

# ARTICLES

## 19<sup>TH</sup> CENTURY INDIAN TREATIES AND 21<sup>ST</sup> CENTURY ENVIRONMENTAL AND NATURAL RESOURCES ISSUES: IS THERE A CONNECTION?

BY

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*The Stevens Treaties of 1854 and 1855 guaranteed, among other things, tribal rights to hunt and fish. In recent years, court enforcement of the Stevens Treaties has led to complex injunctions that, as in United States v. Washington, resemble environmental regulations. This Article discusses some of the questions raised when environmental policy is made through the judicial enforcement of the Stevens Treaties, particularly questions of interpretation, institutional competence, and State–Tribal relations.*

### I.

Knowing the focus of past Huffman Lectures, I thought I would talk to you about environmental and natural resource law, but not in the ordinary sense. Just like other areas of the law, they traditionally operate from a confluence of the three branches of government: the legislature passes a statute, the executive implements it, and the

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judiciary sits ready to ensure that the other branches have acted within legal bounds.

Today, however, a shortcut approach to environmental and natural resource regulation is becoming increasingly prevalent.<sup>1</sup> Rather than advocating for legislative action, many instead favor dusting off 19th-century treaties with Indian tribes and putting those treaties to work in resolving modern-day problems.<sup>2</sup> I'm here to discuss such practice. Specifically, I wish to explore the recent efforts to utilize the Stevens Treaties of the mid-1800s to deal with the current problem of salmon population decline in the Northwest.

### A.

Let me start by providing some background. The Stevens Treaties were negotiated with Northwest tribes between 1854 and 1855 by the first Governor and first Superintendent of Indian Affairs of the Washington Territory, Isaac Stevens.<sup>3</sup> Working on behalf of the United States, Governor Stevens began his diplomatic efforts in December of 1854 by signing the Treaty of Medicine Creek—now known as McAllister Creek—with several tribes in South Puget Sound.<sup>4</sup> He then negotiated his way through the Northwest Territories over the next ten months, at each stop reading from a pre-drafted document with proposed terms to persuade the Indians to cede large portions of their land interests to the United States.<sup>5</sup> He finally ended his tour in October of 1855 in central Montana, signing the Treaty with the Blackfeet.<sup>6</sup>

The result of the Stevens Treaties was that the Northwestern tribal parties relinquished their interests in the land west of the Cascade Mountains and north of the Columbia River, and in exchange they received monetary payments along with a guarantee of certain rights to

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<sup>1</sup> 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, 282 (2003).

<sup>2</sup> *Id.* at 311.

<sup>3</sup> *Id.* at 288.

<sup>4</sup> *Id.* at 289.

<sup>5</sup> *Id.*

<sup>6</sup> Treaty with the Blackfeet, art. I, Oct. 17, 1855, 11 Stat. 657. Over the course of his negotiations, Governor Stevens also signed the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, the Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933, the Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939, the Treaty with the Yakamas, June 9, 1855, 12 Stat. 951 (1855) [hereinafter Treaty with the Yakamas], the Treaty of Olympia, July 1, 1855, 12 Stat. 971, the Treaty with the Nez Percés, June 11, 1855, 12 Stat. 957, the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975, and the Treaty with the Walla-Wallas, June 9, 1855, 12 Stat. 945. Each such treaty contains either nearly identical or similar language. See Wesley J. Furlong, "Salmon is Culture, and Culture is Salmon": Reexamining the Implied Right to Habitat Protection as Tool for Cultural and Ecological Preservation, 37 PUB. LAND & RES. L. REV. 113, 118 n.25 (2016).

continue enjoying the land.<sup>7</sup> Specifically, each treaty negotiated by Governor Stevens contained a nearly-identical reservation of hunting and fishing rights.<sup>8</sup> An example of such reservation can be found in the Treaty with the Yakamas, signed in June of 1855, which guaranteed to the Yakama Nation “the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.”<sup>9</sup>

The reservation of fishing rights was of particular importance to the tribal signatories in light of the centrality of salmon to Pacific Northwest Indian culture.<sup>10</sup> Beyond serving as a means of subsistence and trade, salmon played a fundamental role in the religious systems of the Northwestern tribes, and even served as the basis for several Indian calendar systems.<sup>11</sup> The Quileute Tribe, for example, divided the year into four periods linked to the four great runs of salmon that spawned each year on the Quileute River.<sup>12</sup> The tribes often structured property rights around salmon; indeed, the right to fish at the best spots on neighboring rivers might have passed from individual fisherman to fisherman within each tribe.<sup>13</sup>

More importantly, the Northwest Indian tribes viewed the precious salmon as a practically infinite resource; no amount of fishing could deplete their endless supply of fish.<sup>14</sup> The American settlers held the same view, since it was widely observed at the time that the oceans had

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<sup>7</sup> The Stevens Treaties were not limited to the division of natural resources. Other articles included promises by the United States to set up schools on the reservations, *see, e.g.*, Treaty with the Yakamas, art. V, and promises by the Tribes to “be friendly” with the citizens of the United States and submit disputes between Tribes to the United States for resolution, *e.g., id.* at art. VIII.

