# *NOTES*

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## The *Culverts Opinion* and the Need for a Broader Property-Based Construct



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> *We're the advocates for the salmon, the animals, the birds, the water. We're the advocates for the food chain. We're an advocate for all of society. Tell them . . . how they're our neighbors. And how you have to respect your neighbors and work with your neighbors.*[1]

Since the establishment of the United States, the interests of tribes and states have repeatedly landed at opposite sides of the debate podium.[2] Much of this debate surrounds the establishment of treaties and the duties and rights that arise under such treaties.[3] Whereas tribes generally hold their treaties in high regard as a reminder of their entitlements, many states regard those same treaties as thorns in their collective sides.[4] Not surprisingly, states and tribes have called on the federal courts to interpret whether state actions have been in line with the duties imposed under these treaties.[5]

The frequency of these disputes has constantly increased, and while the subject of the debate changes ever so often, the underlying question perseveres: Are states fulfilling their treaty-imposed duties? In order to answer this question, courts find themselves delineating the states' duties under these treaties. The question then becomes whether the duties delineated by the courts are broad enough to encompass those rights and duties actually created or reserved by the treaties.

Today, the subject of much of this debate is the tribal right to the limited natural resources of the Pacific Northwest—specifically, hunting and fishing rights. During the last thirty years, the State of Washington has been involved in extensive litigation with Indian tribes (with the United States acting as trustee for the tribes) regarding fishing rights and the quality of

1 CHARLES WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY 103–04 (2000) (quoting native fisherman, Billy Frank, Jr.).

2 *See, e.g.*, Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

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

4 *See, e.g.*, *id.*

5 *See, e.g.*, United States v. Washington (*Phase II Trial*), 506 F. Supp. 187 (W.D. Wash. 1980), *aff'd in part and vacated in part*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985).

fish runs throughout the Northwest.[6] While much of this litigation regards tribal fishing rights in the face of state fishing regulations, few cases have specifically touched on a state's duty to protect fish runs and fish habitat.[7]

This duty is an issue of great importance for Northwest tribes. Several exterior forces have affected tribes' abilities to harvest fish. Quantities of fish have dropped due to construction of roads and bridges, and dams have also continued to deplete fish runs.[8] Whereas such changes may be little noticed by non-Indian society, the lack of fish for tribes changes basic aspects of tribal life. In fact, there is very little in non-Indian society to which one can compare the catching and eating of fish for tribes. Eating fish, specifically salmon, is such a large part of native life for Northwest tribes it can even be said to be a tribal sacrament.[9] Salmon is so central to many native cultures that one tribal leader stated: "It is almost impossible to describe in words the pain and suffering this has caused my people. We have been fishermen for thousands of years. It is our life, not just our economy."[10] When fish are depleted from the rivers such that a tribe loses its ability to take fish or fish become so affected by toxins that tribes can no longer safely consume accustomed amounts of fish, the tribes find themselves turning to the courts for assistance. This is the predicament in which Northwest tribes now find themselves situated.

6 United States v. Washington (*Phase I Trial*), 384 F. Supp. 312 (W.D. Wash. 1974); United States v. Washington (*Phase I Appeal*), 520 F.2d 676 (9th Cir. 1975), *aff'g Phase I Trial*, 384 F. Supp. 312; *Phase II Trial*, 506 F. Supp. 187; United States v. Washington (*Phase II Appeal*), 694 F.2d 1374 (9th Cir. 1982); United States v. Washington (*Phase II Appeal Rehearing*), 759 F.2d 1353 (9th Cir. 1985); United States v. Washington (*Culverts Opinion*), No. C70-9213, Subproceeding No. 01-1, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007).

7 *See, e.g.*, Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123 (9th Cir. 1978), *aff'd in part, vacated in part, and remanded sub nom.*, *Fishing Vessel Ass'n*, 443 U.S. 658.

8 *See* Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1, 2, 10 (2001) (citing to testimony of Warm Springs Reservation tribal member that current tribal catch is only one one-hundredth of its historical number).

9 *See id.* at 2–3. ("[T]he Salmon Ceremonies . . . celebrate the holy return of the fish to their natal waters.").

10 *Id.* at 3 n.4 (citing testimony of Chairman Antone Minthorn, a tribal leader, before the Subcommittee on Oversight and Investigations on July 19, 1994).

The question becomes: Do treaties involve an affirmative duty for states to protect fish habitat and ensure quality fish runs? As discussed herein, a federal court has answered this question narrowly, yet affirmatively, failing to employ a property-based construct that encompasses all the rights reserved under the tribal treaties.[11] Therefore, although the courts have recognized the existence of *a* duty, they have not yet recognized its entire scope.

Many theories have been advanced for how courts should interpret a state's duties to protect fish habitat. Generally, treaty-invoked duties are analyzed under a contract-law paradigm.[12] This is not erroneous, as treaties are said to be "contract[s] between sovereign nations."[13] However, when courts look at treaties *only* as contracts, they are missing one major aspect of tribal treaties: property rights. Not only are tribal treaties contracts between sovereigns, they are also deeds of property.[14] Therefore, the bodies of law that are invoked by the formation of a tribal treaty include both contract law and property law. However, despite the promising answers property law provides for treaty interpretation,[15] many judges have shown discomfort at the idea of applying property-based constructs to interpret states' and tribes' duties and rights under such treaties.[16] Some feel that the formalistic rules of property law do not contain enough elasticity to be molded within the Indian law context.[17] For example, when the Ninth Circuit used a property-law analogy to enforce tribes' rights to take fish from the Columbia River, Judge Kennedy concurred in the holding but objected to the court's use of this analogy, arguing that it was not an exact fit.[18] What Judge Kennedy failed to recognize was that

11 *Culverts Opinion*, 2007 WL 2437166.

12 *See, e.g.*, United States v. Washington (*Phase II Appeal*), 694 F.2d 1374 (9th Cir. 1982).

13 ELIZABETH FURSE, THE INSTITUTE FOR TRIBAL GOVERNMENT, INDIAN TRIBES, THEIR RIGHTS AND RESPONSIBILITIES 3 (1999), *available at* http://www.tribalgov.pdx.edu/pdfs/tribal_rights_handbook.pdf.

14 Wood, *supra* note 8, at 36.

15 *See id.* at 5–6.

16 *See* Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123, 1134 (9th Cir. 1978) (Kennedy, J., concurring).

17 *See id.*

18 *See id.*

courts can and should apply the basic models of a property-based construct to analyze treaty rights, even where every jot and tittle may not line up. Refusing to do so is to turn a blind eye to the fact that treaties are deeds of property, and as such, invoke the rules of property law.

