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Tribal Treaty Rights and Natural Resource Protection: The Next Chapter United States v. Washington - The Culverts Case

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The Earth and myself are of one mind.
The measure of the land and
the measure of our bodies are the same."
Nez Perce Chief, Hinmaton Yalatkit (Chief Joseph)

I. INTRODUCTION AND BACKGROUND

Water is the lifeblood of our natural world. How we use, regulate, and protect our water, and the habitat and fishery resources it sustains, reflects who we are as individuals, governments, and nations. Pacific Northwest Tribes ("PNW Tribes")[2] have served as guardians of our natural resources since time immemorial. In more recent times, over the last 150 years, the PNW Tribes have been forced to fight with individuals, businesses, and the state of Washington to protect and maintain their treaty rights to harvest enough salmon to feed their families. While the PNW Tribes' treaty rights to fish, hunt, and gather have been long-established, the state and federal government's duty not to interfere with the PNW Tribes' exercise of those treaty protected rights is less well defined. However, on June 11, 2018, the state of Washington's duty not to

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[2] The Tribes of Washington State that are parties to the Culvert Case proceeding include: Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallam, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribe, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Bands and Tribes of the Yakama Indian Nation, Quileute Indian Tribe, Makah Nation, and Swinomish Tribal Community. References to "PNW Tribes" shall mean all Tribes listed here.

interfere with the PNW Tribes' treaty fishing rights was dramatically defined by the United States Supreme Court decision in *Washington v. United States*, which affirmed the Ninth Circuit's decision in favor of the plaintiffs.[3] This decision recognized Plaintiff PNW Tribes' enforceable right to protect fishery habitat as a component of their treaty fishing rights.[4]

The tribal fishing rights at issue in *Washington v. United States* were established in 1854 and 1855 by the Stevens Treaties.[5] In a series of eight treaties, then Governor Stevens negotiated with the PNW Tribes for the cession of the lands, surface waters, and marine areas they controlled in exchange for the small tracts of land which comprised their reservations and their "right of taking fish, at all usual and accustomed grounds and stations."[6] Ever since, the PNW Tribes have sought to clarify and exercise their treaty-based rights to fish. The *Washington v. United States* case sets new precedent in that it recognized the PNW Tribes' right to enforce an implied duty on the part of the state and federal governments to refrain from damaging natural habitats that support the PNW Tribes' treaty protected resources, including fish, water, and game.[7]

In Section I of this article, we briefly review the historical circumstances and case law leading up to the recent decision in *Washington v. United States*. Section II discusses the procedural history in the trial court, the 9th Circuit decision, and its review by the Supreme Court. In Section III, we analyze the significance of the Supreme Court's affirmation by an equally divided court, and in Section IV, we explore how this expansion of tribal treaty rights may be used by other treaty tribes to protect their treaties involving fishing, hunting, and gathering rights. In Section V, we look into the future application of tribal treaty rights under the Superfund Statute, the Clean Water Act, and the National Environmental

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[3] United States v. Washington, 853 F.3d 946 (9th Cir. 2017), *cert. granted,* 138 S. Ct. 735 (2018).
[4] *Id*. at 59.
[5] Northwest Indian Fisheries Comm'n, *Treaties,* https://nwifc.org/member-tribes/treaties/ [https://perma.cc/2T9A-2DGU] (last visited Mar. 1, 2019).
[6] Treaty with the Nisqualli, Puyallup, etc. (commonly known as Treaty of Medicine Creek), art. 3, Dec. 26, 1854, 10 Stat. 1132, *See also* Treaty with the Dwamish, Suquamish, etc., (commonly known as Treat of Point Elliot), art. 5, Jan. 22, 1855, 12 Stat. 927; *See also* Treaty with the S''K;lallam (commonly known as the Treaty of Point No Point), art. 4, Jan. 26, 1855.
[7] Mason Morisset & Carly Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation,* 1 BELLWEATHER: THE SEATTLE J. ENVTL. L. POL'Y 29, 34 (2009).

Policy Act, and in Section VI, we offer our view of the Culvert Case treaty claim model framework. Finally, our conclusion is laid out in Section VII.