<sup>8</sup> *See, e.g., id.* art. III (“The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory.”); Treaty with the Quinaielt, art. III, July 1, 1855, 12 Stats. 971. (“The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory.”); Treaty with the Nez Percés, art. III, June 11, 1855, 12 Stats. 957 (“The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians.”).

<sup>9</sup> Treaty with the Yakamas, *supra* note 6, at art. III; *see also* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n (*Fishing Vessel*), 443 U.S. 658, 674 n.21 (1979) (“Identical, or almost identical, language is included in each of the other treaties.”).

<sup>10</sup> Lewis, *supra* note 1, at 287.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See* United States v. Washington, No. CV 9213RSM, 2007 WL 2437166, at \*9 (W.D. Wash. 2007) (“During Treaty negotiations, Indians, like whites, assumed that their cherished fisheries would remain robust forever.”).

left man an inexhaustible supply of living resources.<sup>15</sup> Contemporary writers, for example, characterized the Atlantic Ocean as “the great ovarium of fish;—the inexhaustible repository of this species of food, not only for the supply of the American, but of the European continent.”<sup>16</sup> No party to the Stevens Treaties, therefore, held any concern that it would be forced to compete for a scarce supply of salmon in the years to come.<sup>17</sup>

### B.

Disputes over tribal access to salmon fishing spots nonetheless quickly arose.<sup>18</sup> Within the first few decades following the signing of the Stevens Treaties, newly-arrived white settlers to the Northwest began fencing off the traditional fishing grounds of the Northwestern tribes.<sup>19</sup> Construing the Stevens Treaties as guaranteeing the Indian signatories no greater rights than those enjoyed by other residents of the area, the white settlers asserted their property rights trumped any rights of the Indians to access the rivers to fish.<sup>20</sup> But the Supreme Court of the United States decisively disagreed in the 1905 decision *United States v. Winans*.<sup>21</sup> Recognizing the prime importance of salmon to the Indian signatories, Supreme Court Justice Joseph McKenna wrote that the Stevens Treaties reserved to the Indians “a servitude upon every piece of land” and thereby *overrode* any property interests enjoyed by the region’s settlers.<sup>22</sup>

Yet the *Winans* case was far from sufficient in resolving disputes between the Indian tribes and Northwestern settlers, particularly once the salmon runs began to decline in the 20th century. A large variety of factors—both natural and manmade—have brought the once-thought “inexhaustible” source of salmon in Northwestern waters to dangerously

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<sup>15</sup> See LAWRENCE JUDA, INTERNATIONAL LAW AND OCEAN USE MANAGEMENT: THE EVOLUTION OF OCEAN GOVERNANCE 17 (1996) (“At least into the mid-nineteenth century, writers in the field of international law continued to reflect the view that the living resources of the oceans were inexhaustible.”).

<sup>16</sup> JOHN QUINCY ADAMS, THE DUPLICATE LETTERS, THE FISHERIES AND THE MISSISSIPPI 211 (1st ed. 1822).

<sup>17</sup> *Fishing Vessel*, 443 U.S. 658, 669 (1979) (“In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.”).

<sup>18</sup> Michael C. Blumm & Jane G. Steadman, *Indian Treaty Fishing Rights and Habitat Protection: The Martinez Decision Supplies a Resounding Judicial Reaffirmation*, 49 NAT. RESOURCES J. 653, 659 (2009).

<sup>19</sup> *Id.* at 660.

<sup>20</sup> *Id.* at 662.

<sup>21</sup> 198 U.S. 371 (1905).

<sup>22</sup> *Id.* at 381.

low levels.<sup>23</sup> Salmon are indeed heavily vulnerable to the impacts of climate change, as melting snow packs in the North Cascade Mountains yield increasing temperatures in mountain streams critical to salmon spawning.<sup>24</sup> Other factors likewise compete to diminish local salmon populations: drought, disease, predation, and manmade factors like hydroelectric dams, forestry practices, and ocean overfishing.<sup>25</sup> And once salmon runs dropped to a level insufficient for all in the Northwest to make use of them, disputes between Indians and non-Indians in the region naturally intensified.