This Note discusses one recent significant district court opinion regarding treaty-imposed duties for state fish habitat protection and advocates for the use of a broader, property-based construct for future treaty interpretations.

## I
## THE *CULVERTS OPINION*: THE EVER ON-GOING *UNITED STATES V. WASHINGTON*

Early nineteenth century America was a time for exploration and settlement of the West. The famous explorers Meriwether Lewis and William Clark were chosen by Thomas Jefferson to trek through the property purchased from France in the transaction known as the Louisiana Purchase.[19] Their journey was only the beginning trickle of an eventual deluge of settlers to the area later called the Oregon Territory.[20] By the time the 1850s rolled around, the guiding principle of Manifest Destiny[21] began to have a significant effect on western Washington.[22] Whereas America's 1818 treaty with England had maintained an understanding that Americans would stay south of the Columbia River, with England in control of the north.[23] In 1846, England ceded control of what is now the State of Washington, giving Americans a free pass to head north.[24] This resulted in a perpetual increase of settlers into the Puget Sound basin and

19 *See* WASHINGTONIANS: A BIOGRAPHICAL PORTRAIT OF THE STATE 12 (David Brewster & David M. Buerge eds., 1988).

20 *See id.* at 74.

21 The doctrine of Manifest Destiny was originally used as a slogan for the expansionists to rationalize the continued westward expansion of the United States and the annexation of Texas. It was supported by the belief that the United States was destined to span from the Atlantic to the Pacific. *See* Manifest Destiny: The Dragoon Expeditions, The National Park Service Fort Scott National Historic Site, http://www.nps.gov/archive/fosc/mandest.htm (last visited Jan. 3, 2009).

22 WILKINSON, *supra* note 1, at 8.

23 Convention with Great Britain, U.S.-Eng., Oct. 20, 1818, 8 Stat. 248.

24 *See* Treaty with Great Britain, In Regard to Limits Westward of the Rocky Mountains, U.S.-Eng., June 15, 1846, 9 Stat. 869.

soon the town of Olympia and the Nisqually River Valley became central locations for shipping and agriculture.[25] In 1853, Congress staked the borders of the Washington Territory out of Oregon and began to prepare the area for eventual statehood, which did not take place until 1889.[26] Although these changes brought growth and progress, "they brought mostly woe" to the tribal people in the area.[27]

### *A. Treaty Establishment*

In order to prepare the area for settlement and statehood, one main roadblock needed to be removed—Northwest tribes. The dispersed nature of the tribes made it very difficult to plan for progress such as roads and railroads.[28] Moreover, while American settlers had claimed land under the Donation Land Act of 1850, much of that land was still claimed by the Indians, and aboriginal title had not yet been extinguished.[29] Thus, in order to forestall violence between Indians and non-Indian settlers, one of the preparations thought necessary was the establishment of treaties with Indian tribes, with the hope of bringing them onto reservations.[30] In 1854, Isaac Stevens, governor of the Territory of Washington and superintendent of Indian affairs, began to hold treaty councils with tribes across the state, eventually meeting eight different times with tribes from the Puget Sound all the way to the confluence of the Judith and Missouri Rivers near present day Great Falls, Montana.[31] One of Stevens' aims was to "smooth the way for settlement by inducing the Indians of the area to move voluntarily onto

25 WILKINSON, *supra* note 1, at 9.

26 Keith A. Murray, *Statehood for Washington*, COLUMBIA: THE MAG. OF N.W. HIST., Winter 1988–89, at 30, *available at* http://stories.washingtonhistory.org/Carriker/columbia/articles/0488-a1.htm.

27 WILKINSON, *supra* note 1, at 9.

28 United States v. Washington (*Phase I Appeal*), 520 F.2d 676, 682 (9th Cir. 1975).

29 *See* WILKINSON, *supra* note 1, at 9–10; *see also* United States v. Washington (*Phase I Trial*), 384 F. Supp. 312, 355 (W.D. Wash. 1974).

30 *Phase I Appeal*, 520 F.2d at 682.

31 Kent Richards, *The Stevens Treaties of 1854–1855*, 106 OR. HIST. Q. 342, ¶ 2 (2005), *available at* http://www.historycooperative.org/journals/ohq/106.3/richards.html.

reservations."[32] Such a move allowed Stevens to extinguish aboriginal title to a significant portion of the land, establish the best possible lines for roads and railroads, and establish a government and economy stable enough for the population to grow and thrive in this portion of the country.[33]

Apparently, Stevens was no novice in the work he set out to perform. Records indicate that he was a "tactful and effective negotiator."[34] Rather than negotiating with someone chosen by the tribes, Stevens united several Indian communities into "tribes" and selected one "chief" from each "tribe" with whom he negotiated directly.[35] However, what really set Stevens apart as a negotiator was that he apparently understood the culture and lives of Indians who lived in this part of the territory. They were known as the "fish-eaters," a name reflecting that their diets, social customs, and religion all centered around capturing fish.[36] Their fish-based culture and the nature of varying fish runs that changed with the seasons meant that these tribes were mostly nomadic, moving from one spot to another, essentially responding to the ebbs in fish runs.[37] As territorial leaders saw it, this cultural aspect of the tribes stood in the way of white progress and conflicted with the white, Anglo-Saxon, Protestant ideal of permanent residence and agrarian life.[38] Convincing the tribes to settle in a permanent location would be pivotal in Stevens' plan for settlement of the territory and assimilation of the tribes[39] but would come at a high price. Stevens, using a certain amount of violence, eventually convinced the tribes to settle down on reservations, thereby freeing up the needed land for settlement.[40] To reach such an end, Stevens promised the tribes several things: (1) money; (2) the benefits of the white man's goods, education, and civilization; and most importantly,

32 *Phase I Appeal*, 520 F.2d at 682.

33 Richards, *supra* note 31, at ¶ 8.

34 *Phase I Appeal*, 520 F.2d at 682.

35 *Id.*

36 *Id.*

37 *Id.*

38 *See* Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 650 (2000).

39 *See* Richards, *supra* note 31, at ¶ 12.

