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Volume 29

The Right to Habitat Protection

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Recommended Citation
29 Pub. Land & Resources L. Rev. 41 (2008)

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The Right to Habitat Protection

Ruth Langridge
Interim Director, Legal Studies Program
Research Fellow, Center for Global, International and Regional Studies
University of California, Santa CruzCrown College, Santa Cruz CA, 95064
langridr@nature.berkeley.edu; rlangrid@ucsc.edu

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Abstract

Despite an implied right to habitat protection to sustain tribal fisheries, and a more explicit requirement for habitat protection under the Endangered Species Act, in both instances ambiguities remain in the interpretation of its definition and scope. In addition, despite many favorable court rulings, both tribes and environmental groups have generally been unable to achieve the common goal of actual in-stream water flows required to sustain healthy aquatic habitat and fish populations. This paper details the legal decisions addressing tribal rights to habitat protection and the requirement for habitat protection under the Endangered Species Act, delineates the scope of these obligations and discusses existing ambiguities, constraints, and complementarities. It briefly examines several cases where alliances between tribes and environmental groups created stronger opportunities to enhance the protection of aquatic habitat, and discusses areas of common ground that could provide the basis for stronger coalitions between these groups.

I. INTRODUCTION

Healthy fisheries are essential for many American Indian tribes whose fishing lifestyle is central to their existence, culture and welfare.[1] In the foundational 1905 case *United States v. Winans*,[2] the court made it clear that when tribes ceded their aboriginal lands in treaties they did not grant away their fishing rights.[3] However, no court has ruled explicitly whether this fishing right includes a right to habitat protection, although multiple decisions have implied such a right.[4] Similarly, the American public has deemed the conservation of species and the protection of their habitat as an important societal goal. This was made manifest under the Endangered Species Act (ESA) where Congress declared that one purpose of the act was "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[5] Both sections 7[6] and 9[7] of the ESA include requirements to protect habitat for threatened and endangered species. Despite an implied right to habitat protection to sustain tribal fisheries, and a more explicit requirement for habitat protection under ESA, in both instances ambiguities remain in the interpretation of its definition and scope. More important, despite many favorable court rulings, both tribes and environmental groups have generally been unable to achieve the actual in-stream water flows required to sustain healthy aquatic

1. *U.S. v. Wash.*, 384 F. Supp. 312, 350 (W.D. Wash. 1974). Numerous writers have eloquently addressed the importance of fish to Indian tribes. See for example: Jim Lichatowich, *Salmon Without Rivers: A History of the Pacific Salmon Crisis* (Island Press 1999), and Michael C. Blumm, *Sacrificing the Salmon: A Legal and Policy History of the Decline of Columbia Basin Salmon* (Book World Publications 2002), Judith V. Royster & Michael Blumm, *Native American Natural Resources Law* (Carolina Academic Press 2002).

2. *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (The Supreme Court affirmed the treaty right of the Yakima Nation to fish at its "usual and accustomed places," regardless of who owned the land).

3. *Id.* ("Only a limitation of [aboriginal rights], however, was necessary and intended [by the treaty with the Yakima], not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those [rights] not granted."). *Winans* and subsequent cases drew on the canons of treaty construction that require courts to construe treaties in favor of the Indians as they would have understood them at the time of signing, and resolve ambiguous expressions in favor of the Indians. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, § 2.02[1], 119-20 (William S. Hein & Co. 1982).

4. For example, *Coleville Confederate Tribes v. Walton*, 647 F. 2d 42 (9th Cir. 1981) (Coleville II) (holding that the tribes were entitled to sufficient water to maintain a fishery).

5. Endangered Species Act, 16 U.S.C. § 1531(b) (2000).

6. *Id.* at § 1536(a)(2). Section 7(a)(2) of the statute requires that actions authorized by federal agencies not jeopardize the continued existence of listed species, or adversely modify the critical habitat necessary for their survival and recovery. In order to fulfill this duty, a federal agency contemplating an action that may affect a listed species or its critical habitat must formally consult with one of the two agencies that administer ESA, the U.S. Fish and Wildlife Service (FWS) in the Department of Interior and the National Marine Fisheries Service (NMFS) in the Department of Commerce.

7. *Id.* at §1538(a)(1). Section 9 prohibits all actions that "take" a listed species, where "take" is defined in 16 U.S.C. §1532(19) as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." Harm is defined as including significant habitat modification that kills or injures wildlife. 50 C.F.R. § 17.3 (1999).

habitat and fish populations. This has contributed to drastically declining fish populations.[8]

This paper reviews the key legal decisions addressing tribal rights to habitat protection and the requirement for habitat protection under the Endangered Species Act, delineates the scope of these obligations and discusses existing ambiguities, constraints, and complementarities. It examines several cases where coalitions between tribes and environmental groups created stronger opportunities to enhance the protection of aquatic habitat and discusses areas of common ground that could provide the basis for stronger coalitions between these groups.

II. TRIBAL WATER AND FISHING RIGHTS, AND HABITAT PROTECTION

In nineteenth century treaty negotiations with the United States government, many western tribes made it clear that fishing rights were essential to supply them with fish for sustenance and as the centerpiece of their religion and culture.[9] In *United States v. Winans*, the U.S. Supreme Court affirmed these rights, holding that treaties signed by the United States Government with fishing tribes established a right to take fish "at all usual and accustomed places."[10]

While multiple decisions addressed the scope of this fishing right, the courts have skirted whether it actually included a right to habitat protection to sustain tribal fisheries. In the Pacific Northwest, the Columbia River tribes spent decades in litigation to delineate issues of access and habitat

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8. As of October 2005, 114 species of fish had been listed as threatened or endangered in the U.S. *See* U.S. Fish and Wildlife Service, *Threatened and Endangered Species System*, http://ecos.fws.gov/tess_public/servlet/gov.doi.tess_public.servlets.TESSBoxscore?format=display&type=archive&sysdate=10/01/2005 (accessed on Oct. 1, 2005). The Biological Resources Division of the U.S. Geological Survey describes freshwater fishes as the single most imperiled vertebrate group in the United States. *Status and Trends of the Nation's Biological Resources: Regional Trends of Biological Resources, Southwest* vol. 2, 543, 565 (Micael J. Mac et al. eds., U.S. Geological Survey 1998).

9. *U.S. v. Wash.*, 384 F. Supp. at 350. The importance of usufructory fishing rights to fishing tribes was eloquently articulated by the court in 1905, stating that "the right to resort to the fishing places . . . were not much less necessary to the existence of the Indians than the atmosphere they breathed. It was clear that the Indians were vitally interested in protecting their right to take fish . . . and they relied on the good faith of the United States to protect that right." *Wash. v. Wash. St. Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 680 (1979). "The right to hunt, fish, and gather may be either explicitly reserved or inferred from the language, intent and surrounding circumstances of a treaty, executive order or statute." *Id.* at 667. *See* Mary Gray Holt, *Choosing Harmony: Indian Rights and the Endangered Species Act*, in Donald C. Baur & Wm. Robert Irvin, *Endangered Species Act: Law, Policy, Perspectives*, 59 (ABA 2002).

10. *Winans*, 198 U.S. at 379, 381-83. In *U.S. v. Taylor*, 13 P. 333 (Wash. Terr. 1887), the court characterized the Yakima fishing right as a servitude on Taylor's (a non-Indian fisher) land. It was a property right that included access to the river and use of shorelands for housing and drying fish. *Id.* For a comprehensive discussion of the Columbia River Tribes' litigation to establish their fishing rights and the right to habitat protection, *see* Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. Colo. L. Rev. 407 (Spring 1998).

protection.[11] In 1980, the Washington State District Court articulated an explicit recognition of a right to habitat protection.[12] Judge Orrick held that, if the primary purpose of the United States treaty with the Columbia River Tribes was to reserve the right to fish as an economic and cultural way of life, then the treaty must also be interpreted as not allowing actions "that destroy the fishery."[13] If loss of salmon habitat were "to continue, 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" nullifying "the nine-year effort to enforce the treaties' reservation to the tribes of a sufficient quantity of fish to meet their fair needs."[14] But, in an en banc opinion, the district court's habitat ruling was vacated on other grounds.[15]

In subsequent cases, the lower courts affirmed an implicit right to habitat protection for tribal fisheries, for example, a right to the non-consumptive use of water to maintain a viable fishery,[16] and a water right sufficient to maintain a creek for fishing.[17] The courts also indirectly acknowledged the right to habitat protection by providing tribes with injunctive relief including: enjoining dam construction;[18] delaying marina and oil port construc-

11. In *Seufert Bros. Co. v. U.S.*, 249 U.S. 194 (1919), the court enlarged the reach of the fishing servitude by extending the access rights of Columbia River tribes to all customary fishing stations, regardless of whether land had been ceded by the tribes to the federal government. In *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969), the court held that these tribal fishers were entitled to a "fair share" of the harvests, and that salmon conservation for the native fishery was to be considered on a coequal basis with conservation for other users. When non-native fishers challenged the implementation of *Sohappy*, the government filed suit on behalf of seven Washington State tribes (*U.S. v. Wash.*, 384 F. Supp. 312 (W.D. Wash. 1974) (Phase I)). In *U.S. v. Wash.* (Phase I), the court held that a "fair share" required the state to restrict non-natives to fifty percent of the total fish harvest, guaranteeing the tribes also fifty percent. *Wash. St. Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 682, 686-87. The Supreme Court stated that the right to fish included "so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living," and they were entitled to more than the mere chance to dip their nets into empty waters. *Id.* at 679, 686-87. *See* generally Blumm and Swift, *supra* n. 11, for a detailed history and discussion of this litigation.

