterated habitat for salmon production).

9. "Rip-Rap" refers to a layer of boulders or other hard material laid on an embankment to protect it from erosion. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1960 (1981).

10. For example, tribal harvests in Western Washington declined from over 5,000,000 anadromous fish in 1986 to about 500,000 fish in 1999. *See* Request for Determination, *supra* note 1, at 4.

To place the proposed habitat right in the context of the other elements of the fishing right that courts already recognize, this Comment describes the fishing right as a trinity of subsidiary, interdependent rights: the right of access,[11] the right of equitable apportionment,[12] and the habitat right.[13] Each element of the trinity has its own constituent elements.[14] Although courts impliedly recognize the right of access[15] and the right of equitable apportionment,[16] they have not yet recognized the habitat right.[17]

This Comment is divided into four parts. Part I defines the proposed habitat right. Part II explains the historic importance of salmon to the Indians of what is now Western Washington and the negotiations that produced the Stevens Treaties. Part III mentions the canons of construction courts use to interpret Indian treaties.[18] Stevens Treaties case law is then

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11. *See infra* notes 92-104 and accompanying text. The right of access refers to the Indians' treaty right to trespass on and occupy non-Indian land in order to exercise their fishing rights at usual and accustomed places. It is a bedrock principle of Stevens treaty Indian law. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 444 (Rennard S. Strickland et al. eds., 1982) [hereinafter COHEN].

12. *See infra* notes 105-46 and accompanying text. The right of equitable apportionment guarantees the Indians the right to catch up to half the harvestable fish. The U.S. Supreme Court affirmed the right of equitable apportionment in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). *See also* Michael Blumm & Brett Swift, *The Indian Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 452-59 (1998).

13. *See infra* notes 147-71 and accompanying text. "Habitat" means the environmental conditions that fish populations need to survive and prosper. *See* United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980) (*Orrick Decision*), *aff'd*, 759 F.2d 1353 (9th Cir. 1985).

14. The right of access includes the right to trespass and camp on fee land during the fishing season, United States v. Winans, 198 U.S. 371, 381 (1905), the right to fish without paying state-imposed license fees, Tulee v. Washington, 315 U.S. 681, 685 (1942), and the right to fish free of discriminatory state regulations, Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 48 (1973); *accord* Sohappy v. Smith, 302 F. Supp. 899, 907 (D. Or. 1969); Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 398 (1968). The right of equitable apportionment includes the right to an equitable share of the hatchery fish, *Orrick Decision*, 506 F. Supp. at 197, and is not restricted by the treaty with Canada allocating Fraser River salmon, United States v. Washington, 384 F. Supp. 312, 411 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

15. *See infra* notes 92-104 and accompanying text.

16. *See infra* notes 105-46.

17. *See* Blumm & Swift, *supra* note 12, at 414-19; *see also* Brian J. Perron, *When Tribal Fishing Rights Become a Mere Opportunity to Dip One's Net into the Water and Pull It Out Empty: The Case for Money Damages When Treaty-Reserved Fish Habitat Is Degraded*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 783, 784-85 (2001).

18. *See infra* notes 92-100. The canons of construction establish a methodology by which the courts interpret Indian treaties. *See* COHEN, *supra* note 11, at 221-25; *see also*

discussed in terms of the three elements of the proposed trinity plus two corollary judicial doctrines that both support and limit the proposed habitat right: the reserved water right,[19] and the conservation necessity.[20] Finally, Part IV argues that the habitat right should be recognized as the third right in the proposed trinity.

I. Potential Scope of the Implied Habitat Right

Courts recognize that anadromous fish require certain basic environmental conditions to survive and prosper, including 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.[21] The implied habitat right would give tribes a cause of action to preserve and restore those conditions in local watersheds.[22] Armed with the implied habitat right, tribes could force state and local governments as well as private developers to consider the environmental effects of a particular development long before a given fish population heads towards extinction and becomes subject to the Endangered Species Act.[23] In some cases, tribes could even go to court and demand removal of certain developments such as the Lower Snake River dams, that create an especially severe impact on salmon mortality.[24]

David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37 (1999); Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

19. The reserved water rights doctrine holds that when Congress created a federal reservation, such as an Indian reservation, it implicitly reserved enough water to accomplish the purpose of the reservation. *See infra* notes 172-211 and accompanying text. The U.S. Supreme Court first articulated the reserved water rights doctrine in *United States v. Winters*, 207 U.S. 564, 577 (1908). The U.S. Supreme Court applied the right most recently in *Arizona v. California*, 530 U.S. 392, 396 (2000).

20. The conservation necessity recognizes that the Indians cannot fish their fish to extinction. The U.S. Supreme Court first recognized the conservation necessity in *Tulee v. Washington*, 315 U.S. 681, 683 (1942). Since the *Tulee* decision, the conservation necessity has been a feature of every U.S. Supreme Court decision interpreting the Stevens Treaties. *See infra* notes 212-21 and accompanying text.

21. United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353, 1360 (9th Cir. 1985).

22. *See* Blumm & Swift, *supra* note 12, at 473-76; *see also* Perron, *supra* note 17, at 784-85; *see also* Ivy Anderson, *Protecting the Salmon: An Implied Right of Habitat Protection in the Stevens Treaties and Its Impact on the Columbia River Basin*, 24 VT. L. REV. 143, 160-69 (1999).

23. *Id.*

24. *See* Nancy K. Kubasek & Chaz A. Giles, *Dammed to Be Divided: Resolving the*

The implied habitat right could also give tribes more leverage in Federal Energy Regulatory Commission proceedings to demand that a particular dam operate in a more fish-friendly fashion. For example, the Skokomish Indians could intervene in the Federal Energy Regulatory Commission proceedings re-authorizing the Lake Cushman Dams.[25] Potential habitat restoration projects in this case range from simply restoring flows below the lowermost dam, to equipping one or both of the dams with fish ladders, to removing the lowermost dam, or removing both dams.[26] To help select the appropriate restoration option, the tribes could measure the habitat right in terms of money, estimating the value of the fish killed by the dam, comparing the value of the fish to the value of the electricity produced by the dam, and then seek equitable relief based on a combination of habitat restoration and/or financial compensation.[27]

The implied habitat right would not create a "wilderness servitude" requiring the government to return salmon habitat to 1855 conditions.[28] Rather, it would be a tool the Indians could use to prevent threatened habitat destruction and, where appropriate, restore damaged habitat. It could be limited by the moderate living standard,[29] so that tribes couldn't prevent all development, only development that threatens their ability to catch enough fish to attain a moderate living from fishing.[30] Once a tribe achieves a moderate living from fishing, the habitat right would become a "negative right."[31] Tribes could prevent new developments that threaten their ability to achieve a moderate living, but they could not destroy old developments that might prevent higher tribal harvests.[32]

Judicial recognition of an implied habitat right would boost the Indian economy, preserve a treasured cultural icon, and begin restoration of

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Controversy over the Destruction of the Snake River Dams and Providing a Model for Future Decision-Making, 25 WM. & MARY ENVTL. L. & POL'Y REV. 675, 688-719 (2001). *See generally* Rollie Wilson, *Removing Dam Development to Recover Columbia Basin Treaty Protected Salmon Economies*, 24 AM. INDIAN L. REV. 357 (2000).

25. *See* FED. ENERGY REGULATORY COMM'N, FINAL ENVIRONMENTAL IMPACT STATEMENT CUSHMAN HYDROELECTRIC PROJECT NO. 460, at 2-2 (1996).

26. *Id.*

27. *Id.* at 2-16 to 2-17, 5-4 to 5-17.

28. *See* Blumm & Swift, *supra* note 12, at 493.

29. The moderate living standard refers to the number of fish the tribes need to harvest to earn a "moderate living" through fishing. The U.S. Supreme Court first articulated the moderate living standard in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686-88 (1979).

30. *See* Blumm & Swift, *supra* note 12, at 490-500.

31. *Id.* at 500.