The Supreme Court ultimately was forced to wade into such disputes once again in 1979 in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*,<sup>26</sup> commonly referred to as the *Fishing Vessel* case. This was the opinion which essentially affirmed Judge George Boldt's landmark salmon fishing rights decision of 1974.<sup>27</sup> As it had in *Winans*, the Court emphasized the central importance of fish to the Indian signatories of the Stevens Treaties.<sup>28</sup> But the Court also held that the treaties, by promising the "right of *taking fish in common with*" other citizens, reserved to the Indians not only a right to *access* such fish but a *fair share* of the available fish.<sup>29</sup>

In determining what constituted a "fair share," the Court embraced as a starting point a fifty-fifty division of fish between Indians and non-Indians.<sup>30</sup> The Court then explained that the fifty-percent figure was a *maximum*, not a minimum, allocation.<sup>31</sup> Thus, the Court ruled that the Stevens Treaties secured "so much as, but no more than, [what] is necessary to provide the Indians with a livelihood—that is to say, a moderate living."<sup>32</sup>

### C.

The Supreme Court's approach to interpreting the right to take fish in the Stevens Treaties demonstrates the difficulties inherent in interpreting Indian Treaty rights. As the Court often has instructed, a technical understanding of the treaty text is not particularly

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<sup>23</sup> See Larry J. Bradfish, *Recent Developments in Listing Decisions Under the Endangered Species Act and Their Impact on Salmonids in the Northwest*, 3 HASTINGS W. NW. J. ENVTL. L. & POL'Y 77, 79 (1995).

<sup>24</sup> Furlong, *supra* note 6, at 115.

<sup>25</sup> See Bradfish, *supra* note 23, at 79; see also Jane G. Steadman, *Protecting Water Quality and Salmon in the Columbia Basin: The Case for State Certification of Federal Dams*, 38 ENVTL. L. 1331, 1332 (2008).

<sup>26</sup> 443 U.S. 658, 658 (1979).

<sup>27</sup> Mason D. Morisset, *The Legal Standards for Allocating the Fisheries Resource*, 22 IDAHO L. REV. 609, 612 (1986); see also *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974).

<sup>28</sup> See *Fishing Vessel*, 443 U.S. at 664.

<sup>29</sup> *Id.* at 684–85 (emphasis added).

<sup>30</sup> *Id.* at 685.

<sup>31</sup> *Id.* at 686.

<sup>32</sup> *Id.*

important.<sup>33</sup> Rather, we construe treaties between the United States and Indian tribes broadly, and always in the tribes' favor.<sup>34</sup> We depart from our bedrock principles of interpretation here in acknowledgement of the significant disparities between the footing of the United States and that of the Indian tribes in negotiations. As the Supreme Court put it in *Fishing Vessel*: "[T]he United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side."<sup>35</sup>

The Stevens Treaties indeed highlight such concerns. To start, the applicable treaty language is quite short; the section in each of the Stevens Treaties describing the right to take fish does not comprise even a whole sentence.<sup>36</sup> And English, the treaty language, is of particularly low interpretive value because the treaty was negotiated in a Chinook trading jargon.<sup>37</sup> Such jargon included only a vocabulary of roughly 300 words, most of which related to commerce.<sup>38</sup> The negotiating language thus lacked words corresponding to many of the treaty's terms. If that wasn't enough to render the meaning of the treaty murky, there is evidence that many of the Indians at the negotiation table had an imperfect command of the jargon itself, and an even lesser understanding of the language of the settlers.<sup>39</sup>

To give substance to the right to take fish, the Supreme Court thus has been forced to rely extensively on several pronouncements made by Governor Stevens when negotiating the treaties.<sup>40</sup> While assurances contemporary with the negotiations might give some insight into how the Indian tribes understood their treaty rights, the statements of Governor Stevens were frequently as broad as they were vague. For example, Governor Stevens famously declared to Indians when negotiating the Treaty of Point No Point: "This paper gives you a home. Does not a father give his children a home? . . . This paper secures your fish? Does not a father give food to his children?"<sup>41</sup> Needless to say, such

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<sup>33</sup> *Id.* at 676.

<sup>34</sup> *Id.* (recognizing that the Court "broadly interpret[s] [the Stevens] treaties in the Indians' favor"); see also *Tulee v. Washington*, 315 U.S. 681, 684–85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."); *Jones v. Meehan*, 175 U.S. 1, 10–11 (1899).

<sup>35</sup> *Fishing Vessel*, 443 U.S. at 675–76; see also *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (explaining that treaties with Indian tribes are to be interpreted "[h]ow the words of the treaty were understood" by the Indians, "rather than their critical meaning").

<sup>36</sup> See, e.g., Treaty with the Yakamas, *supra* note 6, art. III.

<sup>37</sup> *Fishing Vessel*, 443 U.S. at 666–67 n.10 (1979); see also *United States v. Washington*, 384 F. Supp. 312, 330, 355–56 (W.D. Wash. 1974).

<sup>38</sup> *Washington*, 384 F. Supp. at 330, 355–56.

<sup>39</sup> *Fishing Vessel*, 443 U.S. at 666–67 & n.10.

<sup>40</sup> *Id.* at 667 n.9–11, 668 n.12, 669–70, 676–79.

<sup>41</sup> *Id.* at 667 n.11.

statements provide little insight into the precise contours of the right to take fish.

Interpreting the Stevens Treaties is made *even more* difficult, if not impossible, when we seek to apply them to circumstances not contemplated by any party to the negotiations. In such cases, the text of the treaties and other extrinsic evidence at the time provide little guidance.