40 WILKINSON, *supra* note 1, at 14–18.

(3) "[t]he right of taking fish, at all usual and accustomed" fishing places "in common" with the white settlers.[41]

The treaties themselves were written in English and although few Indians understood English, the negotiators proceeded to read aloud, in English, the treaty language for the Indians' commentary and endorsement.[42] Moreover, the treaties read like formal legal documents,[43] thereby creating obvious comprehension barriers for the tribes. Attempting to mitigate the problem, territorial negotiators translated the treaties and their explanations thereof into a trade jargon common to the Northwest tribes.[44] However, this translation was adequate only to explain the basic nature of the treaty promises.[45]

To the tribes, the right of taking fish, reserved by six of the treaties Stevens negotiated during this period, was the most important of all the treaty clauses.[46] It meant that the tribes were only confined to the reservations in terms of residence but were free to take fish from other places, as they were accustomed. Stevens knew the tribes would never sign without this promise.[47] Moreover, it is likely that Stevens' self-interest was at play here as well.[48] Fishing would sustain the tribes, in turn decreasing the U.S. government's responsibility to provide for them.[49] The fishing right was only limited by an agreement by the tribes to

41 Treaty with the Nisqualli, Puyallup, etc., art. 3–5, Dec. 26, 1854, 10 Stat. 1132 [hereinafter Treaty of Medicine Creek].

> The Treaty of Medicine Creek was signed on December 26, 1854, at a meeting at Medicine Creek in present-day Thurston County. Sixty-two leaders of major Western Washington tribes, including the Nisqually and Puyallup, signed the treaty with Territorial Governor Isaac Stevens (1818–1862). The tribes ceded most of their lands in exchange for $32,500, designated reservations, and the permanent right of access to traditional hunting and fishing grounds.

Walt Crowley, Treaty of Medicine Creek, 1854, http://www.historylink.org/essays/output.cfm?file_id=5253 (last visited Jan. 3, 2009).

42 *Phase I Appeal*, 520 F.2d at 683.

43 *Id.*

44 *Id.*

45 *Id.*

46 United States v. Washington (*Phase II Trial*), 506 F. Supp. 187, 190 (W.D. Wash. 1980).

47 WILKINSON, *supra* note 1, at 12.

48 *See id.*

49 *Id.*

"not take shellfish from any beds staked or cultivated by citizens"[50] and was therefore seemingly unlimited in its application to the right of tribes to take salmon from their traditional fishing grounds. Whether Washington officials ever really recognized this tribal right is unclear. However, by 1945 it was apparent that Washington officials would refuse to recognize any special position of the tribes' right to fish.[51]

### *B. Litigation Ensues*

*1.* Phase I

Just before Christmas, 1945, little more than ninety years after the Stevens Treaties were signed, Billy Frank, Jr., a native fisherman, was arrested as he began cleaning the fish he had just pulled from an area of the Nisqually River called Frank's Landing.[52] This arrest, along with the approximately fifty others that Billy experienced over the next thirty years, put Billy at the head of what has become one of the most drawn out treaty disputes in American history.[53]

During this period, the supply of fish in Washington's rivers began to feel the negative effects of several exterior forces: commercial gillnetting[54] increased exponentially, sport fishing experienced a resurgence among returning World War II veterans, hydroelectricity found a permanent home on the fast-moving rivers of the Cascades, and the baby boom put pressures on natural resources as the logging industry boosted its harvesting activities.[55] As the State increased its fishing regulations to protect salmon runs on the Nisqually and other nearby rivers, it also began to insist that tribes were subject to the same license regulations and take limits as non-Indians.[56] When Indian fishermen continued to fish as normal, the State

50 Treaty of Medicine Creek, *supra* note 41.

51 WILKINSON, *supra* note 1, at 4.

52 *Id.*

53 *See id.*

54 Gillnet fishing is a type of fishing using nets of varying size and thickness. It is one traditional manner of fishing. Gillnet fishing can be very effective in catching large numbers of fish and is therefore closely regulated.

55 WILKINSON, *supra* note 1, at 30–31.

56 *Id.* at 31.

followed up with a law enforcement campaign consisting mostly of "raids and stings" designed to catch tribal fishermen in the act.[57] The State saw the conduct of Indian fishermen as lawless, perverse, and as the causal reason for the decrease in salmon runs.[58] The tribes refused to step down—after all, they and their ancestors had been fishing these rivers for over five thousand years[59]—and soon the number of Indian fishermen arrests began to increase.

In the early 1960s, the State mounted a raid on tribal fishermen that would last for over a decade, flaring up during the salmon runs and then subsiding, only to repeat itself the next season.[60] Life at Frank's landing during this time was

> hyperactive, white hot. The surveillance was continuous. . . .
>
> > The game wardens — a dozen to more than fifty — would descend the banks in a stone-faced scramble toward a few Nisqually men in a canoe or skiff unloading salmon from a gillnet. Usually the Nisqually would give passive resistance — dead weight — and five officers or more would drag the men up the rugged banks toward the waiting vehicles. The dragging often got rough, with much pushing and shoving, many arms twisted way up the back, and numerous cold-cock punches. The billy clubs made their thuds. Sometimes the Indian men struck back.[61]

And strike back they did. In September 1970, the treaty tribes of western Washington and the United States, acting as trustee for the tribes, filed a complaint in U.S. District Court for the Western District of Washington.[62] In what would become known as *Phase I* of the *United States v. Washington* litigation, tribal attorneys set out to argue against any state regulation over treaty fishing and to ensure a significant share of the fish for the tribes.[63] Although tribal attorneys originally did not argue to establish an exact percentage allocation for the tribes, they

57 *Id.*

58 *Id.*

59 *Id.* at 19.

60 *Id.* at 34.

61 *Id.* at 38.

62 United States v. Washington (*Phase I Trial*), 384 F. Supp. 312, 327 (W.D. Wash. 1974).

63 WILKINSON, *supra* note 1, at 51.

floated the idea of a fifty-fifty split but did not push the issue much.[64] The attorneys for the United States were not convinced this was a position supported by case law and doubted whether it was something Judge Boldt would be willing to grant.[65] Just one year prior, the U.S. District Court for the District of Oregon held that tribes were to be allocated a "fair share" of the harvestable salmon in the Columbia River.[66] U.S. attorneys thought it would be sufficient to pursue a similar ruling in Washington.[67] However, by the end of the trial, the federal attorneys were arguing for a fifty percent allocation and the tribes were separately arguing that no exact quota should be set.[68] They argued that tribes should be guaranteed enough fish to meet tribal needs, regardless of the size of their take.[69]

In the fall of 1973, *United States v. Washington* went to trial.[70] For a month, Judge Boldt heard testimony from tribal members.[71] Billy Frank himself testified of his many arrests and confiscations of his fishing gear.[72] Tribal elders testified, recounting the history that had been handed down to them of how their ancestors centered their lives around the river and the fish.[73] Not surprisingly, the decision that was handed down by the court focused on tribal fishing as a matter of "subsistence and cultural identity" and how it "provides an important part of [tribal] livelihood."[74] Judge Boldt also placed significant emphasis on the facts surrounding the treaty negotiations, explaining that "[a]t the treaty negotiations, a primary concern of the Indians whose way of life was so heavily dependent upon harvesting anadromous fish, was that they have freedom to move about to gather food, particularly salmon."[75] In February of

64 *Id.* at 52.