A. *Treaty Rights Were Ignored from the Beginning*

Tribes have faced an uphill battle in exercising their treaty-based fishing rights despite the fact that the treaties explicitly provide the right. In the late 1880s, several members of the Yakama Tribe were forced to file suit to enforce their right to access off-reservation fishing sites because a private landowner had fenced off sections of the Yakima River, preventing access to the Tribe's traditional fishing grounds. [8] The trial court initially ruled in favor of the landowner, but the Supreme Court of the Territory of Washington reversed that decision, finding that the treaty created an equitable servitude on the land that was not ended by the transfer of land from the government to a private individual.[9] A similar issue arose several years later when two brothers who owned land on opposite sides of the Columbia River obtained licenses from the state of Washington to operate several fish wheels that prevented passage of many of the salmon at Celilo Falls. There, the U.S. Attorney filed suit to enforce tribal treaty rights, and again the trial court upheld the landowners' right to exclude others from their property. In 1905, the U.S. Supreme Court reversed that decision, holding that the applicable treaty reserved the tribal right to fish at traditional locations; therefore, when the government transferred the land the new owners could not obtain greater property rights than those acquired by the government through the treaty.[10] Fourteen years later, in another case involving landowners preventing access to fishing grounds near Celilo Falls, the U.S. Supreme Court affirmed an injunction issued by the U.S. District Court in Oregon that prevented the landowners from excluding tribal members.[11] Significantly, this case also affirmed the tribal right to access fishing grounds outside of their ceded territory if it can be shown that the area was used for tribal resource gathering.[12]

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[8] United States v. Taylor, 3 Wash. Terr. 88, 88–89 (1887).
[9] *Id.* at 97–98.
[10] United States v. Winans, 198 U.S. 371, 383–84 (1905).
[11] Seufert Bros. Co. v. United States, 249 U.S. 194 (1919).
[12] *Id.* at 198–99.

Not only did PNW Tribes face significant resistance from private landowners and state authorities to access their usual and accustomed fishing grounds, but the number of fish also steadily decreased. As the state developed and became more populated pressure on the fisheries increased. In response, the State put in place fishing regulations and attempted to force the PNW Tribes to comply with those regulations.

B. *The Fish Wars*

Though the PNW Tribes' right to fish is protected by treaty, tribal members were initially arrested when fishing off-reservation in the 1940s.[13] In 1945, Billy Frank Jr., a member of the Nisqually Tribe who later became a prominent activist for treaty rights and also the long-term Chairman of the Northwest Indian Fisheries Commission, was arrested by game wardens at the age of fourteen for fishing with a net on off-reservation property owned by his family on the Nisqually River.[14] Tensions continued to grow as the fish stocks declined due to increased harvests by unregulated commercial boats and new hydroelectric projects that impacted available habitat.[15] By the 1960s, Billy Frank Jr.'s property, known as "Frank's Landing", was the site of unlicensed "fish-ins" where tribal members repeatedly returned to exercise their treaty rights despite numerous arrests and convictions.[16] The cause began to draw national attention, and in a show of support to the Puyallup Tribe Marlon Brando was arrested for unlicensed fishing during a protest in 1964.[17]

In September 1970, members of the Puyallup Tribe in boats wielding rifles and firing warning shots, challenged government authorities who approached their nets.[18] A protester eventually threw a fire bomb onto a bridge to block the officials from

[13] Charles Wilkinson, Messages from Frank's Landing: A Story of Salmon, Treaties, and the Indian Way (Seattle, WA: University of Washington Press, 2000); Fay Cohen, Treaties on Trial (Seattle, WA: University of Washington Press, Seattle, 1986) 31.
[14] William Yardley, Billy Frank Jr., 83, *Defiant Fighter for Native Fishing Rights*, N.Y. TIMES (March 9, 2014), https://www.nytimes.com/2014/05/09/us/billy-frank-jr-fighter-for-native-fishing-rights-dies-at-83.html
[15] Gabriel Chrisman, *The Fish- Protests at Franks Landing* (Autumn 2007), https://depts.washington.edu/civilr/fish-ins.htm#ref12
[16] *Supra*, note 14.
[17] *Supra*, note 15.
[18] *Id*.

approaching, but the authorities eventually raided the group's camp, breaking up the demonstration with clubs and tear gas.[19] It was in this context that the federal government finally intervened on behalf of the PNW Tribes, suing the state of Washington for its failure to satisfy its obligations under the treaties.[20]

C. *Puyallup I and II – the Supreme Court Recognizes Duty of the United States and the State of Washington to Not Degrade Tribal Fishing Rights*

In what became known at *Puyallup I* and *II*, the U.S. Supreme Court found that state regulation of fisheries for the purpose of conservation could be upheld so long as appropriate standards were met, with "fair apportionment" of fish between Indians and non-Indians.[21] This ruling affirmed the PNW Tribes' interpretation of their treaty rights and protected their "right to take fish" for both a living and food. These decisions were significant because they implied a clear duty on the part of the state not to take actions that degrade the PNW Tribes' treaty-based fishing rights.[22]

D. *United States v. Washington – The "Boldt Decision" Clarifies Existence of Off-Reservation Treaty Rights*

As fisheries declined, due at least in-part to habitat loss, the PNW Tribes asked the court to determine to what extent they could enforce the implied duty of the state to not degrade fishing or hunting habitats used under their treaty rights. In 1974, in a case known as the "Boldt Decision," Federal District Judge Boldt clarified the meaning of "fair apportionment" and the "right to take fish."[23] He found that the PNW Tribes had bargained for the right to continue fishing where they always had, regardless of whether