#### D.

In recent years, however, many have advocated extending the Stevens Treaties to cover circumstances far outside the mind of any negotiator in the 1850s; most recently, that the federal government and affected states guarantee the Indians a fish habitat free from environmental degradation.<sup>42</sup> The Supreme Court failed to read such a right into the Stevens Treaties in the *Fishing Vessel* case, and the Ninth Circuit declined to do so in a subsequent en banc decision from 1985.<sup>43</sup>

#### 1.

But the environmental degradation theory was revived in 2001, when the United States, acting as trustee for several tribal signatories to the Stevens Treaties,<sup>44</sup> sued the State of Washington and asserted that the State had violated the Treaty fishing rights by erecting culverts under State highways that impeded the passage of salmon.<sup>45</sup>

When a roadway passes over a stream, culverts are often used as a drainage pipe to allow water to pass under the road from one side to the other.<sup>46</sup> Depending on their size and shape, however, culverts might not allow fish to pass beneath the roadway so freely.<sup>47</sup> And to the extent such barrier culverts prevent salmon from reaching their upstream spawning grounds, they may play a role in the declining population of salmon.<sup>48</sup> The State of Washington, in particular, constructed most of its culverts under its state-owned highways when few had reason to worry about salmon decline, so many of its culverts do indeed impede the

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<sup>42</sup> Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right*, 30 ENVTL. L. 279, 339–42 (2000); Gary D. Meyers, *United States v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 OR. L. REV. 771, 795–97 (1988); Thomas C. Galligan, Jr. & Michael T. Reynvaan, *Pacific Northwest Indian Treaty Fishing Rights*, 5 U. PUGET SOUND L. REV. 99, 127–29 (1981).

<sup>43</sup> *United States v. Washington*, 759 F.2d 1353, 1355 (9th Cir. 1985).

<sup>44</sup> *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (stating that the “general trust relationship between the United States and the Indian people” is both well-recognized and undisputed).

<sup>45</sup> *United States v. Washington*, 853 F.3d 946, 954 (9th Cir. 2017).

<sup>46</sup> Blumm & Steadman, *supra* note 18, at 677.

<sup>47</sup> *Id.* at 678.

<sup>48</sup> *Id.*

passage of fish.<sup>49</sup> Even though the United States may have originally “specified the design for virtually all of the culverts at issue,”<sup>50</sup> the United States now argued that Washington’s maintenance of such barrier culverts violated an implied right in the Stevens Treaties to a fish habitat free from environmental degradation.<sup>51</sup>

The United States succeeded on such theory in the Western District of Washington in a case styled *United States v. Washington*. The district court agreed that Washington’s maintenance of its barrier culverts violated the Stevens Treaties by diminishing the salmon available to the Northwestern Indian tribes.<sup>52</sup> Relying on Stevens’s assurances during negotiations with the Tribes that their right to take fish was “secure,” United States District Judge Ricardo Martinez reasoned that these assurances would be meaningful only “if they carried the *implied* promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource.”<sup>53</sup> And to rectify the violation of a perceived environmental duty to maintain the salmon population, the court fashioned an environmental remedy: an injunction directing the State to redesign and to replace over 800 barrier culverts to allow fish passage.<sup>54</sup> Yet the replacement of any given culvert is not quite as easy as replacing the drainage pipe under your kitchen sink. Rather, replacing even a *single* culvert easily could cost several hundred thousand dollars, or possibly more than one-million dollars.<sup>55</sup> The replacement of 800 culverts, then, will cost at least 500-million dollars, if not over 1.8-billion dollars, which was the estimate discussed in the litigation.<sup>56</sup>

Fashioning such a wide-reaching environmental regulation yielded complications. Given the district court’s lack of environmental expertise,

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<sup>49</sup> *Id.* at 679.

<sup>50</sup> *United States v. Washington*, 864 F.3d 1017, 1029 (9th Cir. 2017) (O’Scannlain, J., dissenting from the denial of rehearing en banc).

<sup>51</sup> *United States v. Washington*, 853 F.3d 946, 960 (9th Cir. 2017).

<sup>52</sup> *United States v. Washington*, 864 F.3d at 1023.

<sup>53</sup> *United States v. Washington*, No. CV 9213RSM, 2007 WL 2437166, at \*10 (W.D. Wash. Aug. 22, 2007) (emphasis added).

<sup>54</sup> The district court ordered the state to provide for fish passage at all state-owned culverts with “200 lineal meters or more of salmon habitat upstream to the first natural passage barrier” within seventeen years. Permanent Injunction Regarding Culvert Correction at 3, *United States v. Washington*, Nos. 2:01-sp-00001-RSM & 2:70-cv-09213-RSM (W.D. Wash. March 29, 2013), ECF No. 753. For those culverts with “less than 200 lineal meters of upstream salmon habitat” the court ordered the State to provide for fish passage “at the end of the culvert’s useful life, or sooner as part of a highway project.” *Id.* Finally, the court permitted the State to “defer correction of an aggregation of culverts that cumulatively comprise barriers to no more than 10% of the total salmon habitat upstream of those . . . culverts that would otherwise be subject to correction [in the next seventeen years].” *Id.* If the State defers correction of such culverts, it must correct them by the end of the culvert’s useful life or as part of a highway project, whichever comes first. *Id.* at 4.