12. *U.S. v. Wash.*, 506 F.Supp. 187, 203 (W.D. Wash. 1980) (Phase II).

13. *Id.* at 204.

14. *Id.* Where the Supreme Court in *Passenger Fishing Vessel* had ruled that the tribes' share of the fish harvest entitled them to no more than a moderate living, Judge Orrick interpreted the treaties to promise them no less. *See* Blumm and Swift, *supra* n. 11, at 416.

15. *U.S. v. Wash.*, 759 F. 2d. 1353 (9th Cir. 1985) (en banc) (Phase III). The court indicated that without concrete facts it was imprudent to articulate the scope of the habitat right.

16. *See Coleville Confederate Tribes*, 647 F.2d 42.

17. *U.S. v. Anderson*, 591 F. Supp. 1 (E.D. Wash. 1982), *aff'd*, 736 F. 2d 1358 (9th Cir 1984) (cited in Brian J. Perron, *When Tribal Treaty 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. & Policy Rev. 783 (Spring 2001)). For additional discussions on treaty fishing rights see O. Yale Lewis III, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 Am. Indian L. Rev. 281 (2002-2003).

18. *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*, 440 F. Supp. 553 (D. Or. 1977) (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 Indian's fishing grounds and stations on Eliot Bay, Seattle).

tion;[19] preventing construction of a pen "fish farm;"[20] and awarding water rights to protect treaty fisheries."[21] In *Nez Perce v. Idaho Power Company*, the court again recognized a habitat protection right for the fishery, but held that compensation was unavailable to compensate tribes for past losses due to development.[22]

A. *Indian Water Rights and Habitat Protection*

Habitat protection for fish clearly includes sufficient water to maintain the fishery, including the amount and timing of water flows, as well as water quality. Three years after *Winans*, Indian tribes' also established powerful claims to water in a second foundational case, *Winters v. United States*, where the Supreme Court held that the treaty setting aside the Fort Belknap Indian Reservation implied a concurrent reservation of rights to enough water to fulfill the purposes of the reservation.[23] The priority date of a *Winters'* water right is the date the reservation was created, and it is not subject to forfeiture or abandonment for non-use. [24] The early establishment of

19. *Muckleshoot Indian Tribe v. Hass*, 698 F. Supp. 1504 (W.D. Wash 1988) (granting tribes request for preliminary injunction of marina construction).

20. *N.W. Sea Farms v. U.S. Army Corps. of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1981) (upholding the denial of a permit for a fish farm).

21. *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d. 1032 (9th Cir. 1985) (awarding tribes water rights to protect treaty fishery).

22. *Nez Perce v. Idaho Power Co.*, 847 F. Supp. 791, 811 (D. Idaho 1994); *see* Blumm and Swift, *supra* n. 11, and Perron *supra* n. 18, at 481-89 for a discussion of this case.

23. *Winters v. U.S.*, 207 U.S. 564 (1908). *See* Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water, and Indian Water* (U. of Cal. Press 1987), for the history and background of the *Winters* case. With regard to interpretations of the "purpose" of the reservation, the Supreme Court in *U.S. v. N.M.*, 438 U.S. 696, 700 (1978) distinguished between the primary and secondary purposes of a reservation, holding that water is impliedly reserved only for the primary purposes of federal reservations. However, the Court has not yet applied this principle to Indian water rights, and the lower courts have not ruled on a definitive definition of the "purpose" of Indian reservations. For example, in *Colville Confederated Tribes*, 647 F.2d at 48, *cert. denied*, 454 U.S. 1092 (1981), the court held that the general purpose of Indian reservations was to provide tribes with a homeland, but that the primary purposes were twofold, both agriculture and the preservation of the tribes fishery. The court then stated that as the Colville tribes were a traditional fishing culture, the preservation of their access to historic fishing sites was one purpose in establishing the reservation. In *U.S. v. Adair*, 478 F. Supp 336, 339 (D. Or. 1979), the court also found two main purposes for the Klamath reservation, with water reserved for both. The first purpose was to convert the tribes to an agricultural society and the amount of water reserved for this came under the PIA standard. The second purpose was preservation of the aboriginal practice of hunting, fishing and gathering, and the court ruled that this water right was an in-stream flow right that served to prevent others from drawing down the water needed to sustain the tribe's fishing right. In an early non-Indian reserved rights case, *Cappaert v. U.S.*, 426 U.S. 128, 141 (1976), the Supreme Court also qualified the amount of water reserved as "only the amount of water necessary to fulfill the purposes of the reservation, no more." Clearly, how a court chooses to define a reservation's purpose can be significant for the protection of aquatic habitat, and this remains an area of unsettled law.

24. *Winters*, at 564, 577. *See also Ariz. v. Cal.*, 373 U.S. 546, 600 (1963). In addition, if prior to the creation of the reservation, a tribe's past water uses were confirmed by the treaty, agreement, or executive order creating the reservation, the water rights have a "time immemorial" priority date. For example, for tribes historically dependent on fishing, water for the preservation of the fisheries would carry a time immemorial priority date. *U.S. v. Adair*, 723 F.2d 1394, 1413-15 (C.A. Or. 1983) (Adair III). *See* Judith V. Royster, *A Primer on Indian Water Rights*, 30 Tulsa L. J. 61 (Fall 1994), for a comprehensive discussion of Indian water rights.

most Indian reservations means that a *Winters'* water right is superior to most other western water rights.[25]

In *Arizona v. California*, the court quantified a *Winters'* right as the amount necessary to irrigate the reservation's practicably irrigable acreage (PIA).[26] The problem was that the PIA standard resulted in Indian water rights being primarily for out-of-stream diversions for use in irrigation, and an essential habitat requirement to sustain a fishery is sufficient in-stream water.[27] In *Colville Confederated Tribes v. Walton*, the court also acknowledged a non-consumptive in-stream flow right[28] for "sufficient water to permit natural spawning of the trout."[29] In *U.S. v. Adair*, the court relied on language in *U.S. v. Washington* to qualify the measure of the water right to sustain a fishery, limiting it to water sufficient to provide a moderate livelihood for Indians.[30]

The court again recognized an explicit right to habitat protection in *U.S. v. Adair* (Adair III),[31] holding that the treaty right to fish included a tribe's aboriginal water right and "a confirmation to the tribe of such a right to the extent necessary to support its hunting and fishing lifestyle."[32] However,

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25. Most western water rights are regulated under the Doctrine of Prior Appropriation with a first in time, first in right requirement. Under *Winters*, water which is already subject to vested appropriation rights as of the date of creation of the reservation is unavailable to fulfill Winters rights. However, because of the early date of creation of most Indian reservations, there are few state appropriation rights that predate Indian reservations. On water rights, *see generally* Joseph Sax, Barton Thompson, John D. Leshy, & Robert Abrams, *Legal Control of Water Resources: Cases and Materials*, (3rd ed., West 2001).

26. *Ariz.*, 373 U.S. at 600-01. The standard followed from one of the goals of reservation policy that was to establish agrarian Indian communities. The Supreme Court affirmed the Special Master's ruling that the appropriate measure of Indian water rights was an agricultural measure, and stated that the PIA standard would provide sufficient water "to satisfy the future as well as the present needs of the Indian Reservations." *Id.* at 600. The Court rejected the tribes' "reasonably foreseeable needs" as introducing too much uncertainty into western water law. *Id.* at 600-01. *See generally* Royster, *supra* n. 25, on Indian water rights.