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[19] *Id*.
[20] *Id*.
[21] Puyallup Tribe v. Dep't of Game of Wash. (*Puyallup I*), 391 U.S 392, 398 (1968); Dep't of Game of Wash. v. Puyallup Tribe (*Puyallup II*), 414 U.S. 44, 48–49 (1973).
[22] United States v. Winans, 198 U.S. 371 (1905) (holding that the right to take fish requires grantees of the state to allow tribe members access to the usual and accustomed fishing sites); United States v. Winters, 207 U.S. 564 (1908) (holding the tribes had a treaty-based right to water for the purposes of the tribal reservation, including farming and fishing).
[23] United States v. Washington (The Boldt Decision), 384 F. Supp. 312, 332, 392 (W.D. Wash. 1974).

that location was on their reservation or not.[24] This decision acknowledged the role of the twenty treaty Indian tribes in Western Washington as co-managers of the salmon resource with the state of Washington and apportioned the fish between tribal and non-tribal fisherman, holding that PNW Tribes were entitled to fifty percent of the fish runs passing through the Tribes' usual and accustomed fishing grounds.[25]

The case brought against the state was bifurcated for trial, and in 1980, Phase II of the case proceeded to trial. The federal government and tribal governments alleged than an environmental right to have the fisheries resource protected from adverse state action also arose by implication from the reserved right to harvest fish.[26] Judge Orrick of the Northern Division of California held that there is an "implied environmental right" in the treaties.[27] The Judge analogized the habitat right the tribes sought to the right of an implied reservation of water necessary for the protection of fish and farming recognized by the Winters Doctrine.[28] On appeal, the Ninth Circuit dismissed the proceeding for procedural reasons, but made it clear that the issue would be reconsidered if the plaintiffs came forward with a specific case demonstrating the state's obligations regarding habit protection.[29]

II. UNITED STATES V. WASHINGTON – THE CULVERTS CASE

As Washington grew and a network of roads was built, the state constructed and maintained culverts under state roads and highways to divert water away from the roadways. However, the culverts were often not designed or built to allow for fish to pass upstream to access their spawning grounds. These culverts owned and operated by the state, directly contributed to the reduction of salmon runs by reducing available habitat that is essential to the reproductive cycle of anadromous fish. This situation provided evidence supporting that the state was acting with the primary purpose or objective of affecting or regulating fish supplies that are

[24] *Id.* at 407.
[25] *Id.* at 343.
[26] United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980).
[27] *Id.*
[28] *Id*. at 204–05. The Winters Doctrine holds that an implied reservation of water reserved the amount of water necessary to fulfill the purpose of the reservation. United States v. Winters, 207 U.S. 564, 576 (1908).
[29] United States v. Washington, 759 F.2d 1353 (9th Cir. 1985)

protected by treaty – evidence the tribes did not have on appeal in Phase II of the Bolt Decision.

A. *2001 District Court*

Based on the adverse impacts of culverts on the fisheries, in 2001 the PNW Tribes, joined by the United States, asked the U.S. District Court to find that Washington State had a treaty-based duty to preserve fish runs and habitat at off-reservation fishing sites that were usual and accustomed places and to compel the State to repair or replace culverts that impede salmon migration.[30] The PNW Tribes averred that a "significant reason for the decline of harvestable fish has been the destruction and modification of habitat needed for their survival" [31] and noted that the state's own estimate was that removal of obstacles presented by blocked culverts would result in an annual production increase of 200,000 fish.[32]

District Court Judge Martinez found in favor of the PNW Tribes and held that while culverts impeding fish migration were not the only factor diminishing causing diminishment of upstream habitat, the state's construction and maintenance of culverts that impede salmon migration had diminished the size of salmon runs and thereby violated the State's obligation under the treaties.[33] While not explicitly imputing an affirmative duty to take any and all steps possible to protect fish habitat, the decision did cite Judge Orrick's opinion for the basis that such a duty is implied and held that the State had to "refrain from building or operating culverts under state-maintained roads that hinder fish passage."[34] The decision incorporated the Ninth Circuit's caveat that a remedy would only be granted on the basis of specific facts and circumstances of a particular complaint.[35]

Judge Martinez found that the intent of the parties to the Stevens Treaties was to ensure the PNW Tribes would be able to take fish in sufficient amounts to meet their subsistence needs forever.[36] Thus, it is the State's burden to show that "any environmental degradation of the fish habitat proximately caused by the State's actions would not impair the Tribes' ability to satisfy