<sup>55</sup> *United States v. Washington*, 853 F.3d at 976.

<sup>56</sup> *United States v. Washington*, 864 F.3d at 1023 n.1 (O’Scannlain, J., dissenting from the denial of rehearing en banc).



the injunction was ill-tailored to resolving its ecological aims. Many of the 800 culverts the State must remove are located either upstream, or very close downstream, of a privately-owned—or non-state-owned—barrier culvert.<sup>57</sup> Replacing those state-owned culverts thus will have little to no effect on the salmon population. Simply put, salmon attempting to reach their spawning grounds might not benefit from the removal of a state-owned barrier culvert if yet another non-state-owned barrier lies nearby.<sup>58</sup> This is no minor inefficiency. With the cost of replacing even a single barrier culvert potentially reaching seven-figures, the injunction forces the State to spend millions of dollars for no realistic purpose.<sup>59</sup>

## 2.

Yet a panel of our court, the United States Court of Appeals for the Ninth Circuit, left the injunction untouched on appeal.<sup>60</sup> Emphasizing the importance of salmon to the Northwest Indian tribes, as well as the broad statements of Governor Stevens while negotiating the treaties, the panel inferred a promise to Northwest Indian tribes that the number of fish would *forever* be sufficient to provide the tribes a “moderate living,”<sup>61</sup> a term used only in passing in the *Fishing Vessel* decision.<sup>62</sup> Thus, even though no party to the Stevens Treaties contemplated the pressing modern-day environmental and natural resource issues causing the decline of salmon runs, our court held that the Stevens Treaties dictate how the State of Washington must address such problems 160-years later.

Our court failed to reconsider that decision en banc.<sup>63</sup> I dissented from the denial order, joined in whole or in part by eight of my colleagues: former Chief Judge Kozinski, and Judges Tallman, Bybee, Callahan, Bea, Milan Smith, Ikuta, and Randy Smith.<sup>64</sup> And, while the Supreme Court indeed granted certiorari in the case, with Justice Kennedy recused, it could not garner a majority on any of the dispositive issues and was thus compelled to affirm the Ninth Circuit decision by an equally divided court.<sup>65</sup> What that means is that our court’s imposition of an environmental and natural resource duty under the Stevens Treaties remains the law of the circuit, and the district court’s injunction continues to bind the State of Washington.

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<sup>57</sup> *Id.* at 1032.

<sup>58</sup> *Id.* at 1031–33.

<sup>59</sup> *Id.* at 1023 n.1, 1031–33.

<sup>60</sup> *United States v. Washington*, 853 F.3d at 953.

<sup>61</sup> *Id.* at 965.

<sup>62</sup> *Fishing Vessel*, 443 U.S. 658, 686 (1979).

<sup>63</sup> *United States v. Washington*, 864 F.3d at 1017.

<sup>64</sup> *Id.* at 1023.

<sup>65</sup> *Washington v. United States*, 138 S. Ct. 1832, 1833 (2018) (Mem).

## II.

Now that the litigation is finished, I can comment on our court's decision. In many ways, the decision raises more questions than answers—questions about what constitutes a “moderate living,” what other state actions may violate the Stevens Treaties, and whether judicial intervention is the best means of resolving emerging conflicts between tribes, states, and the federal government. But in particular, the decision requires us to grapple with the question whether the language of the Treaties, which grants tribes certain inalienable rights,<sup>66</sup> also supports an *implied* right to a guaranteed fish habitat. Thus, the decision provides the perfect case study to evaluate the wisdom of relying upon 160-year-old Indian treaties to solve modern-day environmental and natural resource problems.

## A.

Because no party to the Stevens Treaties contemplated the large decline in salmon runs that would begin in the 20th century, neither the treaties nor their historical context provide any guidance as to how a court might adjudge a treaty-based right protecting against fish habitat degradation.

Our court's decision—that the State must guarantee that the fish population does not fall below a level sufficient to provide the tribes a “moderate living”<sup>67</sup>—raises questions about just what standard should be used to assess what constitutes a moderate living, assuming the Supreme Court's gloss on the Treaties' language controls. Must the State consider a tribe's population? Local salmon prices? Other income that the tribe earned through a year? Of course, neither the Stevens Treaties nor the decision of our court offer any answers.