65 *Id.* at 53.

66 Sohappy v. Smith, 302 F. Supp. 899, 911 (D. Or. 1969).

67 WILKINSON, *supra* note 1, at 53.

68 *Id.*

69 *Id.*

70 *Id.* at 55.

71 *Id.*

72 *Id.*

73 *Id.*

74 United States v. Washington (*Phase I Trial*), 384 F. Supp. 312, 357 (W.D. Wash. 1974).

75 *Id.* at 355.

1974, Judge Boldt produced his final decision; one of the most important decisions for Northwest tribes.[76] He ruled for the tribes on almost all accounts but most importantly on the fifty-fifty allocation.[77] Judge Boldt based this decision on his interpretation of the three words, "in common with," from the Stevens Treaties, to mean that both Indians and non-Indians must equally share the "opportunity to take fish."[78] Therefore, both non-treaty fishermen and treaty fishermen must each have an equal opportunity to the fish. That is, the opportunity to take up to fifty percent of the harvestable number of fish.

Judge Boldt and his allocation decision came under intense scrutiny after the trial ended. Routinely, U.S. marshals were called on to remove effigies of Judge Boldt, with nooses around their necks, from the front lawns of the federal courthouse.[79] Enforcing the decision, however, was even more difficult and dangerous, as vigilantes and rogue fishermen held "fish-ins" to protest the Boldt decision.[80] Judge Boldt, however, held firm in his decision, eventually issuing hundreds of post-trial enforcement orders.[81]

In 1975, the State and its commercial and sport fishing supporters appealed Judge Boldt's decision to the U.S. Court of Appeals for the Ninth Circuit.[82] After hearing oral arguments, the Ninth Circuit affirmed the Boldt decision.[83] The Ninth Circuit, however, focused a significant portion of its ruling on the question of when, if ever, may the state regulate the fish-take of tribes.[84] Judge Boldt had limited the state's right to regulate Indians' off-reservation fishing to whatever measures "are reasonable and necessary to the perpetuation of a particular run or species of fish."[85] In its analysis of this issue, the court

76 WILKINSON, *supra* note 1, at 55–56.

77 *Phase I Trial*, 384 F. Supp. at 343.

78 *Id.*

79 WILKINSON, *supra* note 1, at 58–61.

80 *Id.* at 58.

81 *Id.*

82 United States v. Washington (*Phase I Appeal*), 520 F.2d 676 (9th Cir. 1975).

83 *Id.* at 693.

84 *See id.* at 686–87.

85 United States v. Washington (*Phase I Trial*), 384 F. Supp. 312, 342 (W.D. Wash. 1974).

analogized the state's and tribes' related interests in the fish to a cotenancy interest in that "[e]ach has the right to full enjoyment of the property"; both parties "stand in a fiduciary relationship one to the other"; and, like cotenants, each "is liable for waste if he destroys the property or abuses it so as to permanently impair its value."[86] The court continued, "neither the treaty Indians nor the state on behalf of its citizens may permit the subject matter of these treaties to be destroyed."[87] While the State asserted its goals for conservation and argued that it should be able to restrain Indian fishing in pursuit of attainment of such goals, the court further explained that although the State's conservation program appeared commendable, the State needed to realize that it shared its interest in the fish with another sovereign party.[88] Therefore, the State could not force the tribes to give up their sovereign rights in the fish in order to promote the interests of the state's non-Indian citizens.[89] In pursuit of its conservation goals, the State must do its best by regulating non-Indian fishing interests and "only after the state has proved unable to preserve a run by forbidding the catching of fish by other citizens" may the State directly regulate Indian fishing.[90] This was clearly not the outcome hoped for by the State, and it was promptly appealed to the U.S. Supreme Court, which then denied certiorari.[91] Judge Boldt's decision was the law of the land.

*2.* Phase II

As part of the *Phase I* litigation, the United States and the tribes originally asserted additional claims for relief from activities, such as logging, pollution, and obstruction of streams

86 *Phase I Appeal*, 520 F.2d at 685.

87 *Id.*

88 *Id.* at 685–86.

89 *Id.* at 686.

90 *Id.*

91 *See* Washington v. United States, 423 U.S. 1086 (1976). A related case, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979), involved the issue of state compliance with the federal court's order. It was the culmination of some state court claims and brought after the Boldt decision was handed down. *See id.* at 662. The U.S. Supreme Court granted certiorari, and found itself essentially ruling on the validity of Judge Boldt's decision and the Ninth Circuit's affirmation of that decision. *See id.* at 696. The Supreme Court's holding affirms Judge Boldt's allocation ruling with slight modifications. *See* United States v. Washington (*Phase II Trial*), 506 F. Supp. 187, 193 (W.D. Wash. 1980).

that caused environmental damage to the fisheries (for example, loss of fish and damage to fish habitat).[92] However, in the interest of simplifying their arguments, the parties agreed to reserve the "environmental issues" for decision in a later phase of the case.[93] *Phase II*, which considered this issue, began in 1976, several months after the Supreme Court denied certiorari in *Phase I*.[94] The tribes and the United States, once again acting as trustee, eventually moved for summary judgment on the issue of whether the treaty fishing right, established by the Stevens Treaties, includes a right to have the fishery resource protected from damaging environmental actions "or inactions" of the state.[95] The court found that over the preceding years there had been a "gradual deterioration and loss" of fish and fish habitat in Washington.[96]

Recognizing the right to "take fish" as the central cornerstone of the Stevens Treaties, District Court Judge Orrick granted summary judgment in favor of the tribes, holding that "implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation."[97] Were fish habitat degradation 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."[98] The U.S. Supreme Court had already clearly stated that treaty fishing rights include much more than this.[99] Such reasoning is further supported by the intentions of Stevens and his fellow negotiators to populate and develop this portion of western Washington, while "assur[ing] the tribes that they could continue to fish notwithstanding the changes that the impending western expansion would certainly entail."[100]

92 United States v. Washington (*Phase I Trial*), 384 F. Supp. 312, 328 (W.D. Wash. 1974).

93 *Phase II Trial*, 506 F. Supp. at 191.

94 *Id.* at 194.

95 *Id.*

96 *Id.* at 203.

97 *Id.*

98 *Id.*

99 *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979) (stating that the treaty fishing clause gives tribes more than "merely the chance . . . occasionally to dip their nets into the territorial waters").

100 *Phase II Trial*, 506 F. Supp. at 204.