27. In addition to the amount and timing of in-stream water flows, temperature and sediment loading requirements are significant factors in sustaining healthy fisheries. Storage facilities block access to miles of streams, impeding historic migration and spawning routes and cause changes in temperature, sediment loadings, river channels and seasonal flows, and these have played a significant role in the collapse of western fisheries. Western Water Policy Review Advisory Committee, *Water in the West: Challenge for the Next Century* (1998). *See generally* Holly Doremus, *Water, Population Growth and Endangered Species in the West*, 72 U. Colo. L. Rev. 361 (Spring 2001).

28. One purpose of the Colville Reservation was the preservation of its fishery. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 48 (9th Cir.1981) (Walton I), *cert. denied*, 454 U.S. 1092 (1981). *See also* Royster, *supra* n. 25, at 72-73.

29. *Id.* The amount was finally fixed at 350 acre feet per year. *Colville Confederated Tribes v. Walton*, 752 F. 2d 397, 404-05 (9th Cir. 1985) (Walton II). *See* Royster, *supra* n. 25, at 77 and Blumm, *supra* n. 2.

30. *Adair*, 723 F.2d at 1414-15. This standard is derived from the Supreme Court's *Passenger Fishing Vessel Assn.*, 443 U.S. 658. The *Adair* litigation arose at roughly the same time as Phase II of the *United States v. Wash.* litigation. *See generally* Ryan Sudbury, *When Good Streams Go Dry: the United States v. Adair and the Unprincipled Elimination of a Federal Forum for Treaty Reserved Rights*, 25 Pub. Land & Res. L. Rev. 147 (2004), for a discussion of the *Adair* cases.

31. *Adair*, 723 F.2d. at 1414.

32. *Id. See also* Sudbury, *supra* n. 31. Unlike the vacated habitat protection decision in *U.S. v. Washington*, in *Adair III*, the U.S. and the Klamath tribes presented "a concrete set of facts to which the habitat protection standard could be applied with certainty." *Id.* at 168.

this explicit affirmation of the right to habitat protection was again thrust aside when the Ninth Circuit vacated the decision on grounds that the case was not ripe.[33]

Today most Indian reserved water rights are still stipulated to be for consumptive use, primarily for irrigation, and they are quantified using the PIA standard. In-stream flow rights to sustain habitat for a fishery remain uncommon. A right to in-stream flows is contrary to the tradition and history of the western law of prior appropriation which requires that water must be taken out of a stream and used for beneficial purposes in order to perfect a right. Water left in the stream was historically considered wasteful. Thus, the normal hostility to Indian water rights is exacerbated in the case of in-stream flow rights.[34] While many states today allow qualified in-stream flow rights, there are still concerns about awarding these rights and the practice remains infrequent.

Court decisions have also been ambiguous regarding a tribe's right to change its water use, originally set aside for one purpose such as irrigation, to another purpose, such as maintaining a sufficient in-stream flow to sustain a fishery.[35] In *Arizona v. California*, the Supreme Court held that PIA method "shall not constitute a restriction of the usage . . . to irrigation."[36] Later, in *Colville*, the Ninth Circuit held that tribes could adapt their water rights to modern usages.[37] But, in *Big Horn III*, the Wyoming Supreme Court ruled that tribes did not have a right to switch a portion of their PIA water rights awarded for future irrigation projects to in-stream flows for fisheries, but the court did not rule as to current PIA water usage.[38] There have been no recent definitive Supreme Court decisions on these issues. Even more important, since the *Winters'* decision, the reserved water rights of Indian tribes have been almost entirely disregarded by state and federal governments with authority over water allocation.[39] Recent court decisions

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33. *Adair*, 723 F.2d. at 1404.
34. See discussions in Royster, *supra* n. 25 and Blumm, *supra* n. 2.
35. *See* Royster, *supra* n. 25, at 78-82.
36. *Ariz. v. Cal.*, 439 U.S. 419, 422 (1979), *rehearing denied*, 462 U.S. 1146 (1983).
37. *Colville Confederated Tribes*, 647 F. 2d 42, *cert. denied*, 454 U.S. 1092 (1981).
38. *In Re General Adjudication of All Rights to Use Water in the Big Horn River System*, 835 P.2d 273, 285 (1992) (Big Horn III). *See* Royster, *supra* n. 25, at 79-81 for a good discussion of the *Big Horn* cases.
39. In particular, whereas other western communities have benefited from federal funding for reclamation projects, this financing has not been available to the Indian Tribes. *See generally* McCool, *supra* n. 24. In its 1973 report, the National Water Commission stated: "Following *Winters* . . . the United States was pursuing a policy of encouraging the settlement of the West and the creation of family-sized farms on its arid lands. In retrospect, it can be seen that this policy was pursued with little or no regard for Indian water rights and the *Winters* doctrine. With the encouragement, or at least the cooperation, of the Secretary of the Interior – the very office entrusted with the protection of all Indian rights – many large irrigation projects were, constructed on streams that flowed through or bordered Indian Reservations, sometimes above and more often below the Reservations. With few exceptions the projects were planned and built by the Federal Government without any attempt to define, let alone protect prior rights that Indian tribes might have had in the waters used for the projects." United States National Water Commission, *Water Policies for the Future: Final Report to the President and to the*

constraining Indian water rights also express concerns that un-quantified and un-exercised reserved rights with a very early priority date could constrain investments in non-Indian water projects.[40] These legacies contribute to a political climate today that makes it difficult for tribes to receive favorable settlements in court, and where they do, to implement their court-granted paper rights and obtain wet water for irrigation purposes and to sustain a fishery. In addition, their fishing right remains essentially unfulfilled due to the significant decline in western fisheries.[41]

III. THE ENDANGERED SPECIES ACT AND HABITAT PROTECTION

It is clear from the language, history and structure of the Endangered Species Act[42] that Congress intended the protection of endangered species and their habitat to be afforded the highest of priorities.[43] However, as with a right to habitat protection for Indian tribes, courts generally affirmed a basic requirement for habitat protection for listed species under ESA, but were inconsistent regarding the scope of this protection; and, as a result, federal agencies often circumvented implementation.[44]

There are several provisions in the ESA that address habitat protection. Section 7 prohibits federal agencies from undertaking activities that destroy or adversely modify critical habitat,[45] Section 4 directs that critical habitat

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Congress of the United States 474-75 (Washington D.C.: Government Printing Office, 1973). *See also* David Getches, *Indian Water Rights Conflicts in Perspective*, in *Indian Water in the New West*, 13 (Thomas R. McGuire et al. eds.,U. of Ariz. Press 1993). As an example, the irrigation system on the Fort Belknap Reservation where the *Winters* case arose is still only half complete and the tribes still lack adequate means to develop their water today. *Id.* at 18.

40. Sax et al., *supra* n. 26.

41. The major alteration of natural water flows, sediment load and temperature resulting from the plethora of non-Indian water projects, particularly dam construction and maintenance, has significantly damaged aquatic habitat and decimated salmon runs in the area west of the Rocky Mountains as a whole, 70 percent of native fish species are already extinct or currently imperiled. *See Sustainability of Western Native Fish Resources* in *Aquatic Ecosystems Symposium: A Report to the Western Water Policy Review Advisory Commission* 63, 73 (W.L. Minckley ed., Western Water Policy Review Advisory Commission 1997) (cited in Doremus, *supra* n. 28, at n. 26).

42. 16 U.S.C. § 1531 et seq.

43. Species are listed as mandated by ESA to be either endangered – in danger of extinction throughout all or a substantial portion of their range, or threatened – not yet endangered but likely to reach that point in the foreseeable future. *Id.* at § 1532(6), (20). In 1978, Senator Jake Garn stated that "the designation of critical habitat is more important than the designation of an endangered species itself," 124 Cong. Rec. 21575 (1978). *See also TVA v. Hill*, 437 U.S. 153, 174 (1978).

44. The U.S. Fish and Wildlife Service for example has used the terms "not prudent" or "not determinable" to avoid designation critical habitat for a large majority of all endangered and threatened species. FWS regulations state that the designation of a critical habitat is not prudent if: a) The species is threatened by taking or other human activity and identifying its critical habitat can be expected to increase the degree if the treat, or b) the designation of a critical habitat would not be beneficial to the species. *See* 50 C.F.R. § 424.12(a)(1). *See* Oliver A. Houck, *The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277, 303 (1993). Of the 1,268 domestic species of plants and animals listed as of October 2005, 466 have designated critical habitat. U.S. Fish & Wildlife Service, *Threatened and Endangered Species System*, http://ecos.fws.gov/tess_public/servlet/gov.doi.tess_public.servlets.CriticalHabitat?listings=0&nmfs=1#E (Oct. 2005).