[30] United States v. State of Washington, 2007 WL 2437166, at 2.
[31] *Id.* at 3.
[32] *Id*.
[33] United States v. Washington, 2007 WL 2437166, at 10.
[34] *Id*.
[35] *Id.* at 5.
[36] *Id*. at 9.

their moderate living needs."[37] The term "moderate living" was interpreted to mean a measure securing fish in an amount so much as, but not more than necessary, to provide the Tribes with a livelihood.[38] Based on that definition, Judge Martinez indicated that the PNW Tribes had provided sufficient evidence of a diminishment of salmon, and that the State's actions were a direct cause of the diminishment, such that the PNW Tribes' treaty rights had been damaged. Further, Judge Martinez ruled that the PNW Tribes did not have to "exactly quantify the numbers of missing fish" so long as there is evidence that the culverts are responsible for some portion of the proven decrease of fish runs.[39]

B. *2013 District Court*

In light of the specific factual showing of lost fishing opportunities due to culverts that blocked the upstream migration of fish, in 2013, the District Court issued a permanent injunction requiring the State to significantly increase its efforts to remove and replace the State-owned culverts that have the greatest adverse impact on the fish habitat by 2030.[40] The Court determined that the PNW Tribes' treaty right to take fish includes protection of fish habitat from man-made degradation. It found that culverts blocking the free passage of salmon upstream result in man-made degradation of the fish habitat. In coming to this conclusion, the District Court relied on the significant decrease in salmon stocks in Washington since 1985, specifically focusing on evidence demonstrating that barrier culverts block hundreds of thousands of salmon from traveling up freshwater rivers and streams to reach their spawning grounds.

C. *2017 Ninth Circuit Decision*

On appeal, the Ninth Circuit upheld the District Court's injunction with a unanimous 3-0 decision, which affirmed the District Court's requirement for Washington State to repair or replace state-owned culverts prohibiting free passage of fish to

[37] *Id*. at 4, (citing United States v. Washington, 506 F. Supp. 187, 207 (1990)).
[38] *Id.* at 7.
[39] *Id.* at 3.
[40] United States v. Washington, No. CV 70-9213, 2013 WL 1334391 (W.D. Wash. Mar. 29, 2013).

spawning grounds and other important habitats.[41] In affirming the injunction, the District Court ruled that Washington State was obligated under the Stevens Treaties to ensure that there were enough fish available for the PNW Tribes to make a "moderate living."[42] Washington State petitioned the Ninth Circuit for both a panel and en banc rehearing but was denied.[43] The dissenting minority of the en banc review issued an opinion and argued that the majority's reasoning ignored the Supreme Court's holding in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, that the opinion was overly broad, and that if unchecked, could significantly affect natural resource management throughout the Pacific Northwest.[44] The majority disagreed with each of those allegations, but because the Ninth Circuit declined to articulate a standard for "moderate living," this standard may be the subject of future litigation.[45]

D. *Review by the Supreme Court*

In 2017, Washington State filed a petition for review of the Ninth Circuit decision with the Supreme Court.[46] The Supreme Court accepted review and agreed to hear the following three issues: (1) whether the treaties guarantee the tribes a "moderate living" from salmon harvests; (2) whether the federal government is barred from bringing the suit because the federal government approved the design and implementation of the culverts for decades; and (3) whether the District Court's injunction violates principles of federalism because there was no judicial finding of a clear connection between culvert replacement and tribal fishing.[47]
The Justices who heard argument appeared particularly interested in identifying a clear test for determining treaty violations and in searching for some quantitative measure of habitat degradation that could serve as a standard for determining when state, local, or

[41] United States v. Washington, 853 F.3d 946, 970-76 (2017).
[42] *Id.* at 962.
[43] United States v. Washington, 864 F.3d 1017, 1018 (2017).
[44] *Id.* at 1024.
[45] *Id.* at 1020.
[46] State of Washington v. United States of America, WL 3600608 (9th Cir. 2017) *cert. granted* (No. 17-269).
[47] Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269), Clerk's Letter of March 23, 2018, available at www.supremecourt.gov/qp/17-00269qp.pdf

private activity would interfere with tribal fishing right.[48] Unfortunately, neither side would commit to an absolute percentage as a test for habitat degradation. Considerable time was also spent discussing the scope of the District Court injunction, with Washington state contesting its factual premises. Washington's Solicitor General proposed a standard based on "a large decline in a particular river."[49] Attorneys for the United States and the PNW Tribes argued that the test should be whether the culverts caused a "substantial decline" in the salmon population.[50]