32. *Id.* at 490-500.

ecological function to under-functioning wetland, riverine, and estuarine environments. For example, one report estimated that the Lake Cushman Dams caused over $5 billion worth of damage to the Skokomish tribe and economy between 1926 and 1997.[33] Simply returning flows to the North Fork of the Skokomish River would return life-giving water to formerly productive fish habitat and at least partially restore the normal process of sediment transportation, flushing out small gravel and other debris that degrades spawning habitat and restoring much-needed debris to the river delta.[34]

The implied habitat right would give tribes the ability to protect the environmental conditions needed for fish populations to survive and prosper. This tool would bring the needs of salmon to the bargaining table when land use planners and developers make decisions about development. It could also force citizens and political leaders to think proactively about how to restore salmon habitat in a cost-effective and creative manner. By recognizing and then enforcing the implied habitat right, the courts could initiate a process to strengthen the culture and spirit of Indians and non-Indians alike.

II. Treaty Negotiations Between the United States and the Fishing Indians of Western Washington

The Native Americans of the Pacific Northwest long relied on salmon for their physical and spiritual nourishment and[35] as the basis for their economy, religion, and culture.[36] Because of salmon, the Pacific Northwest Indians developed one of the few hunter/gatherer societies in the world that consistently produced more food and material wealth than it needed for subsistence.[37] The fishing clause of the Stevens Treaties was designed to protect the source of this wealth — the salmon.[38] When Isaac Stevens negotiated the treaties that bear his name, he was well aware of the significance the Indians attributed to salmon.[39] By assuring the Indians that

33. FED. ENERGY REGULATORY COMM'N, *supra* note 25, at 2-2.

34. *Id.*

35. *See* BARBARA LANE, POLITICAL AND ECONOMIC ASPECTS OF INDIAN/WHITE CULTURE CONTACT IN WESTERN WASHINGTON IN THE MID-19TH CENTURY, PART II, at 6 (1973); *accord* WILLIAM ELMENDORF & A.L. KROEBER, TWANA CULTURE 59-63 (1992).

36. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 350 (W.D. Wash. 1974) (*Boldt Decision*), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975) (*Phase I*); *accord* AM. FRIENDS SERV. COMM., UNCOMMON CONTROVERSY 3 (1970 ed.) [hereinafter UNCOMMON CONTROVERSY].

37. *See* UNCOMMON CONTROVERSY, *supra* note 36, at 3.

38. *See Phase I*, 520 F.2d at 685.

39. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443

the United States would always protect their right to catch salmon, he avoided a needless and potentially inhumane war and paved the way for non-Indian settlement in the Pacific Northwest.[40]

A. The Indian Salmon Fishery Before the Treaties

Salmon have always been at the heart of Pacific Northwest Indian culture.[41] Salmon were central to the Indians' diet, religion, calendar, and system of property rights.[42] To maintain their runs of salmon, the various Indian tribes in the Pacific Northwest developed religious practices that centered on salmon.[43] Salmon were also central to the Northwest Indians' calendar and understanding of the night sky. For example, the Quileute Indians, who lived on the coast near the mouth of the Quileute River, named four periods of the year for the four great runs of salmon that spawned on the Quileute River during the year.[44] The Nisquallys, meanwhile, spoke of a constellation called "edad," meaning fish weir, saw Orion's belt as three fishermen and his sword as a school of fish, and regarded the northern lights as a school of herring exposing their white bellies to the night air.[45]

To the extent that an Indian system of private property rights existed, it focused on salmon. Each tribe maintained a winter village along a particular river.[46] Within the tribes, individual fisherman had hereditary rights to fish at particular spots along the river near their winter villages. There also existed shared rights to fish with people from other villages near their spring and summer fish camps based on ties of marriage and kinship.[47] This system, for the most part, eliminated any need for intertribal warfare over fishing grounds, allowed for escapement,[48] and allowed sufficient numbers of fish to become available for upstream fisherman.[49]

U.S. 658, 666 (1979) (*Fishing Vessel*).

40. *See Boldt Decision*, 384 F. Supp. at 355; *see also* JOSEPH T. HAZARD, COMPANION OF ADVENTURE 121-23 (1952).

41. *See, e.g.*, UNCOMMON CONTROVERSY, *supra* note 36, at 3 (1967 ed.).

42. *See Boldt Decision*, 384 F. Supp. at 350; *see also* LANE, *supra* note 35, at 18.

43. *See Fishing Vessel*, 443 U.S. at 665.

44. *See* FAY G. COHEN, TREATIES ON TRIAL 22-23 (1986) [hereinafter TREATIES ON TRIAL].

45. *Id.*

46. Timothy Wold, After the Boldt Decision: The Question of Inter-Tribal Allocation 23 (1989) (unpublished Master's Thesis, University of Washington) (on file at the University of Washington library).

47. *Id.*

48. Escapement refers to the minimum number of spawners necessary to "escape" mankind's efforts to catch them, spawn, and produce the next generation of salmon. MAGNUSON, *supra* note 5, at 13.

49. *See id.* at 25; *accord* TREATIES ON TRIAL, *supra* note 44, at 24.

B. The Treaty Negotiations

Isaac Stevens, first governor of Washington Territory and first Indian superintendent of Washington Territory,[50] made some attempts to preserve the Indian fishing allocation system when he negotiated the Stevens Treaties.[51] Indeed, he and his advisors discussed the need to preserve the Indians' fishing rights several months before beginning their treaty-making tour on Puget Sound and the Straits of Juan de Fuca in the winter of 1854-55.[52] Based on these discussions, Stevens also decided to "liberalize"[53] the terms of the treaty that his superiors in Washington D.C. suggested.[54] Stevens negotiated treaties that confined the Indians to their winter villages on their reservations in the winter, but in the summer allowed them to roam freely over their aboriginal fishing and hunting grounds, set up fish camps, and catch fish as they always had.[55] The often-quoted[56] speech that Governor Stevens delivered to the Indians during treaty negotiations at Point-No-Point indicated Stevens' intent to protect the Indians' fish:

> Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not do for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? . . . . This paper secures your fish. Does not a father give food to his children?[57]

Stevens conducted the negotiations in the Chinook jargon, a trade patois consisting of some 300 words from English, French, and various Indian dialects, inadequate to communicate the Indian equivalents of many of the

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50. Stevens was also a West Point graduate, a Colonel in the prestigious U.S. Army Corps of Engineers, and Chief of the Northern Pacific Railroad Survey. *See* HAZARD, *supra* note 40, at 4-18.

51. *See* United States v. Washington, 384 F. Supp. 312, 355-57 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975).

52. *See* HAZARD, *supra* note 40, at 122-23.

53. For example, despite his reluctance to contravene orders, Stevens agreed with his staff that the Indians would be better served by many small reservations than one or two larger ones. *See* KENT D. RICHARDS, ISAAC I. STEVENS: YOUNG MAN IN A HURRY 202 (1979).

54. *See* HAZARD, *supra* note 40, at 122.

55. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 n.9 (1979).

56. *See* United States v. Washington, 506 F. Supp. 187, 192 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353 (9th Cir. 1985).

57. *Id.*

English terms used in the treaty.[58] It is unclear why Stevens chose to use Chinook rather than translate directly from English to the appropriate Indian dialect.[59] In later years, an individual considering himself fluent in Chinook stated that the language could not have been used to translate the treaties' terms into words understandable to the Indians.[60]

C. The Stevens Treaties

Stevens began his treaty-making tour on Christmas Eve, 1854, on the banks of Medicine Creek in South Puget Sound.[61] Ten months later, on the banks of the Judith River in Montana, he negotiated his tenth and final treaty.[62] During each negotiation, he read from a pre-drafted document, each containing virtually identical terms.[63] As a result of each negotiation, the Indians ceded vast, if not all, swaths of their aboriginal territory in exchange for items and services such as blankets and blacksmith shops.[64] By far the most important element of the treaty negotiations, however, was not what the Indians either ceded or received, but what they retained.[65] In addition to small reservations of land, the Indians retained the fishing right as codified in the fishing clause:[66]

> 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 usual and accustomed places, in common with 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 lands.[67]

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58. *See* TREATIES ON TRIAL, *supra* note 44, at 37.

59. Owen Bush, a member of Stevens' staff, knew many of the local dialects, but was not allowed to translate. The official interpreter, Colonel Shaw, only knew Chinook. *See* UNCOMMON CONTROVERSY, *supra* note 36, at 23.

60. *Id.* at 24.