Similar questions arose with some frequency before the Supreme Court at oral argument in this case in April 2018.<sup>68</sup> Several justices, including the Chief Justice and Justices Breyer, Alito, Kagan, and Gorsuch, implored the attorneys on either side of the case to offer some tangible percentage of fish decline that might constitute a treaty violation.<sup>69</sup> Yet no lawyer was able to offer a satisfactory answer. Not surprisingly because, without guidance from the treaty or its historical context, there *is* no answer; the Stevens Treaties simply do not speak to the problem of fish decline. Far from a carefully defined state or federal environmental scheme, like the Clean Air Act<sup>70</sup> or the National

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<sup>66</sup> *United States v. Washington*, 853 F.3d at 962.

<sup>67</sup> *Id.* at 965.

<sup>68</sup> See Oral Argument, *Washington v. United States*, 138 S. Ct. 1832 (2018) (No. 17-269), <https://www.oyez.org/cases/2017/17-269>.

<sup>69</sup> *Id.* at 09:01–11:32, 17:00–32, 23:35–58, 34:22–34, 42:03–44:15, 48:03–10, 57:24–54.

<sup>70</sup> 42 U.S.C. §§ 7401–7671q (2012).

Environmental Policy Act,<sup>71</sup> the Stevens Treaties leave the State of Washington and the tribes to determine on their own the appropriate population of fish in Northwestern waters, and, failing that, toss the issue to the federal courts.

Our court's decision raises other questions as well. While this case involved barrier culverts that impeded salmon passage to spawning grounds,<sup>72</sup> what other state action might inadvertently fall within this realm of newly discovered Treaty rights? As I and my fellow dissenting colleagues pointed out, a whole host of state land-use and development decisions could impact salmon habitats.<sup>73</sup> The Washington State Conservation Commission, for example, determined that salmon habitats will likely be affected by allowing livestock to graze near the State's rivers.<sup>74</sup> Unsurprisingly, several commentators already have sparked calls to extend our court's decision to other large public works, like the many hydroelectric dams and water diversions, and certain types of land usage, like timber harvests and farms.<sup>75</sup> Will the State, after the *Washington* decision, be required to increase hatchery construction to boost salmon population for the benefit of the Tribes? Must the Bonneville Dam or other federally owned facilities be removed or remodeled if its existing salmon ladders permit "too few" salmon from reaching their upstream spawning grounds? In light of the ever-dwindling salmon population in the Northwest, one could foresee that even the most incidental effects on salmon might trigger claims that the State has violated the Treaties through its land usage.

Worse still, discovering precisely which state actions are sufficiently injurious, and which are not, will bring an incessant string of lawsuits. Indeed, since the signing of the Treaties in the mid-1800's, there already have been nearly 300 court decisions involving the Treaties,<sup>76</sup> many dealing with Indian fishing rights.<sup>77</sup> And the litigation costs surely will not remain in the State of Washington. Governor Stevens negotiated analogous fishing clauses in many of his treaties throughout the Northwestern states, even right here in Oregon,<sup>78</sup> and the United States negotiated treaties with tribes outside the Pacific Northwest as well.<sup>79</sup> Thus, just recently, the Rosebud Sioux Tribe filed a

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<sup>71</sup> 42 U.S.C. § 4321 (2012).

<sup>72</sup> *United States v. Washington*, 864 F.3d 1017, 1019 (9th Cir. 2017).

<sup>73</sup> *Id.* at 1028 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

<sup>74</sup> CAROL J. SMITH, WASH. STATE CONSERVATION COMM'N, SALMON HABITAT LIMITING FACTORS IN WASHINGTON STATE 127 (2005).

<sup>75</sup> Michael C. Blumm, *Indian Treaty Fishing Rights and the Environment: Affirming the Right to Habitat Protection and Restoration*, 92 WASH. L. REV. 1, 29–31 (2017); see also Sophie Sherry, *Michigan Tribes Could Have Stronger Case Against Line 5 Thanks to SCOTUS Decision*, STATESIDE (June 15, 2018), <https://perma.cc/SJ2S-X5AK>.

<sup>76</sup> See Charles D. Bernholz & Robert J. Weiner, *The Palmer and Stevens "Usual and Accustomed Places" Treaties in the Opinions of the Courts*, 25 GOV'T INFO. Q. 778, 787, tbl.1 (2008).

<sup>77</sup> *Id.* at 787–90.

<sup>78</sup> See Furlong, *supra* note 6, at 118 n.25.

<sup>79</sup> See Bernholz & Weiner, *supra* note 76, at 778–79.

lawsuit against the Trump administration for approving construction of the Keystone XL oil pipeline in South Dakota on the theory that the pipeline may disrupt that Tribe's treaty fishing rights.<sup>80</sup> Elsewhere, tribes along the California–Oregon border have successfully negotiated the removal of dams that inhibited salmon migration in what has been called the “largest dam removal in U.S. history.”<sup>81</sup>