Although the tribes were elated to receive such a judgment, their elation lasted only a short time. Sure enough, the Ninth Circuit agreed to hear the appeal of Judge Orrick's decision, and just over two years later, a three-judge panel reversed the decision, holding that the Stevens Treaties do not "create an absolute right to relief from" any and all environmental degradation of fish habitat that interrupts the tribes' fishing rights.[101] However, the panel did not completely dismiss the issue as conclusively as this language might suggest.[102] The opinion's conclusion stated:

> Let us repeat the essence of our interpretation of the treaty. Although we reject the environmental servitude created by the district court, we do not hold that the State of Washington and the Indians have no obligations to respect the other's rights in the resource. Instead . . . we find on the environmental issue that *the State and the Tribes must each take reasonable steps* commensurate with the resources and abilities of each to preserve and enhance the fishery when their projects threaten then-existing harvest levels.[103]

Although the panel responded by overturning what they called the imposition of an "environmental servitude," they still held that the state, under certain circumstances, must take affirmative action to preserve and even enhance the tribes' fisheries.[104]

Upon a request for rehearing, however, the Ninth Circuit agreed to rehear the case.[105] After the rehearing, the court, en banc, issued a per curiam opinion vacating both the district court opinion,[106] as well as the opinion of the three-judge panel.[107] Although the court was "highly divided"[108] on this issue, it determined that both the district court's opinion and that of the

101 United States v. Washington (*Phase II Appeal*), 694 F.2d 1374, 1375 (9th Cir. 1982).

102 *See* United States v. Washington (*Culverts Opinion*), No. C70-9213, Subproceeding No. 01-1, 2007 WL 2437166, at *6 (W.D. Wash. Aug. 22, 2007).

103 *Phase II Appeal*, 694 F.2d at 1389 (emphasis added).

104 *Id.*

105 United States v. Washington (*Phase II Appeal Rehearing*), 759 F.2d 1353, 1354 (9th Cir. 1985).

106 *Id.*, *vacated*, 506 F. Supp. 187 (W.D. Wash. 1980).

107 *Id.*, *vacating*, 694 F.2d 1374.

108 United States v. Washington (*Culverts Opinion*), C70-9213, Subproceeding No. 01-1, 2007 WL 2437166, at *4 (W.D. Wash. Aug. 22, 2007).

panel, had weak factual accounts on which to base the imposition of an environmental duty to protect habitat, stating:

> We choose to rest our decision in this case on the proposition that issuance of the declaratory judgment on the environmental issue is contrary to the exercise of sound judicial discretion. The legal standards that will govern the State's precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation *upon concrete facts which* [sic] *underlie a dispute in a particular case*. Legal rules of general applicability are announced when their consequences are known and understood in the case before the court, not when the subject parties and the court giving judgment are left to guess at their meaning. It serves neither the needs of the parties, nor the jurisprudence of the court, nor the interests of the public for the judiciary to employ the declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension. . . .
>
> The State of Washington is bound by the treaty. If the State acts for the primary purpose or object of affecting or regulating the fish supply or catch in noncompliance with the treaty as interpreted by past decisions, it will be subject to immediate correction and remedial action by the courts. *In other instances, the measure of the State's obligation will depend for its precise legal formulation on all of the facts presented by a particular dispute*.[109]

Absent a specific factual account detailing a breach of a duty, the court refused to delineate what such a duty may entail, fearing its actions would sweep too broadly.[110]

However, it might be said that the court did not reject the imposition of a duty, but merely postponed such imposition for a later date, when the parties could bring forth a more exact factual account on which to base a breach of that duty.[111] Interestingly, even though the court was divided on this issue, "[n]either the majority opinion, nor any of the dissenting or concurring opinions rejected the district court's analysis on treaty-based obligations."[112] In fact, four of the dissenting judges

109 *Phase II Appeal Rehearing*, 759 F.2d at 1357 (emphasis added).

110 *See id.* at 1361.

111 *Id.* at 1357.

112 *Culverts Opinion*, 2007 WL 2437166, at *5 n.5.

would have affirmed the district court's finding of a duty.[113] Specifically, Judge Nelson stated:

> I agree with the district court that the Tribes have an implicit treaty right to a sufficient quantity of fish to provide them with a moderate living, and the related right not to have the fishery habitat degraded to the extent that the minimum standard cannot be met. I also agree that *the State has a correlative duty to refrain from degrading or authorizing others to degrade the fish habitat* in such a manner.[114]

Consequently, the tribes and the federal attorneys found themselves faced with the decision of how to proceed with the case. Would they be able to produce the "concrete facts" necessary to show the breach of a duty that was not "imprecise in definition and uncertain in dimension"?[115]

### *3.* Culverts *Subproceeding*

In 2001, sixteen years after the Ninth Circuit left open the door for tribes to produce a set of facts establishing a treaty-based duty to protect fish habitat, the western Washington treaty tribes filed a request for determination with the U.S. District Court.[116] The tribes sought three things: (1) a declaratory judgment establishing that the right of taking fish "imposes a duty upon the State of Washington to refrain from diminishing, *through the construction or maintenance of culverts*, . . . the number of fish that would otherwise return to or pass through" the tribes' fishing grounds; (2) a prohibitory injunction requesting a prohibition on any state construction or maintenance of culverts that reduce the number of passing fish; and (3) a mandatory injunction requiring affirmative state action to identify and fix any culverts under state roads that diminish the number of passing fish within five years of the judgment.[117]

The case was brought as a subproceeding under *Phase II* of *United States v. Washington*. As previously, the tribes were

113 *Phase II Appeal Rehearing*, 759 F.2d at 1365–70 (Nelson, J., dissenting; Norris, J., concurring in part and dissenting in part; Poole, J., dissenting) Judge Skopil was the fourth dissenting judge, joining in Judge Nelson's opinion.

114 *Id.* at 1367 (Nelson, J., dissenting) (emphasis added).

115 *Id.* at 1357.

116 Request for Determination, *Culverts Opinion*, 2007 WL 2437166 (W.D. Wash. Jan. 12, 2001).

117 *Id.* at 6–7 (emphasis added).

seeking a declaratory judgment that the state had a duty to protect fish habitat.[118] However, this time the tribes had been able to gather significant data showing that one specific state action—the construction and maintenance of culverts—had diminished the number of fish passing through the tribes' usual and accustomed fishing grounds.[119] The data used by the tribes had been developed by the Washington State Department of Transportation.[120] Culverts that are correctly built and maintained do not block fish passage; however, culverts that have a blocked entrance, have excessive outlet velocity, or are too high off the water-level may completely block the passage of adult salmon returning to spawn and/or the out-migration of juvenile fish.[121] The tribes cited state reports indicating that culverts belonging to the State of Washington impeded the production of two hundred thousand adult salmon annually.[122] By 2006, the state had identified *six times* as many blocking culverts as it had in the 1997 report.[123]

In August of 2006, both the tribes and the State moved for summary judgment.[124] The State argued that the tribes were trying to introduce a new treaty right into the Stevens Treaties: an implied servitude requiring affirmative action on the part of landowners.[125] The tribes, however, argued that they were merely bringing a suit to enforce their right to take fish and to

118 *Id.* at 1.