61. *See* HAZARD, *supra* note 40, at 123.

62. Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES 736 (Charles J. Kappler ed., 1904).

63. *See* United States v. Washington, 520 F.2d 676, 683 (9th Cir. 1975); *accord* Puget Sound Gillnetters Ass'n v. U.S. Dist. Court for the Dist. of Or., 573 F.2d 1123, 1126 (1978) (vacated on other grounds).

64. *See* HAZARD, *supra* note 40, at 122.

65. *See* United States v. Winans, 198 U.S. 371 (1905).

66. *See* Treaty with the Yakamas, June 9, 1855, 12 Stat. 951 (1859).

67. *Id.*

The general meaning of the fishing clause emerges clearly from the historical record. Stevens was under orders to extinguish Indian title to the vast majority of their aboriginal territory to make way for non-Indian settlement.[68] The Indians, meanwhile, wanted to preserve their way of life as much as possible, which to them meant preserving their right to catch as much salmon as they always had.[69] The fishing clause reflects these concerns.[70] The Stevens Treaties guaranteed individual fishermen the right to continue seasonal fishing at their usual and accustomed fishing places off the reservation.[71] It also allowed at least some Indians to continue living in their winter villages. Stevens allowed displaced Indians to build new winter villages on the reservations.[72]

Governor Stevens viewed the fishing clause in a similar vein.[73] To him, it was both cheap and humane to let the Indians continue fishing as they had always done.[74] In Stevens' view, the reservations were adequate in size because they were placed in locations where the Indians could continue to fish, hunt, and "participate in the labor of the Sound."[75] In his official communications to the President, Stevens defended his decision to let the Indians continue fishing because it allowed them to be self-supporting and wouldn't interfere with non-Indians.[76] Furthermore, the fishing clause allowed the Indians to continue supplying the non-Indians with most of their fish and other seafood, including the salmon they cured for export.[77]

The historical record indicates that the Indians understood the fishing clause of the Stevens Treaties as a guarantee that the federal government would protect their fisheries in perpetuity. Stevens probably understood the treaty in the same light. It is unknown whether he was motivated by a sense of common humanity, noblesse oblige, or a simple desire to reduce the cost of feeding the Indians. From a legal standpoint, it is also irrelevant.

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68. *See* United States v. Washington, 157 F.3d 630, 639 (9th Cir. 1998).

69. *Id.*

70. *See* United States v. Washington, 384 F. Supp. 312, 355-58 (W.D. Wash. 1974) (*Boldt Decision*), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975); *accord* UNCOMMON CONTROVERSY, *supra* note 36, at 21.

71. *See Boldt Decision*, 384 F. Supp. at 353-54; *accord* UNCOMMON CONTROVERSY, *supra* note 36, at 21.

72. *See Boldt Decision*, 384 F. Supp. at 353-54; *accord* UNCOMMON CONTROVERSY, *supra* note 36, at 21.

73. *See* UNCOMMON CONTROVERSY, *supra* note 36, at 21.

74. *See* RICHARDS, *supra* note 53, at 201.

75. *Id.*

76. *Id.*

77. *See* TREATIES ON TRIAL, *supra* note 44, at 38.

III. Stevens Treaty Case Law

Courts recognize that the fishing clause guarantees the Indians enough fish to make the fishing right meaningful.[78] Indeed, Stevens Treaties case law can be read as a series of contemporaneous responses to declining fish runs and judicial efforts to fashion new doctrines designed to enforce the treaties central guarantee — that the Indians would always have enough fish to maintain their way of life.[79] To enforce this guarantee, over the last century, courts developed the right of access and[80] the right of equitable apportionment.[81] In addition, some lower court decisions laid the foundation for recognition of the proposed habitat right.[82] If recognized, this third right would be the final element of the proposed trinity.

Stevens Treaties case law recognizes two more doctrines that inform and limit these rights: the reserved water right[83] and the conservation necessity.[84] While the first two elements of the trinity, the right of access and the right of equitable apportionment, are firmly established, the habitat right is not. Likewise, the reserved water right is not unequivocally analogized to the reserved habitat right and the conservation necessity is not unequivocally interpreted so as to restrict the state's ability to destroy, or permit the destruction of, productive fish habitat.

A. The Canons of Construction

Since the tenure of Chief Justice John Marshall in the early days of the U.S. Supreme Court, courts interpret treaties between the United States and the tribes, including the Stevens Treaties, in light of the special canons of construction for Indian treaties.[85] At mid-century, the Court stated that these canons required consideration of "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[86] Citing multiple Supreme Court cases, Felix Cohen, a preeminent scholar of American Indian law,[87] stated that the canons of construction require the

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78. *See infra* notes 96-174 and accompanying text.

79. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676-79 (1979).

80. *See infra* notes 92-104 and accompanying text.

81. *See infra* notes 105-46 and accompanying text.

82. *See infra* notes 147-71 and accompanying text.

83. *See infra* notes 172-211 and accompanying text.

84. *See infra* notes 212-22 and accompanying text.

85. *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979).

86. Choctaw Nation v. United States, 318 U.S. 423, 432 (1943).

87. Felix Cohen wrote the definitive treatise on American Indian law. *See, e.g.*, Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN

courts to construe the treaties liberally in favor of the Indians,[88] resolve ambiguous expressions in favor of the Indians,[89] and interpret the treaties as the Indians would have understood them at the time.[90] Echoing Cohen, the most recent U.S. Supreme Court case interpreting an Indian treaty uses identical language.[91]

B. The Right of Access

In *United States v. Winans*,[92] in 1905, the U.S. Supreme Court held that the fishing clause of the Stevens Treaties contained a right of access, also described as a "fishing servitude."[93] The conflict here began after the Winans brothers installed fishwheels at the Yakama[94] Indians' "usual and accustomed" fishing grounds on the Columbia River at the Washington / Oregon border[95] and attempted to prevent the Indians from accessing their traditional fishing stations.[96] The local U.S. Attorney then sought an

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L. REV. 1, 3 (1997).

88. Cohen cites the following cases for the proposition that courts must construe treaties liberally in the Indian's favor: *Choctaw Nation*, 318 U.S. at 431-32; Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Walker Irrig. Dist., 104 F.2d 334, 337 (9th Cir. 1939). COHEN, *supra* note 11, at 222.

89. Cohen cites the following cases for the proposition that courts must resolve ambiguous expressions in favor of the Indians: McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576-77 (1908). COHEN, *supra* note 11, at 222.

90. Cohen cites the following cases for the proposition that courts should construe Indian treaties as the Indians would have understood them at the time: Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Jones v. Meehan, 175 U.S. 1, 11 (1899). COHEN, *supra* note 11, at 222.

91. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195-96 (1999) (holding that the Mille Lacs Band of Chippewa retained their usufructuary hunting, fishing, and gathering rights on lands ceded to the United States).

92. 198 U.S. 371 (1905).

93. The U.S. Supreme Court used the term "servitude" to describe the Indian's right of access in *United States v. Winans*. *Id.* at 381-82. Commentators have since developed the term "fishing servitude." *See, e.g.*, Blumm & Swift, *supra* note 12. Blumm uses the terms "fishing servitude" and "piscary profit a pendre" interchangeably. "Piscary" means fishing place. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1723 (1981). The holder of a "profit a pendre" has the right to take part in (profit from) the produce or soil of the land of another. BLACK'S LAW DICTIONARY 1211 (6th ed. 1990). Thus, a "piscary profit a pendre" is the right to fish on someone else's land.

94. The Yakama Indian Nation officially changed the spelling of "Yakima" to "Yakama" by resolution in 1972. Tribal Council Res. T-053-94 (Yakama Nation 1994).