45. 16 U.S.C. § 1536(a).

be designated concurrent with a species listing,[46] and Section 5 provides a means for obtaining funding for acquisition of habitat areas.[47] Section 9 prohibits activities that significantly modify or degrade habitat where the action actually kills or injures wildlife,[48] and Section 10 contains provisions that enable private landowners to create habitat conservation plans and obtain incidental take permits.[49]

A. *Critical Habitat Under ESA*

Section 7 of the 1973 ESA mandates that federal agency actions not destroy or adversely modify the "critical habitat" of endangered or threatened species.[50] To clarify the criteria for critical habitat, the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) promulgated regulations that defined it broadly as: "[A]ny air, land, or water area . . . and constituent element thereof, the loss of which would appreciably decrease the likelihood of the *survival* and *recovery* of a listed species or a distinct population segment of its population."[51] Early case law supported the importance of critical habitat in avoiding jeopardy. In *National Wildlife v. Coleman*, the Fifth Circuit Court of Appeals held that a project that would disturb and destroy habitat vital to the listed Mississippi

46. *Id.* at § 1533(a)(3).

47. *Id.* at §§ 1534(b), 1536(a)(2).

48. *Id.* at § 1538(a)(1). This section applies only to endangered species of fish or wildlife. Under Section 4(d) the FWS and NMFS are granted the discretionary authority to extend any of the prohibitions of Section 9(a)(1) to threatened wildlife species. By regulation, FWS has generally extended the Section 9 take prohibition to threatened species. 50 C.F.R. § 17.31(a). NMFS does this on a species by species basis.

49. 16 U.S.C. § 1539(a)(1)(B).

50. *Id.* at § 1536(a). Federico Cheever presents an excellent overview of critical habitat in *Endangered Species Act: Critical Habitat,* in Donald C. Baur & Wm. Robert Irvin, *Endangered Species Act: Law, Policy, Perspectives,* 47 (ABA, 2002).

51. 43 Fed. Reg. 870, 874 (Jan. 4, 1978). This definition required that critical habitat include portions of a listed species' present habitat as well as additional areas needed for recovery of the population. In 1978 amendments to the ESA, Congress clarified that critical habitat must include (i) the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical and biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protections; and (ii) the specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A). The definition of conservation in ESA is significant: "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). In other words, "Congress defined 'critical habitat' with recovery of species in mind." (Cheever, *supra* n. 51, at 49). FWS reiterated this in its determination of critical habitat for four species of endangered fish on the Colorado River, stating that "In the case of critical habitat, conservation represents the areas required to recover a species to the point of de-listing . . . in this context, critical habitat preserves options for a species eventual recovery." *Determination of Critical Habitat for the Colorado River Endangered Fishes: Razorback Sucker, Colorado Squawfish, Humpback Chub, and Bonytail Chub,* 59 Fed. Reg. 13374, 13377 (March 21, 1994) (cited in Cheever, *Endangered Species Act: Critical Habitat, supra* n. 51, at 49-51, n. 17).

Sandhill Crane would violate Section 7 by jeopardizing the crane.[52] In the frequently cited case, *Tennessee Valley Authority v. Hill (TVA)*, the Supreme Court affirmed the power of Section 7 and the importance of critical habitat by enjoining the construction of a multimillion-dollar dam that would have flooded the habitat of the snail darter, listed as threatened under the ESA.[53]

During the 1980s and early 1990s, the FWS and NMFS routinely declined to designate critical habitat for newly listed species. Recent cases however, have challenged this practice. In *Natural Resources Defense Council v. Department of the Interior*,[54] the court stated that FWS violated ESA by failing to designate critical habitat for the coastal California gnatcatcher, and in *Building Industry Association of Superior California v. Babbitt*, the court held that FWS' argument for not designating critical habitat was unsupported by the record.[55] In *Conservation Council for Hawaii v. Babbitt*, the court rejected the FWS's assertion that jeopardy consultation was functionally equivalent to "consultation" under the destruction/adverse modification standard.[56]

Critical habitat designation is not required at the time of listing if it is not determinable, and while agencies frequently decline to designate critical habitat on that basis,[57] the courts have also challenged such agency decisions.[58] In *Northern Spotted Owl v. Lujan* for example, the federal court stated "the designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances."[59] In *Pacific Coast Federation of Fisherman's Association v. NMFS*, the court stressed that the agency must consider near-term habitat loss to populations with short life cycles, and faulted the agency for only considering the impact of its actions over a ten-year period.[60] Despite the requirement that the designation of critical habitat consider not only the best scientific data available but also economic impacts,[61] its designation continually comes under attack in Congress.[62]

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52. *Natl. Wildlife Fedn. v. Coleman*, 529 F.2d 359, 367 (5th Cir. 1976), *cert. denied sub nom.* 400, 407 F. Supp. 705, 707 (S.D. Miss. 1975), *rev'd*, 529 F. 2d 359, 367 (5th Cir. 1976).

53. *TVA*, 437 U.S. 153 (enjoining the operation of the federal government's nearly-completed Tellico Dam on the Little Tennessee River because the operation would "take" the federally endangered snail darter fish that lived in the river).

54. *Natl. Resources Def. Council v. Dept. of Interior*, 113 F. 3d 1121 (9th Cir. 1997) (NRDC II).

55. *Building Industry Assn. of Superior Cal. v. Babbitt*, 979 F. Supp. 893 (D.D.C. 1997), *appeal dismissed*, 161 F. 3d 740, 906 (D.C. Cir. 1998).

56. *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998).

57. Critical habitat is not determinable when: i) Information sufficient to perform required analyses of the impacts of designation is lacking or ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat. 50 C.F.R. § 424.12 (a)(2).

58. See for example: *Forest Guardians v. Babbitt*, 164 F.3d 1261 (10th Cir. 1998), and *Colo. Wildlife Fedn. v. U.S. Fish and Wildlife Service*, 36 E.R.C. (BNA) 1409 (D. Colo. 1992).

59. *N. Spotted Owl v. Lujan*, 758 F. Supp 621, 626 (W.D. Wash 1991).

60. *P. Coast Fedn. of Fisherman's Assn. v. N.M.F.S.*, 265 F.3d 1028, 1037-38 (9th Cir. 2001).

61. 50 C.F.R. § 424.19.

62. See for example, H.R. 3824, Threatened and Endangered Species Recovery Act of 2005, passed in the House on September 29, 2005.

B. *Section 9, the "No Take" Requirement, and the Definition of Harm*

Section 9 of the ESA also explicitly addresses habitat protection. This section makes it unlawful for any person to "take" any species listed as endangered, where "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct."[63] Because so much rides on the word "take," there has been a great deal of controversy over its definition, and in particular over NMFS' definition of harm as including habitat modification. NMFS defined harm with respect to fish species as "an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, feeding or sheltering."[64] Specific activities that may constitute harm include construction of migration barriers, alteration of stream-flows, sediment input into streams from timber harvest, grazing, road-building and mining, and land-use activities that increase erosion.

Initially, in a series of cases focusing on the Palila, a Hawaiian honeycreeper, the courts adopted a broad definition of harm."[65] The Ninth Circuit affirmed that "harm" included habitat modification that threatened a species with extinction, however, it declined to address whether the regulations' requirement for "actual death or injury," could by satisfied be including habitat modification that hindered a species' recovery.[66] The distinction is significant in that a large category of activities may hamper the goal of recovery while still falling short of precipitating a species' extinction.[67]

In *Sweet Home Communities for a Greater Oregon v. Babbitt*, the District of Columbia Court of Appeals and the Ninth Circuit focused on the understanding of harm as stated in *Palila II*. A split in their interpretations resulted in the Supreme Court granting certiorari.[68] The harm rule was upheld in a facial challenge to the regulation, and the court affirmed that indirect injury to a listed species through habitat modification could constitute a

63. 16 U.S.C. § 1532(19).

64. 50 C.F.R. § 222.102.