III. THE UNITED STATES SUPREME COURT AFFIRMS THE NINTH CIRCUIT

On June 22, 1018, the Supreme Court affirmed per curiam the Ninth Circuit's decision in *Washington v. United States* in a 4-4 decision.[51] The Justices were evenly split because Justice Kennedy had recused himself from hearing the case as he had previously heard a portion of the case when he sat on the Ninth Circuit.[52] When the Supreme Court reaches a tie, the lower court ruling generally stands; however, that does not mean that the lower court's decision becomes the law of the land.[53]

The Supreme Court's first tie decision was in 1792. The case, *Hayburn's Case*, required federal circuit courts to determine pensions for disabled revolutionary war veterans. The Supreme Court heard the case, but as it explained, "the Court being divided in opinion on that question, the motion was not allowed." The tie vote in *Hayburn's Case* did not result in the affirmance of a lower court decision but, rather, the denial of the Attorney General's motion. The principle embodied in the case, however, applies to situations where the Supreme Court reviews the decision of a lower

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[48] Transcript of Oral Argument at 5-6, Washington v. United States, 138 S. Ct. 1832 (2018) (No. 17-269).
[49] *Id.* at 5.
[50] *Id.* at 39, 61.
[51] United States v. Washington, 853 F.3d 946 (9th Cir. 2017), *cert. granted,* 138 S. Ct. 735 (2018).
[52] John Eligon, *A Victory For a Tribe That's Lost Its Salmon*, N.Y. TIMES, June 11, 2018 at A12.
[53] *See* United States v. Pink, 315 U.S. 203, 216 (1942) (explaining that an affirmance by equal division is binding on the parties to that litigation but to no one else). *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 n.7 (1987) ("Of course, an affirmance by an equally divided Court is not entitled to precedential weight.").

court. Under the principle in *Hayburn's Case*, the "Supreme Court views itself as being unable to take affirmative action—including reversing the decision of a lower court—in the absence of a majority vote of the Justices." Thus, a tie decision essentially binds only the particular parties in the case to obey what the lower court ruled. That said, if there is no existing authority on the law or the facts, a tie decision still carries persuasive authority in the form of the lower court's decision. For example, if another circuit hears a case with similar facts, it may look to the Ninth Circuit's decision as persuasive authority.[54]

If the Supreme Court were to hear a similar case, however, the Court's decision will likely be significantly influenced by recent changes to the Court's makeup, which now includes President Trump's appointment, Brett Kavanaugh. Mr. Kavanaugh's views regarding Indian Law are relatively unknown. According to Mathew Fletcher, Professor of Law at Michigan State University as well as a citizen of Grand Traverse Band of Ottawa and Chippewa Indians, Mr. Kavanaugh has written less than ten relevant opinions addressing tribal issues. Of those opinions, none "are overtly pro-Indian or anti-Indian."[55]

In contrast, Justice Gorsuch's tenure on the Tenth Circuit provided significant opportunities to address tribal issues. While sitting on the Tenth Circuit, Justice Gorsuch wrote eighteen opinions related to federal Indian law or Indian interests and participated in an additional forty-two such cases.[56] Rather than defer to agency interpretation, Justice Gorsuch has turned to canons of statutory construction, which suggests that he may look closely at specific treaty language when making determinations regarding the rights

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[54] *See Justin Pidot, Tie Votes in the Supreme Court, 101 Minn. L. Rev. 245, 253 (2016).*. The author's survey showed that tie votes have been rare and have averaged fewer than two occurrences per year. The survey also indicated that issues of importance are presented to the Court again very quickly.

[55] Rebecca Nagle, *Brett Kavanaugh, The New Supreme Court Associate Justice Nominee, Should Be Questioned About Native Rights*, NATIVE NEWS ONLINE, Jul. 10, 2018, http://www.nativenewsonline.net/opinion/brett-kavanaugh-the-new-supreme-court-associate-justice-nominee-should-be-questioned-about-native-rights [https://perma.cc/G5G2-S2V2].

[56] John Dossett, *Justice Gorsuch and Federal Indian Law*, AMERICAN BAR ASSOCIATION: SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION, Sep. 20, 2017, http://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2017/september_2017/justice_gorsugo_federal_indian_law [https://perma.cc/G29B-9ZBZ].

reserved to Indian tribes.[57] His previous experience with federal Indian law suggests that he may be both attentive to the details and respectful of the fundamental principles of tribal sovereignty as well as the federal trust responsibility.[58]

IV. BUILDING UPON THE EVOLVING BODY OF FEDERAL COMMON LAW

The Supreme Court has previously recognized implied rights beyond those expressly reserved within the treaties. This precedential history offers context for the courts' determination that implied resource habitat protection rights logically follow from adherence to the canons of treaty construction.[59]