95. United States v. Winans, 198 U.S. 371, 378 (1905) (quoting 1859 Treaty between United States and Yakima Nation).

96. *Id.* at 380.

injunction against the Winans brothers on the Indians' behalf.[97] The Court found for the Indians, articulating the canon of construction that the language of the fishing clause should be construed "as that unlettered people understood it."[98]

The Court observed that the fishing right is "not much less necessary to the existence of the Indians than the atmosphere they breathed."[99] Therefore, the Court reasoned, the Stevens' Treaties contained the implied right of access, because without access to the fishing sites, the sites were worthless.[100] The right of access included the right to camp on the fee land during the season and smoke or otherwise preserve the fish.[101]

The Court reaffirmed the right of access in 1919 in *Seufert Brothers Co. v. United States*.[102] In that case, the Court found that the Yakamas had a right to fish at their "usual and accustomed places" on the north and south side of the Columbia River, despite the fact that the lands ceded to the government during treaty negotiations were only on the north side.[103] To construe the Stevens Treaties otherwise would substitute "the natural meaning of the expression . . . for the [artificial] meaning which might be given to it by the law and lawyers."[104]

The Steven Treaties right of access is well settled. The Indians may access their usual and accustomed fishing grounds, regardless of who actually owns the land on which the fishing grounds are located. If non-Indians, such as the Winans brothers, deny access to the fishing grounds, the Indians may get an injunction requiring the non-Indians to permit access.

C. The Right of Equitable Apportionment

The right to equitable apportionment guarantees the Indians the right to catch up to half the available fish. A federal district court first recognized the Indians' right to what is now known as "equitable apportionment" in 1969 in *Sohappy v. Smith*.[105] In this case, the Yakama Indians challenged a regulation allowing commercial fishing in coastal waters and on the Columbia River below Bonneville Dam, but, for the most part, forbade it above the dam.[106] This was discriminatory because the Yakama's usual and

97. *Id.* at 377.
98. *Id.* at 380.
99. *Id.* at 381.
100. *Id.*
101. *Id.*
102. 249 U.S. 194 (1919).
103. *Id.* at 197-99.
104. *Id.* at 199.
105. 302 F. Supp. 899 (D. Or. 1969).
106. *Id.* at 907-08.

accustomed fishing places were primarily above the dam whereas the non-Indian commercial fishermen fished exclusively below the dam.[107] Adding insult to injury, additional regulations permitted sport fishing above and below Bonneville dam.[108] However, the Indians could not use this exception because they weren't sport fishermen.[109]

To protect their rights, the Indians filed suit in the Western District of Oregon, seeking a decree defining their Stevens Treaty fishing rights.[110] The Court found that during treaty negotiations, the Indians expressed their paramount interest as protecting their fishing rights.[111] Following the canons of construction for Indian treaties,[112] the *Sohappy* court struck down the regulations and directed the state to promulgate new ones guaranteeing the Indians a "fair share" of the fish produced by the Columbia River.[113]

In a series of cases known as the *Puyallup* cases, the U.S. Supreme Court recognized the Indians' right to a fair share of the fish.[114] In *Puyallup I* and *Puyallup II*, the Indians challenged state regulations banning the use of nets on the Puyallup and Nisqually Rivers and in Commencement Bay at the mouths of these rivers.[115] The State of Washington argued that because they helped guarantee escapement, the regulations were designed to protect the fish.[116] In *Puyallup I*, the Court held that the State could impose conservation measures on the Indians provided that the measures met "appropriate standards" and did not discriminate against the Indians.[117]

In *Puyallup II*, the Court applied the standard enunciated in *Puyallup I*, holding that the net bans, while conservation measures, were *discriminatory* conservation measures because they allowed in-river hook and line fishing (sport fishing), practiced exclusively by non-Indians, but forbade net fishing, practiced exclusively by Indians.[118] The Court held that the fish should be "fairly apportioned" between Indians and non-Indians.[119] Twelve years

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107. *Id.* at 907, 909-11.
108. *Id.* at 908.
109. *Id.* at 907-08.
110. *Id.* at 903.
111. *Id.* at 906.
112. *Id.* at 905.
113. *Id.* at 911.
114. Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968) (*Puyallup I*); Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973) (*Puyallup II*); Puyallup Tribe v. Dep't of Game of Wash., 433 U.S. 165 (1977) (*Puyallup III*).
115. *Puyallup I*, 391 U.S. at 396; *Puyallup II*, 414 U.S. at 46.
116. *Puyallup I*, 391 U.S. at 401; *Puyallup II*, 414 U.S. at 46.
117. *Puyallup I*, 391 U.S. at 398.
118. *See Puyallup II*, 414 U.S. at 48-49.
119. *Id.*

later, in *Puyallup III*, the Court upheld a trial court's determination that the Indians were entitled to catch forty-five percent of the harvestable run of natural steelhead on the river.[120]

In *United States v. Washington (Boldt Decision)*, a federal district court interpreted "fair apportionment" as the right to catch up to half the harvestable fish.[121] This litigation began in 1970 with the United States filing an action for declaratory and injunctive relief to define the scope of treaty fishing rights and require the state to promulgate and enforce regulations designed to protect that right.[122] To simplify the proceedings at trial, Judge Boldt bifurcated the issues into two phases.[123] *Phase I*, allocation, focused on who got how much of the pie.[124] *Phase II*, hatchery/habitat, focused on the size of the pie.[125]

At the end of *Phase I*, Judge Boldt found that the right of equitable apportionment implied in the fishing clause of the Stevens Treaties gave the Indians the right to catch up to half the harvestable fish that would pass through their traditional fishing places if not intercepted by non-treaty fishermen.[126] Judge Boldt based this finding primarily on the third canon of construction, requiring courts to construe Indian treaties as the Indians understood them at the time.[127]

Applying this canon to the treaty phrase "in common with" Boldt first noted that the Indians probably didn't know precisely what each term meant because the treaties were written in English and the treaty negotiations were conducted in Chinook, a jargon that many of the Indians did not understand and was inadequate in the first place.[128] Language barriers, Judge Boldt stated, put the Indians at a disadvantage.[129] Therefore, the canons required Judge Boldt to determine what the Indians thought they were bargaining for during treaty negotiations.[130] After three years of exhaustive discovery,[131]

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120. Puyallup Tribe v. Dep't of Game of Wash., 433 U.S. 165, 177 (1977) (*Puyallup III*).

121. United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (*Boldt Decision*), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975) (*Phase I*).

122. *Id.* at 327-28.

123. *See* United States v. Washington, 506 F. Supp. 187, 191 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353 (9th Cir. 1985) (*Phase II*); *accord* Judith W. Constans, *The Environmental Right to Habitat Protection: A* Sohappy *Solution* — United States v. Washington, *759 F.2d 1353 (9th Cir.)*, cert. denied, *106 S. Ct. 407 (1985)*, 61 WASH. L. REV. 731, 732 (1986).

124. *Phase I*, 520 F.2d at 689.

125. *Phase II*, 759 F.2d at 1360.

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

127. *Id.* at 312-31 (citing Jones v. Meehan, 175 U.S. 1, 10-12 (1899)).

128. *Id.* at 330.

129. *Id.*

130. *Id.* at 330-32.

Judge Boldt found that the Indians bargained for the right to maintain their fisheries and their freedom to move about and gather food as they always had.[132] The allocation of up to half the fish was supposed to make this consideration meaningful.[133]

The Ninth Circuit, in *Puget Sound Gillnetters Ass'n v. United States District Court for the Western District of Washington*[134] and the U.S. Supreme Court in *Fishing Vessel*[135] affirmed the *Boldt Decision* on appeal with minor modifications. To affirm the right to a maximum of half the fish, the *Fishing Vessel* Court[136] engaged in its own historical analysis, using the canons of construction articulated in *Winans*.[137] The *Fishing Vessel* Court discussed the "vital importance" the Indians placed on their fishing rights during treaty negotiations.[138] The court then reasoned that the *Winans* Court found only the right of access because that was all the Indians needed to "adequately protect" the fishing right at the time.[139] But the fishing right didn't end with access. The right of access was part of a "greater right" — the right to harvest enough fish to provide the Indians with a "moderate living," subject to Judge Boldt's fifty percent ceiling.[140]

The allocation issue decided, Judge Boldt bequeathed the *Phase II* issues, hatchery and habitat, to a new Judge for the Western District of Washington, Judge Orrick.[141] Judge Orrick found that hatchery fish are included in the Indians' allocation because they were bred to replace wild fish in decline primarily because of non-Indian development.[142] The Ninth Circuit affirmed Orrick's decision allocating half the hatchery fish to the Indians three times, holding that one of the central purposes of the Stevens Treaties was to guarantee the Indians "an adequate supply of fish" and that including hatchery fish in the allocation would at least partially meet this guarantee.[143]

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131. *Id.* at 328.