65. *Palila v. Haw. Dept. of Land and Natl. Resources*, 649 F. Supp. 1070, 1075 (D. Haw. 1986) (Palila II), *aff'd*, 852 F. 2d 1106 (9th Cir. 1988). The court ruled that the state of Hawaii was engaging in the take of the palila finch (*Loxioides bailleui*) by permitting sheep to graze on mamane-naio tree seedlings that when fully grown could have been used by future finches for nesting and foraging. The district court stated that "a finding of "harm" does not require death to individual members of the species; nor does it require that habitat degradation is presently driving the species further toward extinction. Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns, and causes actual injury to the species, effects a taking under Section 9 of the Act. For extensive background on the *Palila I & II* cases, *see* Kenneth J. Plante and Andrew J. Baumann, *Babbit v. Sweet Home Chapter of Communities for a Great Oregon: Preserving the "Critical Link" Between Habitat Modification and the "Taking" of an Endangered Species*, 20 Nova L. Rev. 747, 758-75 (Winter 1996).

66. *Palila II* Appeal, 852 F. 2d at 1110.

67. Plante and Bauman, *supra* n. 66, at 773.

68. *Sweet Home Communities*, 515 U.S. 687 (1995).

"take" prohibited by the ESA. However, in a footnote the Court narrowed the interpretation of harm through habitat modification. The majority indicated that before habitat modification could be considered a take, FWS had to prove that the actions of the "taking" party were the proximate cause of death or injury to the particular species and that the events that caused minimal or unforeseeable harm would not violate the ESA as construed in the harm regulation. They stated that the task of determining whether proximate causation exists was best left to the lower courts.[69] Justice O'Connor's concurrence went further, stating that only those actions that "completely prevented" breeding or made it "impossible," could be defined as habitat modification under the FWS definition of harm.[70] This left open the degrees of proof and causation required before the indirect injury threshold was met. Subsequent court decisions have required stronger proof that an activity will do more than merely hinder breeding, feeding, sheltering or spawning, and have concluded that an activity must proximately cause the actual death or injury to a particular species.[71]

Subsequent lower court decisions were also inconsistent in upholding a requirement to habitat protection under Section 9, finding that habitat modification could cause harm to listed species and thus constitute unlawful take only in certain circumstances. In *Defenders of Wildlife v. Bernal*, scientific experts at trial testified that the pygmy owl would likely be harmed by a development of land where the owl was located.[72] Nevertheless, the district court judge ruled against finding a "take" in the absence of a showing that owls were actually present in the area in which the proposed activities were to occur, and the decision was upheld on appeal.[73] However, in *United States v. Glen Colusa Irrigation District*, the court held that in the Sacramento River in California, where winter-run Chinook salmon were listed under ESA, the fish screens and dams that blocked passage of the migrating fish would not have been constructed "but for" irrigation pumping from the river, and therefore, the irrigation pumping caused a "take,"

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69. *Id.* at 697-700. In Justice O'Connor's concurrence, she questioned the *Palila II* decision and stated that destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently sustaining actual birds. *Id.* at 713-14 (O'Connor, J., concurring).

70. *Id.* at 710.

71. *See generally* James R. Rasband, *Priority, Probability, and Proximate Cause: Lessons from Tort Law about Imposing ESA Responsibility for Wildlife Harm on Water Users and Other Joint Habitat Modifiers*, 33 Envtl. L. 595 (Summer 2003), for a good discussion of Section 9. Also Steven P. Quarles and Thomas R. Lundquist, *When Do Land Use Activities "Take" Listed Wildlife Under ESA Section 9 and the "Harm" Regulation*, in Donald C. Baur & Wm. Robert Irvin, *Endangered Species Act: Law Policy and Perspective* (ABA 2002); Gina Guy, *Take Prohibitions and Section 9*, in Donald C. Baur & Wm. Robert Irvin, *Endangered Species Act: Law Policy and Perspective* (ABA 2002); and Sean C. Skaggs, *Judicial Interpretation of Section 9 of the Endangered Species Act Before and After Sweet Home: More of the Same*, in Donald C. Baur & Wm. Robert Irvin, *Endangered Species Act: Law, Policy and Perspective* (ABA 2002).

72. *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 2000).

73. *Id.* at 927.

and the modification of water permits to ensure adequate water flows for fish was permissible.[74] In *Idaho Watersheds Project v. Jones*, the court held that a private irrigator could not divert water from a Creek without specific structures in place to protect the threatened bull trout.[75] But, in *Arizona Cattle Growers' Ass'n v. United States Department of Fish and Wildlife*, the Ninth Circuit narrowed the indirect injury provision of Section 9, and held that habitat modification alone, without a showing of actual death or injury to an endangered species, is not a "take."[76] Without any clear guidance yet from the Supreme Court as to when habitat modification results in the "take" of a species, this remains an area of unsettled law.

IV. POLITICAL CONSTRAINTS TO ESTABLISHING A RIGHT TO HABITAT PROTECTION

A. *Shifting Societal Goals and Habitat Protection*

The judicial trend is to affirm a basic right to water and fish for Indian tribes, but to narrow its scope. In addition, while recognizing an implicit right to habitat protection for tribal fisheries, the court has yet to affirm an explicit right that would enable tribes to restore their fisheries. Similarly, despite significant legal victories under the Endangered Species Act, the courts and administering agencies are also inconsistent in making clear the extent of the requirement for habitat protection under ESA. There is a failure to actually achieve sufficient protection and restoration of fish species and their aquatic habitat throughout the west.[77]

Several major concerns speak to the courts unwillingness to clarify the scope of habitat protection required for Indian tribes and under ESA. The first involves the conflicts that abound today over shifting attitudes towards water use – the redistribution and alteration of natural water flows supporting irrigated agriculture and municipal development at the expense of degraded rivers, denuded fisheries and the communities that relied on these resources. Holly Doremus discusses how when Europeans moved west-

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74. *U.S. v. Glen Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1133 (E.D.Cal. 1992). *See also Okanogan County v. Nat'l Marine Fisheries Serv.*, 2002 LEXIS 13625 (D. Wash. March 13, 2002).

75. *Idaho Watersheds Project v. Jones*, 2002 U.S. Dist. LEXIS 27589 at *33 (D. Idaho. November 14, 2002). The court stated that "[t]he diversion significantly modifies the habitat of the bull trout by reducing flows below the diversion and diverting bull trout into the irrigation ditch . . . These two threats combine to create a reasonably certain threat of imminent harm to the bull trout under § 9 of the ESA."

76. *AZ Cattle Growers Assn. v. U.S. Fish and Wildlife Service*, 273 F.3d 1229, 1238 (9th cir. 2001). *See* Paul Stinson, *Arizona Cattle Growers Association v. U.S. Fish and Wildlife Service: Has the Ninth Circuit Weakened the "Take" Provisions of the Endangered Species Act*, 30 Ecol. L.Q. 497 (2003), for an analysis of this case.

77. Associated Press, *Half of Oregon's Wild Fish Face Extinction* (Aug. 31, 2005). A status report by Oregon Department of Fish and Wildlife biologists has determined that out of 69 distinct fish populations in Oregon, including all salmon and steelhead species and most trout populations, nearly one half of all populations are at risk of extinction and eight historic populations are already extinct. *See generally* Doremus, *supra* n. 28.

ward, they brought with them a consumptive ethic[78] that promoted large scale water development to supply human and material needs, perceiving this to be the highest and best use of natural resources.[79] The result was years of allocating water for irrigation, power and municipal expansion for non-Indians, while ignoring both the environmental impacts of these policies and the legally recognized rights of Indian tribes to water and fish.[80] In addition, the market economy introduced by white settlers was fundamentally different than the "gift economy" of Indian Tribes that had evolved over 1,500 years.[81] Salmon and other natural resources were captured and sold for profit without any internal checks to moderate their use. The new economy displaced tribal fishers and, through altered fishing techniques and the continuous loss of salmon habitat, devastated the salmon resource.[82]

In the past few decades, the west saw a shift away from a major reliance on resource extraction and the construction of massive water storage and diversion projects. This was coupled with an expanded effort by Indian Tribes to access their water and fishing rights, and efforts by the environmental community to protect and restore degraded ecosystems including rivers and fisheries.[83] As the previously disregarded claims of environmental groups and Indian tribes gained new salience, and as the public refocused its goals to include the support of river and fishery restoration, those who relied on past allocations resisted change.

Many non-Indians view Indian reserved water rights as a potential threat to the survival of their interests,[84] and the specter of Indians becoming water brokers has hindered tribes attempting to secure the actual benefits of their water.[85] Similarly, the ESA generates a great deal of public uncertainty regarding how to resolve the tensions between development and preservation of species and their habitat, and respecting existing uses and promoting environmental restoration.[86] In particular, the designation of critical habitat and the prohibition of any "take" significantly affects private

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78. *Id.* at 364 (citing Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 96 (1995)).