119 *See* Tribal Brief in Opposition to State's Motion for Summary Judgment at 1, *Culverts Opinion*, 2007 WL 2437166 (W.D. Wash. Sept. 27, 2006).

120 *Id.* at 1–2.

121 *See* Request for Determination, *supra* note 116, at 4; *see also* THOMAS H. KAHLER & THOMAS P. QUINN, UNIV. OF WASH., JUVENILE AND RESIDENT SALMONID MOVEMENT AND PASSAGE THROUGH CULVERTS 7 (1998), *available at* www.wsdot.wa.gov/research/reports/fullreports/457.1.pdf.

122 Request for Determination, *supra* note 116, at 5.

123 Plaintiff Tribes' Motion and Memorandum in Support of Motion for Partial Summary Judgment at 10, *Culverts Opinion*, 2007 WL 2437166 (W.D. Wash. Aug. 14, 2006).

124 Plaintiff Tribes' Motion and Memorandum in Support of Motion for Partial Summary Judgment, *supra* note 123; Washington's Motion for Summary Judgment, and Argument in Support, *Culverts Opinion*, 2007 WL 2437166 (W.D. Wash. Aug. 14, 2006).

125 Washington's Motion for Summary Judgment, and Argument in Support, *supra* note 124, at 1–2.

clarify the duty of the state as it relates to fish habitat.[126] Specifically, the tribes suggested that this litigation was merely a "particular fact context," "brought in response to the direction of the Ninth Circuit to seek confirmation of the treaty right" to a protected fish habitat.[127]

Judge Martinez agreed with the tribes that this subproceeding was merely the application of the Ninth Circuit's previous ruling to a specific factual context, culverts, through which the tribes were re-asking a narrower version of the same question they had asked over twenty years prior: Does "the Tribes' treaty-based right of taking fish impose[] upon the State a duty to refrain from diminishing fish runs by constructing or maintaining culverts that block fish passage"?[128] As part of his opinion, Judge Martinez reviewed the case history of *Phase II*, noting that amidst the reversals at the Ninth Circuit, "nowhere in the majority opinion did the court state that no duty arises from the treaties."[129]

Finding that such a duty does in fact arise from the Stevens Treaties, Judge Martinez relied on the principles of Indian treaty construction, specifically that treaties with Indians should be construed broadly in the sense in which they would "naturally be understood by the Indians."[130] During treaty negotiations, Governor Stevens promised the tribes the right to *take* fish, not merely the right *to* fish.[131] He also explained that they were not called upon to change their ways of living, only to confine their communities to one place.[132] Moreover, Judge Martinez stated that it was "the government's intent, and the Tribes' understanding," that they would be able to fish perpetually to meet their needs, so as not to become "a burden on the treasury."[133] This appears to be one of the most influential points of Judge Martinez' decision: not only was it the tribes' intent that

126 Plaintiff Tribes' Motion and Memorandum in Support of Motion for Partial Summary Judgment, *supra* note 123, at 2–3.

127 *Id.* at 3.

128 *Culverts Opinion*, 2007 WL 2437166, at *3.

129 *Id.* at *5 n.5.

130 *Id.* at *6 (quoting Washington v. Wash. State Commercial Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979)).

131 *Id.* at *8.

132 *Id.*

133 *Id.* at *9.

they have perpetual fisheries, but the government's as well. This intent is evidenced by Stevens' aim to keep the tribes off the federal bankroll[134] and a statement made by Stevens at the Point Elliot Treaty council: "I want that you shall not have simply food and drink now *but that you may have them forever*."[135] Furthermore, in the 1850s, the tribal fisheries of western Washington appeared inexhaustible, and it was not until forty years later that scientists began cautioning that salmon might not remain plentiful in perpetuity.[136]

In this manner, the tribes were convinced to give up huge plots of land by the promise of perpetual access to this most important, sacred resource.[137] Because the resource was in no need of protection at the time, the parties felt no need to explicitly include an environmental duty into the treaties.[138] Such protection appeared unnecessary at the time.[139] However, the promises made by Stevens only carried meaning if they included an implied promise that the government would never take actions that would degrade the resource.[140]

Consequently, Judge Martinez held that the treaty language itself, along with the promises made by Stevens and the negotiators, imposed upon the state a duty to refrain from building or maintaining any culverts that act to block the passage of fish to or from the tribes' traditional fishing places.[141] However, Martinez narrowly defined this duty and was careful to ensure that his holding fell within the requirements set forth by the Ninth Circuit,[142] adding:

> This is not a broad 'environmental servitude' or the imposition of an affirmative duty to take all possible steps to protect fish runs as the State protests, but rather a narrow directive to refrain from impeding fish runs in one specific manner. . . .

134 *See id.* at *8–9.

135 *Id.* at *9 (quoting Declaration of Richard White) (emphasis added).

136 *Id.*

137 *Id.* at *10.

138 *Id.* at *9.

139 *Id.* at *10.

140 *Id.*

141 *Id.* at *6.

142 *See, e.g.*, United States v. Washington (*Phase II Appeal Rehearing*), 759 F.2d 1353 (9th Cir. 1985).

> This duty . . . . is necessary to fulfill the promises made to the Tribes . . . .[143]

### *C. Implications*

There is little doubt that the *Culverts Opinion* is a milestone for tribal-rights advocates seeking greater environmental responsibility to be put on the shoulders of the state. It has been hailed as a case of "incredible importance . . . for future generations."[144] It may very well be; only time will guarantee the accuracy of such a prediction. However, it has significant limitations and its scope of applicability is narrow. As noted above, Judge Martinez was careful to restrict the scope of his holding to enforce a duty not to construct culverts that block fish passage and limited his holding to the facts that were before the court.[145] Therefore, this duty probably does not include a duty to refrain from polluting streams even though such activity may reduce numbers of fish. Similarly, the duty probably does not encompass the destruction of fish habitat by state-licensed logging companies or the construction of dams. It is a "narrow directive to refrain from impeding fish runs in one specific manner," namely, the construction and maintenance of culverts.[146]

This case can also be viewed as a stepping stone toward the establishment of either: (1) a broad duty, such as that originally established by the district court in *Phase II*, or (2) several narrow duties (such as this one) directed at specific activities that harm fish passage and habitat.