The 2017 Ninth Circuit decision in *United States v. Washington* specifically looked to water rights case law when the Court found an implied duty of the state to not degrade fish habitat.[60] The water rights cases held that when interpreting the treaties, courts should infer a promise to "support the purpose of the Treaties."[61] In the water rights cases discussed below, this meant that even though an explicit promise to provide water or access to water was not written into the treaty, the courts found that the treaties carried an implied promise; otherwise, the purpose of the treaty would have been meaningless.[62]

The 1908 Supreme Court decision in *Winters* was the first case to recognize the implied right to water.[63] In the treaty that created the Fort Belknap Reservation, while there was no explicit reservation of water use on the reserved lands, the Supreme Court nonetheless inferred a reservation of water "sufficient to support the tribe" because without the reservation of water, the lands reserved for the Tribe were arid and practically valueless.[64] "Between two inferences, one of which would support the purpose of the

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[57] *Id*.
[58] *See* Ute Indian Tribe v. Utah, 790 F.3d 1255 (10th Cir. 2015) (addressing issues of sovereignty); Ute Indian Tribe v. Myton, 835 F.3d 1000 (10th Cir. 2016) (addressing issues of sovereignty)*;* Fletcher v. U.S., 730 F.3d 1206 (10th Cir. 2013).
[59] Mason D. Morisett & Carly A. Summers, *Clear Passage: The Culvert Case Decision as a Foundation for Habitat Protection and Preservation*, BELLWEATHER: SEATTLE J. ENVTL. L. & POL'Y 29, 7 (2009).
[60] United States v. Washington, 853 F.3d 946, 964-65 (9th Cir. 2017).
[61] *Id.*
[62] *Id.*
[63] United States v. Winters, 207 U.S. 564, 577 (1908).
[64] *Id.* at 576.

agreement and the other impair or defeat it, the court chose the former."[65]

The *Winters* decision was later affirmed in *United States v. Adair*. In *Adair*, The Klamath Tribe's 1854 treaty promised that the Tribe would have the right to "hunt, fish, and gather on their reservation" but contained no explicit reservation of water rights. [66] On the reservation, the Klamath Marsh provided the Tribe's primary hunting and fishing areas and relied on a flow of water from Williamson River.[67] Because game and fish in the Klamath Marsh depended on a continual flow of water, the treaty's purpose would have been defeated without the flow. In a decision foreshadowing the eventual decision regarding the impacts of culverts on fisheries in Washington, the Supreme Court inferred a promise of water sufficient to ensure an adequate supply of game and fish.[68]

Cases involving treaty-reserved water rights have typically addressed surface waters. However, in a case that is still before the courts, the Ninth Circuit recently affirmed, and the Supreme Court denied certiorari, regarding a trial judge's determination that the Agua Caliente Band of Cahuilla Indians, located in California's Coachella Valley, have a reserved right applying to groundwater.[69] Due to the arid environment in that area, the groundwater of the Coachella Valley aquifer has been essential for tribal irrigation and drinking water, and is also a key part of the Tribes' ceremonial and spiritual traditions. In May 2013, the Tribe filed suit against the Coachella Valley Water District and Desert Water Agency for damage caused by the water agencies' ongoing overdraft of the Coachella Valley aquifer and its artificial recharge with untreated water imported from the Colorado River.[70] The Tribe and the United States argued that under federal law the Tribe has a reserved right to enough water to fulfill its present and future needs, regardless of whether that water is surface or groundwater.[71] The trial judge recognized the Tribe's reserved water rights and ruled

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[65] *Id.* at 577.
[66] United States. v. Adair, 723 F. 2d 1394, 1408 (9th Cir. 1983).
[67] *Id.* at 1398.
[68] *Id.*
[69] Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist., 849 F.3d 1262 (9th Cir. 2017); Desert Water Agency v. Agua Caliente Band of Cahuilla Indians, No. 17-42, 2017 U.S. LEXIS 7023, at *1 (Nov. 27, 2017), *cert. denied*.
[70] *See id*. at 1266.
[71] *Id.* at 1271.

that under the doctrine of *United States v. Winters*, a tribal-reserved right may be satisfied with groundwater.[72] In 2017, the Ninth Circuit affirmed that decision, and the Supreme Court refused to hear an appeal from the water agencies.[73] The parties agreed to approach the case in three phases and to address the following in turn: (1) whether the Tribe has a reserved or aboriginal right to groundwater (now complete—affirming the reserved right); (2) whether the Tribe's reserved right to groundwater includes a water quality component, the standards for quantifying Tribe's water rights, and whether the Tribe owns the pore space in the aquifer below its reservation; and (3) actual quantification of the Tribe's groundwater and pore space rights within the aquifer, and potentially a determination of the water quality standard that must be met to fulfill the Tribe's water right.[74] Phase 2 of the case is currently before the trial court.[75]