79. Doremus, *supra* n. 28, at 364.

80. *See generally* McCool, *supra n. 24* (a history of conflict over water between Indians and non-Indians).

81. Lichatowich, *supra* n. 2, at 33-51 and Blumm, *supra* n. 2, at 65.

82. Blumm, *supra* n. 2, at 63-65.

83. Ruth Langridge, *Negotiating Contentious Claims to Water*, 2003, U.C. Berkeley, dissertation. Ruth Langridge, *Negotiating Contentious Claims to Water : Shifting Institutional Dynamics for the Allocation of Water Between the Eel and Russian River Basins* (unpublished Ph.D. dissertation, U. of Cal., June 1, 2004) (copy on file with eScholarship Repository at http://repositories.cdlib.org/wrc/tcr/gilless).

84. This threat was apparent during a 1988 drought, when a Wyoming Supreme Court decision resulted in placing limits on the water diversions of non-Indian irrigators so that a tribal fishery could be maintained throughout a dry year. *See* Getches, *supra* n. 40, at 7-8.

85. For example, *Winters'* rights, as property rights, should by definition be transferable, but this has not generally been permitted for tribes. *Id.* at 21.

86. *See* Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 Cal. L. Rev. 2375, 2379 (Dec. 2000).

landowners. In 1982, Congress addressed the tension between the activities of private landowners and the "no take" provision of ESA by adding additional provisions to allow for incidental "take" as part of a habitat conservation plan where the Secretary can issue an incidental take permit (ITP) when assured mitigations will occur and the applicant will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.[87] Although the habitat conservation program was expanded during the Clinton administration, [88] opponents of ESA continue their efforts to weaken habitat protection provisions.[89]

A second major concern for tribes and environmental groups is the question of how to delineate the baseline for restoring ecosystems. The courts have been wary of affirming a right to habitat protection for tribes to sustain a fishery because it might be interpreted as a "wilderness" servitude, and require a restoration of conditions that existed at the time a reservation was created. This could result in a widespread halt in development. However, Blumm and Swift point out that no tribe has pushed for a return to treaty conditions.[90] In addition, they argue that the way to avoid concern with a "wilderness" servitude is to confine the scope of the treaty right only to actions or developments that "unreasonably interfere" with the tribe's attainment of a moderate living. They propose that this include a requirement that a proposed development effect the least restrictive imposition on treaty rights available to achieve its benefits, and all reasonable measures are incorporated to reduce its adverse effects on treaty fishing. In addition, if there is a loss or diminishment of treaty rights that impair the tribes' moderate living standard, "just compensation" should be provided to the tribes.[91]

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87. The 1982 amendments included two separate incidental take authorizations. Section 7 could authorize certain takings that were in compliance with the terms and conditions set forth in an "incidental take statement" issued by FWA as part of a Section 7 biological opinion. 16 U.S.C. § 1536(o). Amendments were also added to Section 10 authorizing the secretary to issue "incidental take permits" to applicants who have prepared conservation plans that meet established criteria. 16 U.S.C. § 1539(a)(2)(A)(B). Section 10 (a) addressed situations where a private property owner's otherwise lawful activities might result in a limited "take" of threatened or endangered species. 16 U.S.C. § 1539(a)(2)(A). The ESA mandates that for each HCP, a permit applicant is required to specify: (i) the impact likely to result from an incidental taking, (ii) steps that will minimize and mitigate such impacts and funding available to implement them, and (iii) alternative actions considered.

88. *See* Karen Donovan, *"HCPs: Important Tools for Conserving Habitat and Species,"* in Donald C. Baur & Wm. Robert Irvin, *Endangered Species Act: Law, Policy, and Perspectives,* 320-29 (ABA 2002). Habitat Protection Plans are also critiqued, particularly the "no surprises" provision requiring a long term locked in plan that avoids the possibility of private landowners having to assume liability for new species found on their land. However, if properly administered, HCPs can provide a way to address the tension between habitat protection and human activities. When community outreach is included as part of the negotiation process, along with both monitoring and adaptive management, the HCP process can potentially increase both the acceptance and achievement of habitat protection.

89. *See* Threatened and Endangered Species Recovery Act, H.R. 3824, 109th Cong. (Sept. 30, 2005) (passes in the House of Representatives).

90. Blumm and Swift, *supra* n. 11, at 490.

91. *Id.* at 497-99.

Similarly, fulfilling the mandate of ESA to recover species through Section 7 and 9 could require a reversion to some previous condition where human activity was at a minimum. Congress expressed this concern when it stated that the designation of critical habitat could lead to designating all habitats of a listed species as their critical habitat, thereby increasing area designated as critical habitat.[92] This could "increase proportionately the area that is subject to the regulations and prohibitions which apply to critical habitat."[93] In practice however, under Sections 7 and 9 agencies include only specific areas occupied by the species at the time of listing, with features "essential" to the conservation of the species, although FWS has also added that areas not currently containing essential features, but which might in the future, may be designated as critical habitat.[94]

V. CULTURAL CONSTRAINTS TO ESTABLISHING A RIGHT TO HABITAT PROTECTION

A. *Reconciling Tribal Goals and Environmental Interests*

Habitat protection is clearly critical for many tribes who rely on adequate water to sustain essential fisheries. Tribes have challenged policies that degraded watersheds and won, relying on treaty claims as well as on the Endangered Species Act. These victories achieved some of the same goals that environmental groups pushed for and litigated under ESA. In addition, both communities ran into similar conflicts regarding the reallocation of previously appropriated water and the need to balance conservation and development. Tribes and environmental groups can achieve better representation and ultimately greater protection for fisheries and aquatic habitat by finding areas of common ground and forming strategic coalitions. One problem is that fundamentally, the resource concerns of tribal communities and environmental groups emerge from different roots.[95] For many Indian people, the notion of water as a commodity and the "ownership" of water, land or other natural resources is foreign. In addition, litigation initiated by non-Indians has often disrupted tribal water rights,[96] as well as hunting and

92. Cheever, *supra* n. 51, at 49.

93. However, Section 3(5)(c) appears to limit the areas that may be designated to *not* include "the entire geographical area which can be occupied by the endangered or threatened species" except "in circumstances to by decided by the Secretary." Endangered Species Act 16 U.S.C. § 1532 (5)(c) (cited in Cheever, *supra* n. 51, at 49).

94. *See* Cheever, *supra* n. 51, 50-51 (citing 16 U.S.C. 1532(5)(A)(ii)).

95. Chelsea Congdon, *Environmental Management and the Effects of Water Use*, in *Indian Water 1997: Trends and Directions in Federal Water Policy, Report to the Western Water Policy Review Advisory Commission,* 27-32 (Todd Olinger ed., October 1997) (Relating how a meeting in 1995 of conservation groups and tribes to explore potential for cooperation was difficult because culturally their resource concerns emerge from fundamentally different roots).

96. Adrian N. Hansen, *The Endangered Species Act and the Extinction of Reserved Indian Water Rights on the San Juan River*, 37 Ariz. L. Rev. 1305 (1995) (Off reservation economic development by non-Indian caused drastic reductions in native fish population, leading to ESA action that curtailed Indian reserved water rights). *See* Carl H. Johnson, *Balancing Species Protection with Tribal Sover-*

fishing rights[97] and religious expression.[98] After struggling to validate water rights and develop water projects, tribes are often in conflict with environmental constraints placed on new development, particularly under the requirements of the Endangered Species Act.[99] The historic inability of Indian tribes to gain access to government subsidies to develop their water projects and fulfill their water rights[100] has resulted in tribes bearing a disproportionate burden to conserve endangered fish species under ESA.[101] In particular, the prohibition of federal actions likely to jeopardize species under Section 7 of the ESA has prevented some tribal water projects.[102] This is ironic since non-Indian development projects were in large part responsible for "past and continuing degradation of the environment,"[103] including the decline in fish species. While the United States is obligated to

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eignty: What Does the Tribal rights-endangered Species Order Accomplish? 83 Minn. L. Rev. 523, 525 (Dec. 1998).

97. *Mille Lacs Band of Chippewa Indians v. Minn.*, 124 F.3d 904 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 2295 (1998) (State of Minnesota sought to enjoin Chippewa tribes from exercising their treaty fishing rights despite their conservation plan to mitigate the potential for overfishing). *See* Johnson, *supra* n. 97, at 525.

98. *U.S. v. Lundquist*, 932 F. Supp. 1237 (D. Or 1996) (upholding the conviction of an Indian under the Bald and Golden Eagle Protection Act for possessing eagle parts , reasoning that it did not violate his religious or privacy rights). *See* Johnson, *supra* n. 97, at 525.