This ruling will probably have significant impacts on the projects and budget of the Washington State Department of Transportation. Due to this impact, it can be expected that the ruling will be appealed. Unless it is reversed on appeal, it is likely that the tribes will rely upon the ruling and argue that it should be expanded to cover other environmental harms to fish and fish habitat.

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143 *Culverts Opinion*, 2007 WL 2437166, at *12.

144 U.S. v. Washington Culverts Case, http://tribal-law.blogspot.com/2007/08/us-v-washington-culverts-case.html (Aug. 24, 2007).

145 *See Culverts Opinion*, 2007 WL 2437166, at *12.

146 *Id.*

## II
## THE MISSING ANALYSIS: A PROPERTY-BASED CONSTRUCT

This ruling has one significant weakness: its failure to analyze the state's duty under a property-rights construct. As noted above, tribal treaties are not only contracts but also deeds of property.[147] These were no small deeds by any means. Tribes ceded "millions of acres" in their treaties with the U.S. government.[148] Therefore, failure to apply a property construct in a treaty-rights analysis is a failure to recognize the true nature of treaties: that tribes exchanged interests in property for their most valuable resource—fish.

Most important to this analysis, however, is that tribes of western Washington did not only give up significant property rights, they also agreed to *share* certain property rights with the Territory (now State) of Washington.[149] One of these rights is discussed here: the "right of taking fish."[150] This right was reserved to the tribes "in common with all citizens of the territory."[151]

Moreover, the weight of authority acknowledges that fishing rights are property rights and therefore subject to the rules of property law.[152] The U.S. Supreme Court clarified that tribal property rights are of federal origin, and tribes can bring common law causes of action to vindicate those rights.[153]

One property analysis that has been applied by the Ninth Circuit regarding the allocation issue but has yet to be tested in its application toward fish habitat protection, is the analogy of a cotenancy. Because the right to take fish is a right reserved to the tribes "in common" with the state, it is a shared right. Although it may be true that neither party has ownership over the resource, the use of a cotenancy analogy is a helpful way to describe the relationship between the state, the tribes, and the

147 Wood, *supra* note 8, at 36.

148 United States v. Washington (*Phase II Appeal Rehearing*), 759 F.2d 1353, 1366 (9th Cir. 1985).

149 *See* Treaty of Medicine Creek, *supra* note 41.

150 *Id.*

151 *Id.*

152 *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1141 (Nell Jessup Newton ed., LexisNexis 2005) (1941); *see also* Wood, *supra* note 8, at 36.

153 Wood, *supra* note 8, at 37–38.

fish.[154] However, this analogy has only been applied when dealing with fish apportionment issues, never in regards to fish habitat protection.[155] The reason often cited arguing against its application, as Judge Kennedy explained, is that the relationship between the state and the tribes does not meet all the requirements of a state common law tenancy-in-common or joint tenancy.[156] However, it is not necessary that all of the formalistic requirements of state common law be met in order to apply the analogy. This analogy is helpful because it provides both a duty as well as causes of action, such as waste and ouster, that can be applied to the fish habitat protection context.[157] Because of the useful lessons and remedies that stem from a cotenancy analogy, courts should be willing to apply it as a property-based construct when dealing with a state's or a tribe's actions towards treaty fisheries.

First, the relationship between states, tribes, and treaty fisheries is analogous to a cotenancy.[158] The Ninth Circuit, in 1978, called the relationship a "quasi-cotenancy,"[159] due to the fact that it had some but not all of the common law attributes. Traditionally, under state common law, the term "cotenancy" is used to describe the relationship between common owners of property.[160] Although there are several different forms of common ownership, the differences really only arise when one of the cotenants dies.[161] While the owners are alive, they are all referred to as cotenants and have essentially the same rights and

154 *See* United States v. Washington (*Phase I Appeal*), 520 F.2d 676, 685–86 (9th Cir. 1975). The Ninth Circuit was careful to point out that "[t]he two groups of fishermen [did] not share a cotenancy in the fish," but that "[n]evertheless, their relationship [was] analogous to a cotenancy." *Id.*

155 *See id.*; *see also* United States v. Washington (*Phase II Appeal*), 694 F.2d 1374, 1381 (9th Cir. 1982); Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123, 1128 n.3 (9th Cir. 1978). *But see* Washington's Motion for Summary Judgment, and Argument in Support, *supra* note 124, at 5–6 (arguing that the cotenancy analogy does not support the tribes' case).

156 *See Puget Sound Gillnetters*, 573 F.2d at 1134 (Kennedy, J., concurring).

157 Dale E. Kremer, Comment, *The Inter Vivos Rights of Cotenants Inter Se*, 37 WASH. L. REV. 70, 76–79 (1962).

158 *Phase I Appeal*, 520 F.2d at 685–86.

159 *Puget Sound Gillnetters*, 573 F.2d at 1130.

160 Kremer, *supra* note 157, at 70.

161 *Id.*

responsibilities.[162] Conferring common ownership (for example, conveyance of part and reservation of part) of the right to take fish, the Stevens Treaties use the language, "in common with" to signify such an outcome.[163] Consequently, because the states and the tribes share this common ownership, one can call their relationship, "analogous to a cotenancy."[164]

Second, simply because the relationship between the states and tribes does not meet all the formal requirements of either a common law tenancy-in-common or joint tenancy does not mean that the cotenancy analogy cannot be applied.[165] "Obviously, not all the rules of cotenancy in land can apply to an interest of the nature of a profit," but that fact alone has been no barrier to courts using analogies to "explain[] the rights of the parties."[166] Important to recognize is that common property law is state law, whereas Indian law is federal law, and is therefore not restrained by the complex intricacies of state common law.[167] Moreover, federal Indian law is said to be sui generis, or unlike any other area of the law.[168] This unique status leaves open the door for judicial creativity to apply analogous principles, such as those from the common law, to solve complex disputes.

Prominent experts in this area agree: "[I]t is appropriate to draw upon property concepts for 'foundational' principles, though specific doctrines may not be wholly transferable in their

162 *See id.*

163 *See* United States v. Washington (*Phase I Trial*), 384 F. Supp. 312, 343 (W.D. Wash. 1974).