132. *Id.* at 355.

133. *See id.*

134. 573 F.2d 1123 (9th Cir. 1978).

135. Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

136. *Id.*

137. *Id.* at 678.

138. *Id.* at 666-67.

139. *Id.* at 678-81.

140. *Id.* at 686.

141. United States v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980) (*Orrick Decision*), *aff'd*, 759 F.2d 1353 (9th Cir. 1985) (*Phase II*).

142. *Id.* at 198-99.

143. *Phase II*, 759 F.2d at 1358.

The right of equitable apportionment, therefore, gives the Indians the right to catch enough fish to maintain a moderate living through fishing, up to the fifty percent ceiling recognized by Judge Boldt. Hatchery fish are included in the allocation. In the first few years after the *Boldt Decision*, tribal harvests improved.[144] Since the mid-eighties, however, fish runs and tribal harvests declined.[145] The problem for Indians today is not their *piece* of the pie, it is the *size* of the pie.[146] To address the size of the pie, some courts have considered the proposed habitat right.

D. The Habitat Right

The U.S. District Court for the Western District of Washington found a habitat right by focusing on the canons of construction requiring it to discern the central meaning of the Stevens Treaties.[147] According to Judge Orrick, the central concern of the Indians who negotiated the treaties was to "continue fishing as they had always done."[148] He based this finding on the fact that "fish were the mainstay of the Indian's economy and the focal point of their culture."[149] The canons of construction required Orrick to interpret the Stevens Treaties consistently with the Indians' contemporaneous understanding of their fishing rights.[150] Orrick articulated the canons as follows: 1) interpret the treaty so as to "promote [its] central purpose," 2) in a manner that is sensitive to the "intentions and assumptions" of the Indians as they entered the treaties, and 3) resolving "any ambiguities . . . in the Indians' favor."[151]

Judge Orrick's analysis focused on the first canon. Orrick reasoned that the central premise of the fishing clause was to "reserve to the tribes the right to continue fishing as an economic and cultural way of life,"[152] which

144. Tribal harvests in Western Washington peaked in the mid to late 1980s, depending on species. *See* Northwest Intertribal Fisheries Comm'n, *Tribal Salmon Harvests 1970-1997*, at http://www.nwifc.wa.gov/esa/stats.asp (last visited Nov. 11, 2001).

145. *Id.*

146. *See* Northwest Intertribal Fish Comm'n, *Run Reconstruction Data*, http://www.nwifc.wa.gov/fisheriesdata/runreconstruction.asp (last visited Nov. 11, 2001).

147. *Orrick Decision*, 506 F. Supp. at 195.

148. *Id.* at 192.

149. *Id.* at 191.

150. *Id.* at 195.

151. *Id.* Precisely why the *Orrick Decision* articulated the canons of construction slightly differently than they were articulated by Felix Cohen is unclear. *See supra* notes 85-91 and accompanying text. The U.S. Supreme Court articulated the most recent, and therefore definitive, statement of the canons of construction in *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172 (1999). *See supra* notes 85-91 and accompanying text.

152. *Orrick Decision*, 506 F. Supp. at 205.

was predicated on "the existence of fish to be taken."[153] Fish survival was, in turn, dependent on habitat.[154] Orrick also held that "neither party to the treaties, nor their successors in interest, may act in a manner that destroys the fishery."[155] According to Judge Orrick, previous holdings were always based on this general rule.[156] Therefore, a habitat right was well within the footprint of the fishing right that the U.S. Supreme Court already recognized.[157] If Washington continued to allow, and participate in, habitat degradation, the fish runs would become extinct and the Stevens Treaties' guarantee would be broken.[158]

The Ninth Circuit heard the *Orrick Decision* three times. Initially, a three-judge panel affirmed but "modified" Orrick on the habitat issue.[159] An en banc panel of eleven judges then reheard the case and decided that the state's appeal should be dismissed because the "case was not ripe for judicial review."[160] Finally, a second en banc panel reheard the case but left the issue of the habitat right undecided.[161] The first en banc opinion was withdrawn and the opinion of the three-judge panel vacated.[162] None of the eleven judges hearing the final appeal said they would reverse the lower court's habitat holding on the merits.[163] However, the court of appeals did not have enough "concrete facts" to definitively hold that the Stevens Treaties created a habitat right.[164] Such guesswork, according to the Ninth Circuit, was contrary to "sound legal discretion."[165]

While the *Orrick Decision* is the only court decision explicitly recognizing a habitat right, several other lower courts' decisions come close. These decisions hold that the government may not destroy the Indians' usual and accustomed fishing grounds. In the first such case, *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*,[166] the U.S. District Court

153. *Id.* at 203.
154. *Id.*
155. *Id.* at 204.
156. *Id.*
157. *Id.* at 203.
158. *Id.*
159. Phillip Katzen, Tribal Rights to Protect the Fishery Habitat Necessary to Exercise the Treaty Right of Taking Fish, Address Before the 13th Annual American Indian Law Conference, University of Washington Continuing Legal Education Foundation (Aug. 31, 2000) (on file with author).
160. The first en banc panel is unpublished. *Id.* at 3.
161. United States v. Washington, 759 F.2d 1353 (9th Cir. 1985) (*Phase II*).
162. Katzen, *supra* note 159, at 3.
163. *Id.*
164. *Phase II*, 759 F.2d at 1357.
165. *Id.*
166. 440 F. Supp. 553 (D. Or. 1977).

for Oregon issued a declaratory judgment requiring the U.S. Army Corps of Engineers to seek congressional approval before constructing a dam across Catherine Creek in Northeastern Oregon because the dam would flood the Indians' usual and accustomed fishing grounds.[167] In an analogous case, *Muckleshoot Indian Tribe v. Hall*,[168] the U.S. District Court for the Western District of Washington enjoined a private developer from building a marina on usual and accustomed fishing grounds and stations on Elliot Bay, Seattle.[169] More recently, in *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*,[170] the U.S. District Court for the Western District of Washington affirmed the U.S. Army Corps of Engineers' denial of a permit to build a fish farm that would restrict access to the Lummi Indian Nation's usual and accustomed fishing grounds and stations in the San Juan Islands of Northwestern Washington.[171] These cases effectively preserved productive fish habitat.

Using the canons of construction for Indian treaties as their guiding light, courts have stated that the Stevens Treaties guarantee the Indians a right of access to their traditional fishing grounds and a right of equitable apportionment of up to half the harvestable fish. One court expressly recognizes the implied habitat right. This right was not affirmed on appeal, but other courts' opinions are logically consistent with it.

E. The Reserved Water Right

The reserved water right supports the finding of an implied habitat right by analogy. The reserved water rights doctrine, also known as the *Winters* doctrine, holds that when Congress reserved land for "federal enclaves" such as Indian reservations and military bases, it implicitly reserved enough water to fulfill the reservation's purpose.[172] If the purpose of the reservation is to promote agriculture, the *Winters* doctrine reserves enough water to irrigate all the practicably irrigable acres on the reservation.[173] If the purpose was to protect fish species, the *Winters* doctrine reserves enough water to protect natural spawning and rearing habitat.[174] Today, the controlling question in any *Winters* rights dispute is "what was the purpose for which Congress

167. *Id.* at 556.
168. 698 F. Supp. 1504 (W.D. Wash. 1988).
169. *Id.* at 1505.
170. 931 F. Supp. 1515 (W.D. Wash. 1996).
171. *Id.* at 1518, 1525.
172. Cappaert v. United States, 426 U.S. 128, 138 (1976).
173. *See* Arizona v. California, 373 U.S. 546, 601 (1963); *accord* Arizona v. California, 530 U.S. 392, 398 (2000).
174. *See Cappaert*, 426 U.S. at 141.

created the reservation and what is the minimum amount of water necessary to achieve this purpose?"[175]

The U.S. Supreme Court first recognized the doctrine of reserved water rights in *Winters v. United States.*[176] In that case, the Court held that when Congress created the Fort Belknap Indian Reservation in what is now Eastern Montana, it implicitly reserved all the water the Indians needed to fulfill the purposes of the reservation.[177] The Court used the same reasoning that it used three years earlier in *Winans* to find the right of access.[178] First, the Court noted that the purpose of the reservation was conversion of Indians from a "nomadic and uncivilized people" into a "pastoral and civilized people."[179] Next, the Court applied the canons of construction for Indian treaties: "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."[180] In finding an implied water right, the Court noted that, without water, the purpose of the reservation would be frustrated.[181]

The Supreme Court has examined the contours of the *Winters* right nine times over the twentieth century, holding that whenever Congress creates a federal reservation of land, including an Indian reservation,[182] national forest,[183] or a national monument,[184] it implicitly reserves enough water to fulfill the purposes of the reservation, but no more.[185] In 1963, in *Arizona v. California,*[186] the Court considered how to measure the scope of the implied water right. The Court reasoned that because the purpose of the Great Colorado River Indian Reservation was to provide a homeland for

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175. *See, e.g.,* United States v. New Mexico, 438 U.S. 696, 700 (1978); Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-48 (9th Cir. 1981).