99. *See* Holt, *supra* n. 10, at 163. Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. Rev. 381, 417 (1998) (arguing that the ESA's provisions for the protection of habitat, viewed through the lens of tribal self-determination, interferes with tribal sovereignty and bears little relation to tribal ecological norms and values). Steven K. Albert, *American Indian Perspectives on the Endangered Species Act*, 9 Buff. Envtl. L.J. 175, 184-86 (Spring 2002) (arguing that ESA implementation that causes Tribes to be precluded from exercising their reserved water rights is unfair). *See generally* Jennifer M. Regis-Civetta, *The Effect of the Endangered Species Act on Tribal Economic Development in Indian Country*, 50 Wash. U. J. Urb. & Contemp. L. 303 (Fall 1996) (discussing the effect of indirect takings of endangered species on Indian reservations, and the extent to which the ESA takings provision limits economic development in Indian Country).

100. *See* Brian A. Schmidt, *Reconciling Section 7 of the Endangered Species Act with Native American Reserved Water Rights*, 18 Stan. Envtl. L.J. 109, 120 (Jan. 1999) (The history of federal investment in water projects demonstrates that the percentage of overall funding that went to Native American projects averaged 25 percent between 1920-30 and then decreased to less than 2 percent of all projects by the 1960s-1970s). *See* Michael R. Moore, *Native American Water Rights: Efficiency and Fairness*, 29 Nat. Resources J. 763, 773 (1989). Also, *see generally*, Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. Rev. 381 (1998).

101. *See generally* Zellmer, *supra* n. 100 (discussing how Section 7 of the ESA may impair the use of Native American water rights and in particular how the incremental mortality approach of Section 7 disproportionately affects Native American water development and how this has damaged the water rights of the Southern Ute, Ute Mountain Ute and the Navajo).

102. In practice, the federal government funds water development on tribal reservations, and even if the federal government did not fund a particular project, the project would probably require a Clean Water Act, Section 404 permit to dredge and fill a waterway. 33 U.S.C. 1344 (1994). *See* Schmidt, *supra* n. 101, at 116-21.

103. Lionel Boyer, Comments in Tribal Workshop on the Endangered Species Act, Seattle, Wash. (Feb 1-2, 1996). *See* Charles Wilkinson, *Symposium: Indian Law into the Twenty-First Century: The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 Wash. L. Rev. 1063, 1065 (October 1997) (discussing "the process that led up to the issuance of the Order and the extent to which the development and content of the Order fulfills the promise of a serious, bilateral relationship between the federal and tribal governments.").

protect the survival and recovery of listed species under ESA, it is also obligated to Indian tribes under its treaty and trust obligations.[104] However, if the goal of ESA to conserve species and ecosystems is shared by all affected parties, including tribes, environmental groups, the federal and state governments, and non-Indian resource users, the economic burden could be more equitably apportioned.[105]

B. *The Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*

To resolve some of these issues, an initial workshop was held in 1996, followed by a series of meetings to examine how tribes could look beyond the ESA to accomplish their long-term objectives.[106] In particular, the tribes emphasized an issue that resonates with environmental groups – that ecosystem management approaches move beyond the species-by-species last ditch focus of the ESA and address both the causes for species decline and the sustainability of cultures and economies. The tribes believe such approaches should build on principles such as holistic management, sustainability, continuity of culture, and stewardship, among others.[107]

The outcome of this workshop and the additional meetings was a June 5, 1997 jointly-released Secretarial Order signed by Secretary of the Interior Bruce Babbitt and Secretary of Commerce, William Daley entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act"[108] to address the conflicts described above. The Order attempted to harmonize both Indian law and the ESA, and set out five principles, including that federal departments work directly with Indian tribes on a government-to-government basis to assist tribes in developing and expanding tribal programs to promote healthy ecosystems while being sensitive to Indian culture, religion and spirituality. Federal departments were to recognize that Indian lands are not subject to the same controls as public lands, and they were to facilitate the mutual exchange of informa-

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104. The United States has a federal trust obligation for Indian tribes, *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), that requires it to protect "to the fullest extent possible" the tribe's treaty rights and the resources on which those rights depend." *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973). This trust responsibility has a procedural component of ensuring that the trustee consults with its beneficiary to obtain the tribes' own views of their interests, *see Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22951 (May 4, 1994), and Exec. Or. No. 13084, 63 Fed. Reg. 27655 (May 14, 1998), and obligates the U.S. Department of Justice to represent tribes and their interest in court, including rights to the use of natural resources. 25 U.S.C. § 175. *See Rincon Band of Mission Indians v. Escondido Mutual Water Co.*, 459 F. 2d 1082 (1972). *See* Holt, *supra* n. 100, 155-58.

105. Holt, *supra* n. 100, at 164-165.

106. *Id.* at 165

107. Memorandum summarizing the Tribal Workshop on the Endangered Species Act (Feb. 20, 1996) (cited in Wilkinson, *supra* n. 104, at 1073-74).

108. Secretarial Order: American Indian Tribal Rights, Federal – Tribal Trust Responsibilities, and the Endangered species Act (1997). Secretarial Or. No. 3206, (June 5, 1997) (cited in Wilkinson, *supra* n. 104, at n. 43).

tion.[109] Because the Order promoted increased sharing of information on issues such as habitat protection for endangered species,[110] it can potentially increase communication and a sharing of expertise between Indian tribes and environmental groups, facilitating new opportunities to work towards common goals.[111]

VI. POTENTIAL SOLUTIONS

A. *Negotiated Settlements*

The trend in western water policy today is a movement away from new water development to a focus on managing water resources to meet competitive demands for water. As already indicated, satisfying the mandate to protect species and their ecosystems, and the rights of Indian tribes to access water and fish, requires a revisiting of past water allocation and management practices. This has primarily occurred in the courts, but litigation presents significant drawbacks.

Water conflicts on many Indian reservations, like litigation under ESA, often go through an almost endless succession of court cases.[112] In the case of stream adjudications, litigation is also lengthy and expensive and often results in paper rights to water for tribes and under ESA, without either the delivery of actual water or the provision of funds for future delivery.[113] In addition for Indian tribes, the judge is generally limited to addressing the quantity and priority of a water right without discussion of funding, water management, water marketing or the development of new water.[114]

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109. Wilkinson, *supra* n. 104, at 1082. Charles Wilkinson states that what was most significant about the Executive Order was the bilateral process through which the tribes and the federal government negotiated as equals and eventually agreed upon a final document. Set against long and mostly negative past relations between these two groups, it held out the possibility of a new way of working together to achieve common goals. The memorandum was significant in finally taking into account the concerns of the Round Valley Tribes in negotiations between NMFS, FERC and California officials over Potter Valley Hydropower Project (in Northern California) operations to recover the declining Eel River fishery. *Id.* at 1077-80. *See generally* Langridge, *supra* n. 84.

110. Potential ramifications on the negative side include that the Order was restricted to "Indian lands" rather than "Indian country," preventing tribes from regulating activities on nonmember fee land that may adversely affect critical habitat, and having to rely on NMFS and FWS to take action against non-Indian parties on allotments within reservations who may be violating ESA. *See* Wilkinson, *supra* n. 104, at 1085.

111. Carl H. Johnson, *supra* n. 99, at 561. Past mistrust between tribes and the federal government led tribal officials to sometimes withhold information from the FWS regarding listed species on the reservation. The order encourages mutual cooperation that could support increased information sharing. In addition, it could set a standard for a more appropriate model of sovereign-sovereign relationships. *Id.*

112. McCool, *supra* n. 24, at 181-82. (The water rights for the Pyramid Lake tribe, for example, have been in court off and on since 1913).