164 United States v. Washington (*Phase I Appeal*), 520 F.2d 676, 685 (9th Cir. 1975).

165 *See* Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123, 1128 n.3 (9th Cir. 1978). The court stated:

> We refer to the cotenancy analogy only because it is helpful in explaining the rights of the parties, not because all the rights and incidents of a common law cotenancy necessarily follow. . . . It is this equality of right between two quasi-sovereigns which we expressed by analogy in the earlier case.

*Id.*

166 *Id.*

167 *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 561 (1832) (holding that federal law and not state law controls regulation of Indian affairs).

168 Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1498 (1994).

entirety."[169] However, Judge Kennedy, who was serving on the Ninth Circuit at the time the "quasi-cotenancy" analogy was employed, failed to realize this when he rejected the idea of a cotenancy or quasi-cotenancy analogy. Judge Kennedy rejected the idea simply because the parties do not have the "right to possess and use the entire" resource, whereas in a traditional cotenancy both parties have that right.[170] Indian law is not so constrained; the majority of the court agreed with the use of the analogy.[171] Simply because every common law attribute of a cotenancy is not met regarding the relationship between states and tribes, does not mean cotenancy remedies cannot be applied.[172] For example, the Ninth Circuit, ruling on the apportionment issue in *Phase I* of *United States v. Washington*, analogized the state's and tribes' relationship to a cotenancy and indicated that its apportionment decision was essentially a "partition of the property" interest in catching fish.[173] Partition is a remedy one member of a cotenancy can seek in order to protect his interest in the property.[174] The court, specifically recognizing that the interest in the fish was not a cotenancy per se, still applied a cotenancy remedy to this analogous situation.

Third, because this relationship is analogous to a cotenancy, causes of action such as waste and ouster should be applied to regulate state or tribal actions that degrade the fisheries. Cotenants have a fiduciary relationship toward one another.[175] Therefore, when one cotenant acts, it is subject to a duty of acting in a fiduciary capacity toward the other cotenants.[176] In no context does this fiduciary relationship manifest itself more so than in the causes of action available to cotenants: waste and ouster.

169 Wood, *supra* note 8, at 38 n.183 (citing Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 123–26 (1995)).

170 *Puget Sound Gillnetters*, 573 F.2d at 1134 (Kennedy, J., concurring).

171 *Id.* at 1128 n.3.

172 United States v. Washington (*Phase I Appeal*), 520 F.2d 676, 687 (9th Cir. 1975).

173 *See id.*

174 *See id.* (citing Kremer, *supra* note 157, at 77).

175 Kremer, *supra* note 157, at 70.

176 *See id.*

### *A. Waste*

Waste is usually described as "an abuse or destruction of property by one [cotenant] . . . resulting in a permanent injury to the inheritance."[177] Waste has occurred when one of the cotenants has overstepped the limitations of his property rights to the property.[178] According to Judge Prager, two general kinds of waste exist: voluntary and permissive.[179] Voluntary waste includes affirmative acts, while permissive waste includes the failure to perform necessary affirmative acts for the benefit of future cotenants.[180] This is a great analogy to the tribal fisheries context. When one of the cotenants to the resource acts in any way "inconsistent with the limitations" of his rights to the resource, he has committed waste.[181] This could conceivably include overfishing, introducing fish-harming pollution, construction of fish-harming obstructions such as culverts and dams, and any other significant destruction of the resource.

### *B. Ouster*

Ouster is another cause of action available to cotenants. It is defined as "the act of one cotenant in depriving the other cotenant of his rights" with respect to the common property interest.[182] One act that constitutes ouster is the denial of access to the other cotenants of the shared property.[183] Usually, the question of whether one cotenant's acts constitute ouster is a question for a jury to decide.[184] This cause of action provides again, like waste, some interesting remedies for tribes whose treasured resources are harmed in such a way as to make it impossible for them to access that resource. For example, if any acts of the state either permit or cause pollution to diminish the level of fish such that tribes are denied "access" to their fisheries,

177 *Id.* at 76.

178 *Id.*

179 JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 556 (Aspen Publishers 4th ed. 2006) (1993).

180 *Id.*

181 Kremer, *supra* note 157, at 76.

182 *Id.* at 78.

183 *Id.*

184 *Id.*

the tribes would have a cause of action for ouster against the state.

Both waste and ouster are creative and time-tested causes of action for damage to a shared property interest. Because the relationship between tribes and states with regards to treaty fisheries is analogous to a cotenancy, these causes of action should be used in effecting remedies for state degradation of tribes' right to take fish as secured by tribal treaties.

## III
## CONCLUSION

Over the next several decades, the issues confronted within the *United States v. Washington* litigation will probably continue to appear before adjudicators. Courts must be willing to be creative in how they analyze and tackle issues in the Indian law realm. Specifically, when dealing with shared resources between states and tribes, courts should employ property-based rules and constructs in addition to their traditional contract-based tools to interpret treaties. This is not a new idea. The Ninth Circuit began applying the cotenancy analogy to interpret treaty fishing rights in *Phase I*, even going as far as to say, in dicta, that states should not allow the fisheries to be degraded.[185] But this analogy later disappeared in the *Phase II* and *Culverts* litigations, as the court opted to only analyze the state's duties under traditional contract law analysis.

A contract law analysis, by itself, is incomplete because it only considers the duties and rights that arise out of the treaty in conjunction with the law of contracts. What it fails to include are the duties and rights that flow out of the deed of property that exists within the treaty. As such, the *Culverts Opinion* fails to fully encompass the duties and rights that arise out of the analogous cotenancy relationship the state has with the tribes. As Professor Mary Christina Wood states: "It is imperative that courts construe treaties . . . by applying principles derived from this common [property] law framework."[186] Indian law is "new" law in the Anglo-American context—it has no exact analogue

185 *See* United States v. Washington (*Phase I Appeal*), 520 F.2d 676, 687 (9th Cir. 1975).

186 Wood, *supra* note 8, at 38.

and there is little guiding precedent.[187] However, the common property law has traditionally been available for this exact purpose: responding to new and changing conditions.

> The very essence of the common law is flexibility and adaptability. *It does not consist of fixed rules, but is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life*, as from time to time they are brought before the courts. . . . If the common law should become so crystallized that its expression must take on the same form whenever the common law system prevails, irrespective of physical, social, or other conditions peculiar to the locality, it would cease to be the common law of history, and would be an inelastic and arbitrary code. It is one of the established principles of the common law, which has been carried along with its growth, that precedents must yield to the reason of different or modified conditions.[188]

Courts today should be willing to apply a property-based construct along with traditional treaty interpretation rules in deciphering whether a state or tribe has acted in accord with its duties and rights toward shared resources.

187 *Id.*

188 *In re* Hood River, 227 P. 1065, 1086–87 (Or. 1924) (emphasis added).