The treaty language at issue in *United States v. Washington* explicitly promises that the treaty secures the PNW Tribes' right to fish such that there would be food forever.[76] Thus, no such inference was needed. However, the Ninth Circuit's decision explicitly stated that even if the treaty had not contained the explicit promise of "food forever", the Court would have inferred, as in *Winters* and *Adair*, a promise to support the purpose or intent of the treaties.[77]

V. TRIBAL TREATY RIGHTS - WHERE DO WE GO FROM HERE?

A. *Bringing Claims*

United States v. Washington has the potential to create a new platform from which Tribes may assert their treaty rights. The case builds on strong precedent and outlines a clear strategy for bringing treaty-based claims. *United States v. Washington* could be used to support the ability of tribes to protect their direct (the reserved right to hunt, fish, gather, etc.) and indirect resources (protection of habitat that ensures continued access to the named right) guaranteed

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[72] *Id.*
[73] *Id.* at 1273.
[74] *Id.* at 1267.
[75] Order Granting Plaintiff's Motion to Lift Stay and Proceed with Phase II (Dkt. No. 173), Doc 180 Order Granting Plaintiff's Motion to Lift Stay and Proceed with Phase (IN CHAMBERS)
[76] Treaty of Medicine Creek, 10 Stat. 1132; see also Treaty of Point Elliot art. V, 12 Stat. 927, Treaty of Point No Point art. IV, 12 Stat. 933.
[77] United States v. Washington, 853 F.3d 946, 965 (2017).

under the treaty. The decision could have broad implications for other government or private entities that own, manage, or control barriers—including tide gates, floodgates, and dams—if it can be demonstrated that those things block or diminish a treaty-guaranteed right to hunt, fish, or gather a natural resource. This decision creates a foundation to argue for a de facto environmental servitude on the part of the state and federal government, once a tribe can establish that a state action causes significant decreases in the tribe's ability to hunt, fish, or gather their named resource under the treaty. This narrow focus may actually make the decision less vulnerable to reversal by future courts because there is a definitive standard that tribes must meet in order to bring a duty-based treaty resource claim. In order to bring a successful duty-based treaty resource claim, tribes will need to have a treaty-reserved right to fish, game, or other natural food source that then creates an inference of an implied duty by the state to protect the natural habitat that supports the direct resource protected under the treaty.[78]

As an example of expanding the scope of this decision beyond just the PNW tribes in the Culverts Case, the Chippewa Tribes have a treaty reserved right similar to the PNW Tribes. The 1837 Treaty explicitly states that the Chippewa Tribes retain the privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, but such privilege is at the pleasure of the President.[79] So long as the Chippewa can identify a diminishment of the wild rice and aver that a significant reason for the diminishment is the state's destruction and modification of the habitat where the wild rice grows, it is likely that a court will find an implied duty on the part of the state to ensure that the amount of wild rice within the habitat is enough to provide for a moderate living.

B. *Application under the Superfund Program*

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), for wastes left on-site, remedial actions must comply with federal environmental laws that are legally applicable or are relevant and appropriate under

[78] *See*, *e.g.*, Treaty of Medicine Creek, art. III, 10 Stat. 1132 (1854).
[79] Treaty with the Chippewa, art. V, 7 Stat. 536 (1837).

the circumstances of the release.[80] In addition, Superfund remedial actions must comply with state environmental or facility siting laws, provided that state requirements (1) are promulgated; (2) are more stringent than federal laws; and (3) are identified by the state in a timely manner.[81] These standards, which must be met, are called **a**pplicable or **r**elevant and **a**ppropriate **r**equirements (ARARs).

The decision in *Washington v. United States* may be interpreted to establish treaty-related ARARs that prohibit the diminishment of treaty-reserved tribal resources. In the appropriate context, treaties should be found to establish ARARs because treaties to which the United States is a party are equivalent in status to federal legislation and form part of what the Constitution calls "the supreme Law of the Land."[82] Where the implied obligation to protect indirect resources under a treaty is not met by existing federal or state laws, the treaty's requirements can be read as a federal environmental law applicable as an ARAR if the Environmental Protection Agency (EPA) is notified by the affected tribe of the obligation under the Clean Water Act (CWA).[83] This could help tribes ensure that the cleanup of contaminated sites, either on or off the reservation, is performed to a standard that is protective of their direct and indirect treaty-based resource rights.