176. 207 U.S. 564 (1908).

177. *Id.* at 567, 576-77.

178. United States v. Winans, 198 U.S. 371, 379-81 (1905).

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

180. *Id.* at 576-77.

181. *Id.*

182. *Id.*

183. *See* United States v. New Mexico, 438 U.S. 696 (1978).

184. *See* Cappaert v. United States, 426 U.S. 128 (1976).

185. The scope of the *Winters* right was the central issue in the following Supreme Court cases: Arizona v. California, 530 U.S. 392 (2000); Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983); Nevada v. United States, 463 U.S. 110 (1983); Arizona v. California, 460 U.S. 605 (1983); United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128 (1976); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. California, 373 U.S. 546 (1963); United States v. Powers, 305 U.S. 527 (1939).

186. 373 U.S. 546 (1963).

the Indians where they could practice agriculture, the measure of the water right was enough water to irrigate all the "practicably irrigable acreage on the reservation" in light of present as well as future needs.[187]

The next major refinement in the *Winters* Doctrine came in 1975, in *Cappaert v. United States*, when the U.S. Supreme Court recognized a *Winters'* right for the benefit of fish.[188] Here, a ranching family, the Cappaerts, began pumping well water from their land, lowering the water level in Devil's Hole National Monument. Declining water levels threatened the survival of the Devil's Hole pupfish, an endangered species.[189] The *Cappaert* Court found that the monument's purpose was to preserve both the pool and the pupfish.[190] It also noted that while the water right was based on the purpose of the reservation, it was also limited by it.[191] Thus, the Cappaerts could pump from their wells until the water level in the pool dropped below a certain level and no further.[192]

Following *Cappaert*, in 1981, the Ninth Circuit applied the *Winters* doctrine to support a water right for fish habitat in *Colville Confederated Tribes v. Walton*.[193] The *Colville* court held that the confederated tribes on the Colville reservation in North Central Washington had a *Winters* right to "sufficient water to permit the natural spawning" of Lahontan trout.[194] Because the reservation was created for at least two purposes: agriculture and fishing,[195] and the Grand Coulee Dam destroyed tribal fishing grounds, the court reasoned that the Indians' had a right to enough water to support the Omak Lake Lahontan trout fishery established as a replacement fishery.[196]

The Ninth Circuit applied the *Winters* doctrine most recently in *United States v. Adair*,[197] holding that the Indians had a right to enough water to maintain fishing and hunting on lands once part of the Klamath Reser-

187. *Id.* at 600.

188. Cappaert v. United States, 426 U.S. 128 (1975).

189. The federal government listed the Devil's Hole Pupfish on the Endangered Species List in 1967. Its existence in Devil's Hole has been precarious ever since. *See* James Deacon, *More Information on the Devil's Hole Pupfish, at* http://www.earthsky.com/2001/esmi010618.html (last visited July 2001).

190. *Cappaert*, 426 U.S. at 141.

191. *Id.* at 141-42.

192. *Id.*

193. 647 F.2d 42 (9th Cir. 1981).

194. *Id.* at 48.

195. *Id.*

196. *Id.*

197. 723 F.2d 1394 (9th Cir. 1984).

vation.[198] The court first examined the treaty between the United States and the Klamath Indian Tribe, containing a clause guaranteeing the Indians "exclusive on-reservation fishing and gathering rights."[199] The court next considered the historical circumstances under which the treaty was negotiated, establishing the "central importance of the Tribe's hunting and fishing rights."[200] Finally, the Court found that "a quantity of water flowing through the reservation" was necessary to protect the hunting and fishing right.[201] If the purpose of the reservation is to preserve fishing rights, then the *Winters* doctrine guarantees the Indians enough water to maintain the fishery, even if the water originates off the reservation.[202]

In 1985, the Ninth Circuit reached a similar result in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*,[203] affirming the lower court's order requiring the water master to release water to cover salmon redds.[204] Because releases of extra water the previous fall artificially raised the water level, causing the salmon to spawn higher in the watershed and further from the main channel than normal, the extra water was required to cover the redds in the spring.[205] If the water master hadn't maintained these flows through the spring, the redds would dry out, essentially destroying the salmon run for that year.[206]

Two district courts also recognize a *Winters* right for the benefit of naturally spawning fish. In *Pyramid Lake Paiute Tribe of Indians v. Morton*,[207] in 1973, the U.S. District Court for the District of Columbia overturned a regulation issued by the U.S. Secretary of Interior allocating the waters of the Truckee River between Indians, wanting the water to protect spawning habitat, and non-Indians, desiring the water for irrigation.[208] The court held that, as the tribe's trustee, the U.S. Secretary of Interior had a fiduciary duty to allocate "all water not allocated by court decree or contract" to the Indians.[209] In a similar case, *Confederated Salish*

198. *Id.* at 1417.
199. *Id.* at 1409.
200. *Id.*
201. *Id.* at 1410.
202. *Id.* at 1410-11.
203. 763 F.2d 1032 (9th Cir. 1985).
204. *Id.* at 1035. A "redd" is a shallow depression in a suitable gravel bed that the female salmon excavates with her tail before depositing her eggs. ROBIN ADE, THE TROUT AND SALMON HANDBOOK 6-7 (1989).
205. *Kittitas Reclamation District*, 763 F.2d at 1033-34.
206. *Id.*
207. 354 F. Supp. 252 (D.C. Cir. 1973).
208. *Id.* at 257.
209. *Id.* at 256.

and Kootenai Tribes of the Flathead Reservation, Montana v. Flathead Irrigation and Power Project,[210] in 1985, the U.S. District Court for the District of Montana granted the Indian tribes an emergency injunction forcing the United States to release enough water from the Flathead Irrigation and Power Project to protect tribal fisheries from irreparable harm.[211]

The *Winters* doctrine established that when Congress creates a federal reservation it implicitly reserves enough water to fulfill the purposes of the reservation. If the reservation is an Indian reservation, and one of the purposes of the reservation is to protect the Indian's right to catch fish, then the *Winters* guarantee is that of enough water to maintain harvestable populations of fish. It would be but a small judicial step to analogize the *Winters* right to the habitat right.

F. The Conservation Necessity

Like the *Winters* right, the conservation necessity supports the implied habitat right by analogy. The conservation necessity is the flip side of the implied habitat right. Whereas the implied habitat right expands the scope of the Indian fishing right, the conservation necessity limits the scope of the non-Indian development right. The conservation necessity holds that the tribes' fishing right does not include the right to fish a given species to extinction. By analogy, it should also hold that non-Indians don't have the right to drive a given species of fish to extinction by destroying its habitat.

The conservation necessity flows from a stark biological fact unrecognized at treaty time: Stevens Treaties fishing rights are limited by the ability of a given watershed to produce fish.[212] At treaty time, these limitations were difficult to see because nature could produce more fish than humans could consume.[213] But since then, habitat degradation and overfishing has reversed the situation so that treaty fisherman can't even catch enough fish to support their moderate living needs.[214]

The Supreme Court first recognized the conservation necessity in *Tulee v. Washington*,[215] in 1942, when it struck a balance between the Indians' claim that the treaty allowed them to fish at usual and accustomed places

210. 616 F. Supp. 1292 (D. Mont. 1985).