113. Royster, *supra* n. 25, at 100.

114. Austin Nunez and Mary G. Wallace, *Solutions or Symbols? An Indian Perspective on Water Settlements*, in *Indian Water in the New West*, 37 (Thomas R. McGuire et al. eds., U. of Ariz. Press 1993). Negotiated settlements can be pragmatic alternatives to litigation. However, a tribe might find itself in a weak bargaining position in negotiations if a court has not yet determined a tribe's water quantity and priority dates. Royster suggests that it may be in a tribe's best interest to litigate certain basic reserved rights issues prior to negotiating settlements. *See* Royster, *supra* n. 25, at 100-01. Peter

Negotiated water settlements can potentially address the broader goals of both tribes and environmental groups for habitat protection, and provide for the needs of all communities for housing, farming and manufacturing.[115] Their advantages include flexibility to accommodate local needs and potentially a less expensive and faster resolution of difficult issues. While tribes might have to relinquish some legal rights, they could finally receive actual "wet" water and generate a stronger ability to bargain for aspects of reserved rights that have not yet been resolved by the courts, such as access to groundwater, change of water use and off-reservation water marketing.[116]

Where ESA and tribal rights are involved with other parties in a highly politicized conflict, there can be significant advantages to utilizing a court supervised negotiated remedy. The court can set clear recovery levels and mile-posts for projected tasks and maintain continuing jurisdiction over the remedy making sure it is enforced. In addition, other groups and agencies can be brought into the process.[117] For example, in planning for the recovery of the Columbia River salmon, the Northwest Power Planning Council had a statutorily defined role under the Federal Northwest Power Act.[118] However, the treaty tribes and states also had a role in that the Council's plan for recovering the salmon was required to take into account their recommendations. This included a detailed recovery plan for the Columbia River Basin developed by the Columbia River tribes that addressed day-to-day operation of the hydro-system and reflected a clear expression of the level of protection needed to restore their fisheries to harvest levels.[119]

In the Truckee-Carson Basins in western Nevada, urban users joined forces with Indian tribes and environmental interests seeking to restore the

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Sly also notes that "the weakness of the negotiation process is its lack of structure, which can consume time and effort at high cost without measurable results." *Reserved Water Rights Settlement Manual,* 39 (Island Press 1988).

115. *See* Joseph Sax, *supra* n. 87, at 2378-79

116. Gina McGovern, *Settlement or Adjudication: Resolving Indian Reserved Rights,* 36 Ariz. L. Rev. 195, 197-98 (Spring 1994). States also gain the certainty of resolving water rights claims. Since the 1970s, settlements of Indian rights to water have increased, and they have the potential to become the preferred method of both resolving complex issues and increasing the likelihood of tribe's actually obtaining in-stream flows to sustain fisheries *See* Royster, *supra* n. 25, at 100-01. Settlements also dramatically increased spending on Indian water and related programs, a dramatic change from the past. *See* Daniel McCool, *Native Waters: Contemporary Indian Water Settlements and the Second Treaty Era,* 54 (U. of Ariz. Press 2002).

117. *See* Mary Christina Wood, *Reclaiming the Natural Rivers: The Endangered Species Act as Applied to Endangered River Ecosystems,* 40 Ariz. L. Rev. 197, 283-84 (Spring 1998).

118. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 et seq. (1994 and Supp. 1 1995). Passed by Congress in 1980, the Act created the Northwest Power Planning Council consisting of state-appointed representatives from the Columbia River Basin states. *Id.* at § 839(a)(1) – (2). The Council was charged with developing hydropower and providing for the recovery of the fish. *Id.* (discussed in Wood, *supra* n. 118, at 222-23).

119. Wy-Kan-Ush-M Wa-Kish-Wit (Spirit of the Salmon): The Columbia River Anadromous Fish Restoration Plan of the Nez Perce, Umatilla, Warm Springs and Yakima Tribes (1996) (cited in Wood, *supra* n. 118, at 226). The plan addresses the entire life cycle of the salmon from inception, when eggs are deposited in graveled spawning beds, to the end when adults return to their natal waters to spawn and then die.

degraded aquatic ecosystems. They competed with the established allocations of long term irrigators. The listing of the cui-ui and Lahontan cutthroat trout under the ESA and the emergence of two long subordinated Indian claims for water to support their traditional fishery and to irrigate crop lands, exposed the need for new water allocation patterns and governance instituted on a basin wide scale.[120] The initial defeat of the tribes, where they claimed reserved rights in attempting to gain sufficient water to support the fishery, led them to turn to the ESA as a second strategy.[121] Working with other environmental groups, they were successful in gaining control over a major source of unallocated water to use as a drought reserve,[122] which in turn created incentives for urban interests to push for a more comprehensive basin-wide settlement that emphasized more sustainable use and management that would conserve habitat.[123] Finally, in 1990, Congress intervened to create a process to develop a physical solution with the Truckee-Carson – Pyramid Lake Water Rights Settlement Act that resolved disputes between both California and Nevada and settled allocations between the Pyramid Lake Paiute Tribe and urban water users. The legislation resulted in the negotiation of the Truckee River Operating Agreement (TROA), that combined more efficient operations of existing reservoirs to both provide drought insurance for the Reno – Sparks area and improve spawning flows for the Pyramid Lake fishery.[124]

Successful settlements often involve a long-term process characterized by (a) initial litigation as a catalyst for negotiation,[125] (b) prolonged litigations, and (c) a litigation strategy aimed at winning recognition of the power of one or more parties.[126] For example, this can occur where litigation involves tribal and/ ESA claims for habitat protection,[127] and where the two groups strategize together to achieve common goals. Dan Tarlock points to strategies that can create new solutions for and the institutions for administration of basins and watersheds with a focus on more limited (but better quality) participation by involved parties.[128] Tarlock suggests that federal threats to reallocate water can often induce all parties involved in a water conflict to seek alternatives to gridlock such as negotiated settle-

120. A. Dan Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement* in Symposium, *Case Study on Regulatory Integration: Water Policy and the Protection of Endangered Species in the Truckee-Carson River Basin*, 25 Ecol. L.Q. 674, 678 (1999).

121. *Id.* at 679.

122. *Id.* (Stampede Reservoir on the Truckee River).

123. *Id.*

124. *Id.* at 684.

125. William H. Swan, *The Salt River Pima-Maricopa Settlement: An Overview*, in *Indian Water in the New West*, 119 (Thomas R. McGuire et al. eds., U. of Ariz. Press 1993).

126. McCool, *supra* n. 117 at 54-55.

127. The formation of CALFED is a good example.

128. Tarlock, *supra* n. 124, 676, n. 6 (citing Jim Rossi , *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-Making*, 92 Nw. U. L. Rev. 173 (Fall 1997)).

ments.[129] Examples include the California Bay Delta and the Orange County Multi-Species Habitat Conservation Plan, where the threat of federal clout was a driving factor behind legal and institutional innovation.[130] Tarlock also suggests that when several necessary conditions occur, there is a greater likelihood of successful basin-level solutions. These include (1) incentives by the federal government to induce all parties to consider reallocation possibilities, (2) large blocks of water held by institutional parties that have the capacity to bear risk, (3) actual or threatened legal or political power shifts, and (4) good scientific basis for physical solutions and adaptive management.[131]

VII. CONCLUSION

While the Bureau of Reclamation was supporting water development throughout the west, tribes were mostly denied the benefits of these programs. With few exceptions, projects were built by the federal government without any attempt to define or protect the prior rights of Indian tribes to the waters utilized for these projects. In addition, their environmental impacts were not considered throughout most of the twentieth century.

Since the latter part of the twentieth century, despite a significant push for habitat protection by Indian tribes and environmental groups, courts have been inconsistent in supporting both a tribal right to habitat protection and a requirement for habitat protection under ESA, and both groups continue to face declining wildlife populations. Stronger coalitions can clearly strengthen efforts to achieve greater habitat protection, such as through major changes in re-operating or significantly re-tooling existing irrigation and hydropower facilities to increase the timing and amount of in-stream flows for fish.

Social movement theorists have pointed to how success by less powerful groups in altering particular policies is related to internal characteristics, such as the ability of these groups to form successful coalitions.[132] Acknowledging that the trend today is towards negotiated settlements, developing strong coalitions between these two communities will encourage the sharing of local knowledge and expertise and support the achievement of a common goal, the right to habitat protection for rivers, their fisheries and the communities that rely on these resources for sustenance.

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129. *Id.* at 677

130. *Id.* at 683 (referencing Elizabeth A. Reike, *The Bay Delta Accord: A Stride Toward Sustainability*, 67 U. Colo. L. Rev. 341 (1996), and John Welner, *Natural Communities Conservation Planning: An Ecosystem Approach to Protecting Endangered Species*, 47 Stan. L. Rev. 319 (Jan. 1995)).

131. Tarlock, *supra* n. 121, at 681-82.

132. *See*, for example, Sidney Tarrow, *Power in Movement: Social Movements and Contentious Politics* (Press Syndicate U. of Cambridge 1998), and Doug McAdam, Sidney Tarrow & Charles Tilly, *The Dynamics of Contention* (Press Syndicate U. of Cambridge 2001) (these theorists discuss how political opportunities for successful action include the potential for political alignments and coalitions).