THE ELUSIVE IMPLIED WATER RIGHT FOR FISH: DO OFF-RESERVATION INSTREAM WATER RIGHTS EXIST TO SUPPORT INDIAN TREATY FISHING RIGHTS?

COMMENT

FULL CITATION:

Katheryn A. Bilodeau, *The Elusive Implied Water Right for Fish*, 48 IDAHO L. REV. 515 (2012).

This article Copyright © 2012 *Idaho Law Review*. Except as otherwise expressly provided, permission is hereby granted to photocopy this article for classroom use, provided that: (1) Copies are distributed at or below cost; (2) The author of the article and the *Idaho Law Review* are properly identified; (3) Proper notice of the copyright is affixed to each copy; and (4) Notice of the use is given to the *Idaho Law Review*.

THE ELUSIVE IMPLIED WATER RIGHT FOR FISH: DO OFF-RESERVATION INSTREAM WATER RIGHTS EXIST TO SUPPORT INDIAN TREATY FISHING RIGHTS?

COMMENT

TABLE OF CONTENTS

I. INTRODUCTION 515
II. BACKGROUND 517
III. FISHING RIGHTS, ROUND ONE: THE RIGHT TO ACCESS USUAL AND ACCUSTOMED PLACES 518
IV. CHANGES IN THE COLUMBIA RIVER BASIN 520
V. FISHING RIGHTS, ROUND TWO: IS THE RIGHT TO TAKE FISH A RIGHT TO THE OPPORTUNITY TO CATCH FISH, OR IS THE RIGHT SOMETHING MORE? 521
VI. THE IMPLIED RESERVATION OF WATER: *WINTERS V. UNITED STATES* AND THE DEVELOPMENT OF THE WINTERS DOCTRINE 524
A. *Winters v. United States* 525
B. The Winters Doctrine 528
VII. INSTREAM WATER RIGHTS TO SUPPORT FISHING RIGHTS: RIGHTS APPURTENANT TO LAND 530
VIII. THE YAKIMA RIVER ADJUDICATION 531
IX. FISHING RIGHTS, ROUND THREE: AN OFF-RESERVATION INSTREAM WATER RIGHT TO SUPPORT THE NEZ PERCE TREATY FISHING RIGHT 536
A. SRBA Analysis 536
B. A Critique of the SRBA Analysis 539
X. FISHING RIGHTS, ROUND FOUR: TREATY-BASED DUTY TO REFRAIN FROM IMPAIRING FISH RUNS (A STEP TOWARDS INSTREAM WATER RIGHTS) 543
XI. FISHING RIGHTS, THE NEXT ROUND: INSTREAM FLOW 545
A. What About Changed Conditions? 549
B. A Note on Jurisdiction 550
XII. CONCLUSION 550

I. INTRODUCTION

What is included with a treaty right to fish? Courts have repeatedly considered this question over the course of the past century. The first question addressed was whether the treaty right to fish at traditional places included a right to access those places, a servitude across the land. As the Columbia Basin was impacted by a decline in salmon, the

next question was whether the treaty right to take fish meant an opportunity to fish, or a right to a harvestable amount of fish. Now, the treaty right to fish is affected by environmental and habitat considerations. Between climate change, habitat modification, and an increasing amount of water users who draw water from the rivers, there is a low volume of stream flow, which affects the riparian habitat that fish require to survive. Fish need water, so does a treaty right to fish include an instream water right to ensure that there are fish? Several courts that have addressed this question have been willing to imply an instream water right to support a treaty fishing right. However, a common feature of these cases is that the treaty right was located on reservation land. Many of the treaties signed by Pacific Northwest Indian Tribes reserved the right to fish at "usual and accustomed places," some of which are not located on reservation land. These treaties prompt the question: Do treaty rights to fish include an instream water right when the traditional fishing ground is off-reservation?

The Confederated Tribes of the Yakama Nation is a group that has experienced a century of litigation over the meaning of their treaty right to fish. After an unpromising decision from the Supreme Court of Washington diminishing the Tribe's fishing rights, the Yakama Nation spent ensuing years in negotiations with adversaries for instream flows to protect its fish resource.[1] This article will examine how a Washington or other Pacific Northwest court today might analyze whether there is an off-reservation instream water right to support a fishing right reserved by treaty language. Such a court should find that an off-reservation instream water right supports a treaty fishing right because a water right would support the fish population, and rules of Indian treaty interpretation require courts to adopt inferences that will support treaty.