211. *Id.* at 1297.

212. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 668-69 (1979).

213. *See* United States v. Washington, 384 F. Supp. 312, 351 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975).

214. *See* Request for Determination, *supra* note 1.

215. 315 U.S. 681 (1942).

free from state regulation of any kind and the State of Washington's claim that it could regulate Indian fishing at their usual and accustomed places to the same extent that it could regulate non-Indian fishing.[216] The *Tulee* Court held that the Indians' construction of the treaty was too broad while the state's construction was too narrow, forging the conservation necessity from the two extremes.[217] Fishing restrictions of a "purely regulatory nature . . . as are necessary for the conservation of fish" do not violate the treaty. But the treaty would not tolerate restrictions designed merely to raise money.[218]

The Court revisited the conservation necessity doctrine in the first two *Puyallup* cases. In the 1968 *Puyallup I* decision, the Court held that the state had the power to regulate the "manner of fishing, the size of the take, the restriction of commercial fishing and the like" in the "interest of conservation," so long as the regulation met "appropriate standards" and did not discriminate against the Indians.[219] In the 1973 *Puyallup II* case, the Court was even more direct, stating that the treaty did not give the Indians "the right to pursue the last living steelhead until it enters their nets."[220] By the time the Court decided *Puyallup Tribe v. Department of Game of Washington (Puyallup III)*,[221] in 1977, and *Fishing Vessel*, in 1979, the conservation necessity had become a background principle of federal Indian law.[222]

Stevens Treaties case law provides a strong foundation from which to build the proposed implied habitat right. The Federal District Court for Western Washington explicitly found the proposed right, but the decision was vacated on appeal. Three other district courts have found that the fishing clause prevents both public and private parties from destroying usual and accustomed fishing grounds. Two additional doctrines of Stevens Treaties case law support the proposed habitat right by analogy: the reserved water rights doctrine, and the conservation necessity.

IV. The Stevens Treaties Created an Implied Habitat Right

Courts should recognize that the fishing clause of the Stevens Treaties creates an implied habitat right. Although the courts do not yet recognize

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216. *Id.* at 684.
217. *Id.* at 685.
218. *Id.*
219. Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 398 (1968).
220. Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 49 (1973).
221. 433 U.S. 165 (1997).
222. *See, e.g.*, United States v. Eberhardt, 789 F.2d 1354, 1362 (9th Cir. 1986); *accord* Antoine v. Washington, 420 U.S. 194 (1975).

such an implied right, they have recognized other rights also implied in the fishing clause: the right of access and the right of equitable apportionment. Courts recognized these two rights by applying both the canons of construction and case law to the facts at hand. The canons of construction require the courts to: 1) construe Indian treaties liberally in favor of the Indians, 2) resolve ambiguous expressions in favor of the Indians, and 3) construe the treaties as the Indians at that time understood them.[223] Stevens Treaties case law requires courts to interpret the Stevens Treaties in a way that guarantees the Indians enough fish to make a "moderate living" through fishing.[224]

A. The Canons of Construction for Indian Treaties Support a Holding that the Stevens Treaties Contain an Implied Habitat Right

The first canon of construction requires the courts to construe Indian treaties "liberally in favor of the Indians."[225] Some courts go so far as to find hunting and fishing rights on former reservation land even after Congress abrogated the treaty creating the reservation. For example, the *Adair* court, discussed in Part III, *supra*, found that the Indians retained the reserved water right implied by the treaty creating their reservation even after Congress terminated the reservation.[226] If courts can find an implied reserved water right for hunting and fishing rights guaranteed by a treaty that is no longer in force, then surely they can find an implied habitat right for a treaty remaining in full force today.[227]

The second canon of construction requires courts to resolve ambiguous expressions in favor of the Indians.[228] For example, the phrase "in common with the citizens" is ambiguous. It could mean that the Indians share the right to catch fish off their reservations equally with non-Indians, so that if there were nine non-Indian fisherman for every one Indian fishermen, the non-Indians would get ninety percent of the catch, or the phrase could mean that the Indians got half the catch and the non-Indians got the other half,

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223. *See supra* notes 85-91.

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

225. *See supra* note 88 and accompanying text.

226. Klamath Indian Tribe v. Adair, 723 F.2d 1394, 1416 (9th Cir. 1984).

227. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (holding that the Indians' usufructuary fishing, hunting, and gathering rights on lands reserved to them by a treaty of 1837 survived an Executive Order from 1850 that removed the Indians from the lands in question, a treaty of 1855 that expressly abrogated all the Indians' "right, title, and interest, of whatsoever nature they may be, in the ceded lands," and the Admission of Minnesota into the Union).

228. *See supra* note 89 and accompanying text.

regardless of the ratio of Indians to non-Indians. The *Boldt Decision* interpreted the phrase in favor of the Indians, finding that the Indians and non-Indians were each entitled to "share equally" in the catch.[229] Therefore, the Indians received up to half the harvestable salmon and non-Indians the other half.[230]

Courts should interpret the phrase "right of taking fish" in a similar fashion. The phrase does not define how many fish the Indians may take or whether the government is obligated to protect the right in any way. Nonetheless, it is well settled that the right is not an empty one. The fishing clause guarantees the Indians something more than the "chance, shared with millions of other citizens, occasionally to dip their net into territorial waters."[231] To resolve the ambiguity in favor of the Indians and make the phrase meaningful, courts should find the implied habitat right because without the habitat, there are no fish.[232]

The third canon of construction has long been the primary canon used by courts to interpret the Stevens Treaties.[233] It requires courts to interpret an Indian treaty as the Indians understood it at the time.[234] This task is made somewhat difficult by the fact that historical accounts of the treaty negotiations do not indicate precisely what the Indians understood the treaty to mean when they signed it. Negotiations were conducted in the Chinook patios and precise meanings of the English terms were impossible to convey.[235] Nonetheless, Chinook was capable of conveying the general meaning of the fishing clause to the Indians.[236] To discern the Stevens Treaties general meaning, courts must explore the historical circumstances in which the United States and the Indians negotiated the treaty and the intent of each party, especially the Indians.[237] Once the court understands

229. United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (*Boldt Decision*), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975).

230. *Id.* at 343.

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

232. *See, e.g.*, RICHARD WILLIAMS (CHAIR), INDEPENDENT SCIENTIFIC GROUP, RETURN TO THE RIVER xvi-xx (1996).

233. *See Boldt Decision*, 384 F. Supp. at 331.

234. *See* COHEN, *supra* note 11, at 222 (citing Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970)). Chief Justice John Marshall first articulated this canon in *Worcester v. Georgia*, 31 U.S. 515, 593-95 (1832).

235. *See supra* notes 58-60 and accompanying text.

236. *See Boldt Decision*, 384 F. Supp. at 330.

237. *See* United States v. Winans, 198 U.S. 371, 381 (1905); *accord* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

the circumstances and the Indians' intent, it must interpret the treaty to give effect to the Indians' intent.[238]

Historical accounts indicate that Stevens and the Indians understood the fishing clause as a guarantee that the Indians would be able to catch fish at their usual and accustomed fishing grounds in perpetuity.[239] As Stevens stated in his opening address at the Treaty of Point-No-Point, "this paper secures your fish."[240] The Indians took him at his word.[241] This was the consideration for which they ceded essentially all of their aboriginal territory to non-Indians.[242] It is in this sense that courts must interpret the fishing clause today.[243] Courts should hold that the Stevens Treaties contain an implied promise to protect productive fish habitat. Otherwise, the salmon face extinction and the treaty guarantee will be broken.

The canons of construction for Indian treaties require the courts to construe Indian treaties liberally in favor of the Indians, resolve ambiguous expressions in favor of the Indians, and construe the treaties as the Indians understood them at the time.[244] Applying these canons to today's world of declining harvests, it is clear the fishing clause guarantee will be broken unless the courts recognize the implied habitat right.