Future litigation will not just be between Indian tribes and state governments. New conflicts between the tribes and the federal government may arise. For example, while the *Washington* decision involved *state* highway culverts,<sup>82</sup> conflicts between the tribes and the federal government just as easily could arise over *federal* road design on forests and military bases. In a similar vein, although the United States acted as trustee for the Tribes in the culvert case,<sup>83</sup> one could foresee potential conflicts of interest between the government defending tribal rights on the one hand and asserting its own environmental agenda on the other through agencies such as the Environmental Protection Agency, the Department of Energy, or the Bureau of Reclamation.<sup>84</sup>

Conflicts may also surface between tribes themselves over disagreements in their prioritization of fishing and other conservation objectives.<sup>85</sup>

For instance, the Lummi Nation—an Indian Tribe centered just north of Seattle—has utilized the Stevens Treaty of Point Elliot to spearhead efforts to block coal production and export facilities in its vicinity, citing adverse impacts on fish runs from the increased shipping traffic and coal dust.<sup>86</sup> But other tribes in the area have opposed such efforts, viewing coal production as essential to their interests.<sup>87</sup>

## B.

Questions about the scope of the newly-created right to fish habitat protection bring to mind additional questions about our court's institutional competency to navigate the intricacies of environmental and natural resource regulation, as I and eight of my colleagues also

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<sup>80</sup> *Tribes Sue to Stop Keystone XL Pipeline*, NATIVE AM. RTS. FUND LEGAL REV., Summer/Fall 2018, at 1, 4.

<sup>81</sup> See Tove Danovich, *After Decades, Native American Tribes are Regaining Their Fishing Rights. But are there any Fish Left?*, NEW FOOD ECON. (Sept. 11, 2018), <https://perma.cc/MVC3-WCSM>.

<sup>82</sup> *United States v. Washington*, 864 F.3d 1017, 1019 (9th Cir. 2017).

<sup>83</sup> *Id.* at 1029.

<sup>84</sup> See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 182 (2011) (noting that the “Government may be obliged ‘to balance competing interests’ when it administers a tribal trust,” including “environmental and conservation obligations” and “conflicting obligations to different tribes or individual Indians.”).

<sup>85</sup> See Furlong, *supra* note 6, at 117.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

pointed out in dissent.<sup>88</sup> Inherent in any determination that a particular state action reduced the quantity of available fish are difficult factual questions that require both time and a thorough understanding of biological and environmental science.

### 1.

Yet it is axiomatic that courts are ill-equipped to engage in such scientific fact-finding.<sup>89</sup> A court must work solely from the record before it, which rarely holds all the factual information pertinent to complicated scientific questions. And even with a full record, courts surely are not in the business of unearthing novel scientific discoveries unassisted; our craft is assessing the arguments made by the lawyers on either side of a case, and neither side will necessarily have the incentive to portray accurately the underlying science. Nor are the traditional tools of assessing witness credibility properly suited to determining which of two competing expert witnesses has the better side of a highly technical debate. An expert witness's demeanor on the stand is indeed a poor indicia of scientific rigor.<sup>90</sup> And finally, courts often have little time to spend on any given case, which makes our lack of expertise in environmental science even more difficult to surmount.<sup>91</sup>

Federal environmental and natural resource statutes have recognized well such institutional limitations. The National Environmental Policy Act (NEPA), for example, operates as a purely "procedural" mechanism.<sup>92</sup> That is, the statute requires federal agencies to consider the environmental impacts of their proposals in a published statement prior to acting upon them.<sup>93</sup> But it is well-settled that NEPA imposes no *substantive* restriction on the environmental impacts of agency policy, because to create such a restriction would force courts to

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<sup>88</sup> *United States v. Washington*, 864 F.3d 1017, 1023 (9th Cir. 2017) (O'Scannlain, J., dissenting from the denial of rehearing en banc).

<sup>89</sup> See, e.g., Note, *Admitting Doubt: A New Standard for Scientific Evidence*, 123 HARV. L. REV. 2021, 2030–31 (2010); Joëlle A. Moreno, *Einstein on the Bench?: Exposing What Judges Do Not Know about Science and Using Child Abuse Cases to Improve How Courts Evaluate Scientific Evidence*, 64 OHIO STATE L.J. 531, 533 (2003); David S. Caudill & Richard E. Redding, *Junk Philosophy of Science?: The Paradox of Expertise and Interdisciplinary in Federal Courts*, 57 WASH. & LEE L. REV. 685, 751–52 (2000); Adam J. Siegel, *Setting Limits on Judicial Scientific, Technical, and other Specialized Fact-Finding in the New Millennium*, 86 CORNELL L. REV. 167, 170–71 (2000).

<sup>90</sup> See Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1622–23 (1998).

<sup>91</sup> Hon. Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 CARDOZO L. REV. 2189, 2196 (2011).