In order to answer the question of whether an off-reservation instream right exists to support a treaty fishing right, this comment will begin with treaty fishing rights, move to reserved water rights, and then address where the gaps in analysis are and how to fill them in. First, the comment will examine what is included with the treaty right to fish. Supreme Court decisions have relied on a similar analysis to decide what this right does and does not include. Next, the comment will look at the origin of the implied reserved water right, and argue that the analysis of the court to find a reserved water right is similar to the analysis of the court to determine what is included in a treaty fishing right. Because the implied reserved water right developed into a doctrine, the doctrine will be compared with the original rule. After discussing treaty fishing rights and implied reserved water rights in Washington State litigation, this comment will discuss and evaluate the only court decision, an Idaho court decision, to rule on the question of an off-reservation instream water right to support a treaty fishing right. Fol-

1. *See* Michael C. Blumm, David H. Becker & Joshua D. Smith, *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENVTL. L. 1157, 1180–82 (2006).

lowing a critique of the Idaho court decision, the comment will consider the recent move of a district court to apply treaty-based analysis and find for protection from fish habitat degradation and what this means for instream water rights. Finally, this comment will look at potential approaches to resolve whether there could be an instream water right implied to support fish for a treaty fishing right, which includes identifying links and bridging the gaps between treaty right and reserved water right analysis.

II. BACKGROUND

The Confederated Tribes of the Yakama Nation[2] consists of indigenous groups who have, since time immemorial, lived on the Columbia Plateau east of the Cascade Mountains and west of the Yakima River, [3] land which is now present-day Washington State. The Yakama subsided on hunting, fishing, and gathering, and these subsistence activities influenced strategic seasonal migration around the plateau.[4] As with other tribes in the Pacific Northwest region, salmon consisted of a substantial part of the diet for Yakama Tribes.[5]

In the mid-1800s, federal Indian policy touched the Indian tribes of the Pacific Northwest. In anticipation of an increased flow of settlers into the newly formed Washington Territory in 1853, Washington Territory Governor Isaac Stevens attempted to make land and resources accessible to these new settlers.[6] During 1854-1855, Stevens formed ten treaties with different Pacific Northwest Tribes; the purpose of these series of treaties was to make land available for settlers migrating west, and to provide the Indians areas where they could remain until fully assimilated into American society.[7] The region-wide intent on the part of the United States resulted in similarly drafted treaty language.[8]

---

2. This article will adhere to the spelling "Yakama" when referring to the Confederated Tribes of the Yakama Nation. Traditionally spelled "Yakima" in many historical documents, including the Treaty of 1855, in the mid-1990s the Tribe changed the spelling of its name to "Yakama" because it was closer to the native pronunciation. *Yakama Nation History*, YAKAMANATION-NSN.GOV, http://www.yakamanation-nsn.gov/history3.php. The Yakama were a native group of tribes to the region that had constructed a permanent village at a place where the Yakima River narrows, and the people came to be known as the Yakama, or "narrow-river people." NORTHWEST POWER AND CONSERVATION COUNCIL, TRIBAL BRIEFING BOOK 61 (2000), *available at* http://www.nwcouncil.org/library/2000/2000-11.pdf.

3. *Yakama Nation History*, YAKAMANATION-NSN.GOV, http://www.yakamanation-nsn.gov/history.php (last visited Nov. 14, 2011).

4. *See id.*

5. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664 (1979).

6. Kent Richards, *The Stevens Treaties of 1854-1855*, 106 OR. HIST. Q. 342, 346 (2005).

7. *Id.* at 347.

8. *See, e.g.*, Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957; Treaty with the Yakama, June 9, 1855, 12 Stat. 951; Treaty at Medicine Creek, Dec. 26, 1854, 10 Stat. 1132.

Tribal signatories from the different tribes of the Pacific Northwest shared a common thread: they sought to preserve their traditional food resources. Anthropological experts from a Washington district court decision summarized the importance of the fish resource to the Northwest Indians: "[F]ish were vital to the Indian diet, played an important role in their religious life, and constituted a major element of their trade and economy."[9] During the Stevens Treaty negotiations, tribes repeatedly emphasized the importance of fish to their culture, and expressed their desire to continue to collect salmon at their usual and accustomed fishing grounds.[10] Governor Stevens assured the tribes the continued freedom of accessing traditional fishing places while maintaining that this right would be shared with other territory residents.[11]

The Yakama Nation was among Pacific Northwest Indian Tribes that entered into a treaty agreement initiated by Washington Territory Governor Isaac Stevens.[12] Similar to many tribes in the Northwest, the Yakama were concerned with preserving access to places where they traditionally fished.[13] The result was a provision in article three of the treaty that addressed this concern: "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 . . . ."[14] This treaty language, echoed in various other treaties,[15] was to become perhaps the most litigated provision in Indian treaty interpretation.

III. FISHING RIGHTS, ROUND ONE: THE RIGHT TO ACCESS USUAL AND ACCUSTOMED PLACES

The first question posited to the courts involved the right to access usual and accustomed fishing grounds. Approximately one half century after the Treaty with the Yakama was signed, residents of Washington State who owned property abutting the Columbia River erected state-licensed fishing wheels in common areas where the Indians and citizens both fished.[16] The structure of the fishing wheels was such that it monopolized the fishing area and blocked the Yakama's access to tradition-

9. United States v. Washington, 384 F. Supp. 312, 350 (D. Wash. 1974). Fish constituted one of the major resources comprising the Northwest Indians' diets. *Id.* Tribes held a religious ceremony at the beginning of the harvest to ensure future harvests of fish. *Id.* at 351. Fish was a fundamental element of inter-tribe trade that occurred within the region. *Id.*

10. *Id.* at 355.