B. Courts Have Expanded the Explicit Scope of the Fishing Clause to Protect Indian Fishing Rights in the Face of Declining Harvests

After nearly a century of Supreme Court and lower court decision making, the central meaning of the fishing clause is well established. The fishing clause guarantees the Indians enough fish to meet their "reasonable livelihood needs."[245] In other words, the treaty guarantees the Indians a "moderate living" through fishing.[246] The history of Court decision making on this subject can be described as a series of contemporaneous responses to the declining Indian harvest.[247] As anadromous fish populations

238. *See* United States v. Washington, 157 F.3d 630, 642-43 (9th Cir. 1998).

239. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666-67 & nn.7-9 (1979); *accord* UNCOMMON CONTROVERSY, *supra* note 36, at 113-18; *see also supra* notes 51-57, 61-77 and accompanying text.

240. *See supra* note 57 and accompanying text.

241. *See supra* notes 50-77 and accompanying text.

242. *Id.*

243. *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 330 (W.D. Wash. 1974) *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975).

244. *See supra* notes 85-91.

245. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979) (*Fishing Vessel*).

246. *Id.* at 686.

247. *See* Perron, *supra* note 17, at 790-99.

declined, the Court consistently readjusted the scope of the fishing right to insure that the fishery would meet the Indians' needs.[248]

1. Today's Courts Should Meet the Challenge of Declining Tribal Fisheries Applying the Same Logic Used By Earlier Courts to Recognize the Right of Access and the Right of Equitable Apportionment

Courts should recognize the habitat right as an element of the fishing right by virtue of the same logic that spawned the rights of access and equitable apportionment. During the first half-century of non-Indian settlement in Western Washington, fish were so abundant that both Indians and non-Indians harvested all the fish they wanted.[249] After the turn of the nineteenth century, however, non-Indians began crowding the Indians from their traditional fisheries. Responding to this inequity, in *United States v. Winans*,[250] the Supreme Court recognized the right of access. Nearly half a century later, in the *Puyallup* cases, the Court began to hint that access wasn't enough.[251] This hint became black letter law in *Fishing Vessel* when the Court affirmed the Indians' right to half the catch.[252]

In the years immediately following *Fishing Vessel* and the *Boldt Decision*, the allocation scheme was enough to meet the Indian's reasonable livelihood needs, at least partially.[253] Now they need more. As the *Orrick Decision* held, "the most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[254] Without adequate fish habitat, there are no fish, making the right to take fish meaningless. If the trend in habitat degradation continues, "the right to take fish would eventually be reduced to the right to dip one's net into the water . . . and bring it out empty."[255] Such a result violates the fishing clause, the canons of construction, and nearly one hundred years of litigation on the subject.[256] The *Fishing Vessel* Court all but resolved the habitat issue when it rejected the contention that the fishing clause guaranteed nothing more than an equal opportunity to try to catch fish.[257]

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248. *See* Blumm & Swift, *supra* note 12, at 440-59.

249. *See Fishing Vessel*, 443 U.S. at 659; *see also* Perron, *supra* note 17, at 790-99.

250. 198 U.S. 371 (1905).

251. Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 399-403 (1968); *accord* Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 48 (1973).

252. *Fishing Vessel*, 443 U.S. at 685-87.

253. *See* Request for Determination, *supra* note 1, at 3-4.

254. United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353 (9th Cir. 1985).

255. *Id.*

256. *Id.*

257. *Id.*

Some federal district court cases came close to recognizing the same habitat right that the *Orrick Decision* recognized.[258] For example, the District Court of Oregon enjoined construction of a dam on Catherine Creek because it would "destroy" the steelhead fishery above the dam.[259] Likewise, the *Muckleshoot* court found that a proposed marina would harm the tribes' fishing right because it would both deny them access to their usual and accustomed grounds and stations and damage the habitat.[260] Although these cases involved the right of access, it is only a small logical step from a finding based on access to a finding based on habitat.

2. Today's Courts Should Also Recognize the Habitat Right by Analogy to the Reserved Water Rights Doctrine and the Conservation Necessity

Courts should also recognize the habitat right by analogy to the reserved water rights doctrine and the conservation necessity. As discussed in Part III, *supra*, the Ninth Circuit found a reserved water right (*Winters* right) to support fish habitat on four different occasions.[261] These cases all arose from conflicts between Indians and non-Indians over water in the arid regions of the Pacific Northwest and they all explicitly found that the Indians needed the water in order to protect the fish habitat. The issue has not yet been joined in Western Washington because water is usually not the limiting factor in the production of wild fish. The limiting factor here is habitat.

In Western Washington, the *Winters* doctrine applies to the proposed habitat right by analogy. If *Winters* guarantees enough *water* to fulfill the purposes of an *arid* reservation, then, by analogy, it guarantees enough *habitat* to fulfill the purposes of a *wet* reservation. Without the *water* on the Colville reservation, for example, the Lahontan cutthroat trout fishery would have been destroyed. Likewise, by analogy, without the *habitat* on the Skokomish Reservation, the salmon fishery was destroyed.

Courts should also recognize the habitat right by analogy to the conservation necessity. Historically, courts always cite the conservation necessity as a reason to restrict Indian fishing, but non-Indians don't have the right to destroy the fishery either.[262] Each side is obliged to give something up to prevent salmon populations from falling below levels necessary to provide

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258. *See infra* notes 259-60.

259. Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 556 (D. Or. 1977).

260. Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1517 (W.D. Wash. 1988).

261. *See supra* notes 193-206.

262. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684-85 (1979).

the Indians with a moderate living. The Indians' right to make a living by fishing is limited by the conservation necessity as expressed in restrictions on harvest. The citizen's right to make a living by developing natural resources, on the other hand, should be limited by restrictions on habitat degradation. While the conservation necessity restrains Indian activities that may limit salmon population growth (primarily harvest), it should also limit non-Indian activity affecting salmon production (primarily habitat destruction).

In terms of the treaty right, harvest and habitat degradation are equivalent. Both over-harvest and unrestricted habitat degradation violate the spirit of the treaty. Each activity reduces the number of fish available for escapement and propagation of the species. When the Puyallups asserted their exclusive right to harvest the fish running through their reservation on the Puyallup River, the U.S. Supreme Court held that they did not have the right to pursue the "last living steelhead"[263] on the river to extinction. Likewise, the state doesn't have the right to develop or degrade the last piece of steelhead habitat and drive the fish to extinction.

Habitat degradation is a form of harvest. For example, the Lake Cushman Dams on the North Fork of the Skokomish River on the Olympic Peninsula harvest nearly the entire natural run of anadromous fish. Before the dams, the Skokomish River, and more particularly the North Fork of the Skokomish River, was the most biologically productive river on the Hood Canal and provided the Skokomish Indians with ample quantities of fish.[264] After the dams, almost all of the water that previously flowed down the North Fork was diverted into a power tunnel to generate electricity.[265] Without the water, the habitat was completely unusable and the fish perished.[266] In the eyes of the treaty, the dams "harvested" the fish as completely as any Indian gillnet strung across the river.

V. Conclusion

The fishing right guaranteed by the fishing clause of the Stevens Treaties has long included the right of access and the right of equitable apportionment. Today, it is time for the courts to recognize the third element of the fishing right — the proposed habitat right. Following the canons of

263. Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 49 (1973).

264. *See* CHINOOK NORTHWEST, INC. & MARTINO & ASSOCS., ESTIMATED ECONOMIC DAMAGE TO THE SKOKOMISH INDIAN TRIBE FROM UNREGULATED CONSTRUCTION AND OPERATION OF THE CITY OF TACOMA'S CUSHMAN HYDROELECTRIC PROJECT, 1926-1997, REPORT FOR THE SKOKOMISH INDIAN TRIBE 2-3 (1998).

265. *Id.*

266. *Id.* at 2-2, 2-4.

construction, the courts should interpret the Stevens Treaties by determining what consideration the Indians bargained for when they ceded all claims to their ancestral homeland, then determine how to honor that consideration today. This consideration emerges with unmistakable clarity from the historical record of the treaty negotiations and nearly a century of litigation on the subject. The Indians gave up their land in exchange for the United States' solemn guarantee that it would protect their right to fish at their usual and accustomed places so they could catch enough fish to make a moderate living from fishing.[267] The Indians' treaty fishing right is one right made manifest by three other rights: the right of access, the right of equitable apportionment, and the habitat right.

267. *See* United States v. Winans, 198 U.S. 371, 380 (1905).