<sup>92</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1988) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

<sup>93</sup> See 42 U.S.C. § 4332 (2012); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756–57 (2004).

meddle with issues that require “a high level of technical expertise.”<sup>94</sup> In a similar vein, the Endangered Species Act requires *consultation* between the Secretary of the Interior and federal agencies whenever the Secretary determines that an agency action might jeopardize endangered wildlife or flora.<sup>95</sup>

Our court’s adoption of the newly-created treaty right to fish habitat protection, however, takes an entirely different approach. Rather than deferring to the Washington State environmental and natural resource agencies, the district court in the culvert case took it upon itself to diagnose and to cure the State’s problem of declining salmon runs. To be fair, Judge Martinez did the best he could with the information the parties provided. Yet, in light of its institutional deficiencies in scientific fact-finding, it should not be surprising that the district court’s injunction unfortunately proved overbroad and inefficient. I respectfully suggest that the district court, just as the court of appeals, lacks the institutional competency to make the complicated factual determinations that a Stevens Treaties-based right to habitat protection requires.

A more cautious approach—and one respectful of tribal fishing rights and the State’s imperative in managing its natural resources—would have been to allow the State environmental agencies to work together with the Tribes to craft a state-wide environmental and natural resource agenda. One could argue that such an approach, though not compelled by any law or language of the treaties, could be good public policy.

## 2.

But hold on, some might object, wouldn’t deferring to state agencies be the proverbial equivalent of leaving the fox in charge of the hen house? Is it not the very *point* of the Stevens Treaties to restrain certain action by state and federal governments? These are surely legitimate concerns where the interests of Indian tribes and the states might conflict.

Yet in the context of preserving fish, or environmental and natural resource regulation more generally, the Indian tribes and the states largely work toward the same ends.<sup>96</sup> Washington holds a significant interest in preserving salmon runs within its borders because of the commercial and recreational importance of salmon to its citizens; such fishing adds 2.5-billion dollars, along with 30,000 jobs, to the

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<sup>94</sup> See *Sierra Club v. U.S. Dep’t of Energy*, 867 F.3d 189, 196 (D.C. Cir. 2017) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989)).

<sup>95</sup> See *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 651–52 (2007).

<sup>96</sup> 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, 460–61 (1998).

Washington State economy.<sup>97</sup> We therefore need not fear that, absent judicial intervention, Washington might “block every salmon-bearing stream feeding into Puget Sound.”<sup>98</sup> Indeed, entirely apart from the district court’s injunction in this case, Washington State agencies *already* had begun identifying and replacing the barrier culverts that most significantly impacted the salmon population.<sup>99</sup> Fairly balancing the extraordinarily expensive nature of culvert replacement with the State’s shared need for salmon, the State of Washington had already replaced 218 barrier culverts to open up 486 miles of salmon habitat.<sup>100</sup> And to combat further the problem of salmon decline, the State operates 87 separate hatcheries, which together breed around 190-million salmon and steelhead each year.<sup>101</sup>

The State of Washington had thus not turned a blind eye to salmon decline within its borders. By relying on local environmental agencies tasked with solving such a problem, the State had crafted a finely-tuned regulatory scheme that kept one eye toward preserving salmon runs, with another aimed at preserving other important State interests. Yet one could argue that by affirming the district court’s broad injunction, our court ignored the State’s expertise and abandoned such delicate balance.

Future courts may question whether the Stevens Treaties—or any other mid-nineteenth-century treaty with American Indians—ought to be expanded to countenance such a profound disruption of state environmental and natural resource policy. And when faced with new contexts in which to apply our court’s decision—whether it be to culverts owned by private parties or to other private, state, and federal projects—we must ask: will the decision survive? After all, the Supreme Court split 4–4 in June; now there is a ninth justice to break the tie.<sup>102</sup>

### III.

To conclude, I should emphasize that I do not minimize the pressing modern-day environmental and natural resource issues that have arisen over decades of societal change. The degradation of salmon runs deserves urgent attention from all of us.

I ask only that we refrain from tossing out our traditional methods of governance in a rush to solve such a problem. As I and my eight colleagues noted in dissent, legislative solutions and agency action in consultation with the tribes, rather than judicial intervention, chart a

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<sup>97</sup> *Fisheries Economics of the United States, 2015*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (May 10, 2017), <https://perma.cc/J9CD-NJRH>.

<sup>98</sup> *United States v. Washington*, 853 F.3d 946, 962 (9th Cir. 2017).

<sup>99</sup> Blumm & Steadman, *supra* note 18, at 679.

<sup>100</sup> *Id.* at 679–80.

<sup>101</sup> *WDFW Hatcheries - Overview*, WASH. DEP’T OF FISH & WILDLIFE: CONSERVATION, <https://perma.cc/9ELJ-KQQC> (last visited Nov. 2, 2019).

<sup>102</sup> *Washington v. United States*, 138 S. Ct. 1832, 1833 (2018) (Mem).

much sounder course.<sup>103</sup> And when the time comes for the courts to become involved in disputes between tribes, states, and the federal government, hopefully the lessons of the *Fishing Vessel* decision should be the touchstone of future decisions.

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<sup>103</sup> United States v. Washington, 864 F.3d 1017, 1029 (9th Cir. 2017) (O'Scannlain, J., dissenting from the denial of rehearing en banc).