C. *Application under the Clean Water Act*

Under the CWA, the federal government has an obligation to establish water quality standards (WQS), which provide the regulatory and scientific foundation for protecting water quality under the CWA.[84] WQS not only set water quality goals for specific water bodies but also serve as the regulatory basis for establishing water quality-based treatment controls and strategies. The authority to develop WQS can be delegated to states and tribes, but the EPA must approve all proposed standards before they are applicable under the CWA.[85]

The decision in *Washington v. United States* may provide a tool to allow tribes to push for the establishment of more stringent

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[80] *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9621(d)(2)(A)(i)–(ii) (1986).
[81] *See*, *e.g.*, *Id.*
[82] U.S. CONST. art. VI, cl. 2.
[83] *See* 40 C.F.R. §§ 131.4(c), 131.10-13.
[84] 33 U.S.C. § 1313.
[85] *Id.*

WQS based on the federal and state obligation to protect the indirect resources supporting the treaty-reserved resources. Where a proposed WQS fails to protect those resources, the approval of the WQS would result in a violation of the treaty-based obligations addressed in *Washington v. United States*.

D. *Application under the National Environmental Policy Act and Related State Acts*

The National Environmental Policy Act (NEPA) and the local State Environmental Policy Act (SEPA) both present opportunities to pro-actively apply the *Washington v. United States* decision. It holds that governmental agencies and third parties cannot take actions that diminish a tribe's right to a reserved or implied treaty right.[86] The most efficient way to ensure that those rights are considered is to add a requirement into NEPA and SEPA environmental checklists requiring applicants to prove that their proposed development will not diminish a reserved or implied tribal right.

By placing the tribal rights review requirement into the permitting documents, concerns of whether a proposed development will affect tribal rights in the future is addressed preemptively. This creates a place for tribes to be at the negotiating table and provide an opportunity for cooperation that could preemptively avoid protracted, uncertain, and costly litigation.

VI. THE CULVERT CASE MODEL

Despite the Culverts Case's ability to augment certain types of claims, there are three overarching potential limitations on the scope of the decision's ability to create a successful new pathway for tribal claims. The first limitation is the fact-specific inquiry that must be conducted. The second limitation is the lack of a definitive standard for what amounts to a "moderate living."[87] This is concerning because "moderate living" standards can change depending on the resource that must be protected, and it affects what duty the state and third-party actors must take to mitigate or remedy the degradation. Finally, the third limitation is determining what an

[86] *See* United States v. Washington, 853 F.3d 946, 967 (2017) (citing Cramer v. United States, 261 U.S. 219, 234 (1923)), *aff'd by an equally divided court* Washington v. United States, 138 S. Ct. 1832 (2018).
[87] *See* United States v. Washington, 853 F.3d 946 (2017).

appropriate remedy would be for any future cases. In *United States v. Washington*, a clear remedy was available based on the allegations brought, but due to the complexity of environmental damages claims, determining remedies is never easy.

The PNW Tribes' and federal government's arguments proved successful in part because the PNW Tribes established that state-owned road culverts were causing a substantial decrease in the number of salmon to which the PNW Tribes were entitled. There was a clear decrease in the protected resource—salmon, the state's duty was identified, and the PNW Tribes presented sufficient evidence of causation on the part of the state that caused the decrease in their protected resource.[88] Accordingly, successful application of the principles in the Culverts Case elsewhere will likely require (1) a similar fact-specific inquiry in order to determine the baseline level of unimpaired resources, services, and evidence of the decline in a treaty protected resource; (2) a duty on the part of the state or third-party to protect or not degrade the resource; and (3) sufficient evidence to demonstrate the state or third party's actions caused or contributed to the decline in the treaty-protected resource.

Furthermore, because neither the District Court nor the Ninth Circuit defined the "moderate living" standard, the Supreme Court's tie decision leaves open the extent of the state's duty in any particular case. While Washington State tried to argue that a definition was needed in order to establish the extent of its duty, the courts found that in this case a definition was not needed in order to find a duty on the part of the state.[89] However, because this term was not defined, the extent of the state's duty must be determined on a case by case basis.

Finally, the question of what an appropriate remedy would be in any future case remains. In *Washington v. United States*, the Court affirmed the district court's decision to order the state to remove or fix all state-owned culverts that blocked access to salmon passage.[90] This is a relatively straightforward remedy because there is a direct connection between physical structures and diminishment of the fisheries. For other claims of resource impairments, a determination of an appropriate remedy may prove more

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[88] *Id.* at 966.
[89] *See Washington,* 853 F.3d at 958-59 (citing to *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979)).
[90] *See Id.* at 979-980.

challenging due to the complexity of environmental claims and number of parties involved.

VII. CONCLUSION

The Ninth Circuit decision, affirmed by the Supreme Court, requires the Washington state to meet its duty not to interfere with the PNW Tribes' treaty protected rights and to correct its own actions as well as those of state-sanctioned private actors that either directly or indirectly limit those treaty rights. This newly defined obligation creates an opportunity for tribes, states, private parties, and federal agencies to develop guidelines to improve their relationships and improve the quality of the environment for the benefit of all citizens. It is your co-authors hope that moving forward, we shall all be guided by the words of Chief Joseph and embrace our collective duty to protect the Earth.