11. *Id.*

12. Treaty with the Yakama, *supra* note 8.

13. United States v. Washington, 384 F. Supp. at 350.

14. Treaty with the Yakama, *supra* note 8.

15. Treaty at Medicine Creek, *supra* note 8, at art. 3. Treaty of Point Elliott, art. 5, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, art. 4, Jan. 26, 1855, 12 Stat. 933; Treaty with the Nez Perces, *supra* note 8, at art. 3.

16. United States v. Winans, 198 U.S. 371, 379–80 (1905).

al fishing grounds.[17] In response to this new development, the Yakama brought suit. To determine whether the Yakama had legal recourse for exclusion from their fishing places, the Court had to first determine the nature of the fishing right in article three of the treaty.

In construing the "right of taking fish at all usual and accustomed places," the Supreme Court looked to its existing precedent to guide Indian treaty interpretation. In 1905 there was one established cornerstone of how to interpret an Indian treaty, and the rule involved heavy consideration of how the Indian signatories understood the treaty:

> And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'[18]

Since justice and precedent warranted interpretation according to tribal understanding, the next step was to consider how historical circumstances surrounding the treaty informed the Court as to the Indians' understanding of the provision.[19]

The Supreme Court looked to the Indians' rights as a precursor to circumstances surrounding the signing of the treaty. The Court acknowledged these rights to be completely unfettered from time immemorial.[20] However, the Court noted, changing times limited these rights.[21] Since Indians originally had unlimited rights, the starting point for analysis of a treaty should presume that the Indians have rights not expressly limited by language: "[T]he treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted."[22] These reserved rights that were not expressly granted to the government implied a servitude on the land: the right to cross land to access these fishing grounds and the right to occupy land for the purpose of fishing.[23]

The Court went on to explain that the right to take fish in common with territorial citizens was not an exclusive right: It was a protected right of access to fishing grounds.[24] Although the Yakama Tribe had no exclusive rights, neither did the owners of land appurtenant to the Columbia River. Any arrangement, including fish wheel construction, where the Yakamas would have been denied access to usual fishing

---

17. *Id.* at 380.
18. *Id.* at 380–81 (quoting Choctaw Nation v. United States, 119 U.S. 1 (1886) and citing Jones v. Meehan, 175 U.S. 1 (1899)).
19. *Id.* at 381.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *See id.*

sites, was incompatible with rights reserved to the Yakama by treaty and was thus impermissible.[25]

IV. CHANGES IN THE COLUMBIA RIVER BASIN

A century and a half later, the Columbia River Basin is vastly altered from its natural free-flowing condition and the era of the Stevens Treaties. Beginning in 1933 and for the next forty years, thirteen dams were erected on the main stem of the Columbia.[26] These include Bonneville, The Dalles, John Day, and McNary dams, all of which are located between the confluence of the Yakima and Columbia rivers and the mouth of the Columbia at the Pacific.[27] These concrete structures created upstream lakes and permanently altered river habitat for anadromous fish.[28] This habitat change has resulted in a sharp decline in salmon numbers in the Columbia River Basin since the 1970s.[29] The decline has been so sharp from what it once was that currently twelve distinct population segments of salmon and steelhead in the Columbia River Basin are listed as either endangered or threatened under the Endangered Species Act (ESA).[30] The definition of "endangered species" under the ESA is a species that is in danger of extinction throughout at least a significant portion of its range.[31] "Threatened species" are species at risk of becoming endangered throughout at least a significant portion of its range.[32] An anadromous fish species is listed under the ESA by the Secretary of Commerce (delegated to NOAA[33] Fisheries) on the basis of the best available science.[34] So, according to the best available science,

---

25. *Id.* at 382.

26. MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 164 (Penguin Books 1993).

27. *Hydroelectric Information for Columbia and Snake River Projects*, UNIV. OF WASH. SCH. OF AQUATIC & FISHERY SCIS., http://www.cbr.washington.edu/crisp/hydro/ (last visited Nov. 14, 2011).

28. Bill Lang, *Columbia River*, CTR. FOR COLUMBIA RIVER HISTORY, http://www.ccrh.org/river/history.htm#gorge (last visited Nov. 14, 2011). Reservoirs disorient fish because the water in a reservoir moves slower and is warmer than the river water that constitutes their normal habitat; this puts physiological stress on the salmon. *See* NATIONAL RESEARCH COUNCIL, UPSTREAM: SALMON AND SOCIETY IN THE PACIFIC NORTHWEST 229 (National Academy Press 1996). Reservoirs also increase the time and energy fish spend attempting to migrate downstream. *Id.* at 65. Salmon migrating upstream to their spawning habitats become disoriented and sometimes pass back through the dam downstream. *See* George P. Naughton et al., *Fallback by Adult Sockeye Salmon at Columbia River Dams*, 26 N. AM. J. OF FISHERIES MGMT. 380, 381 (2006).

29. Bill Lang, *Columbia River*, CTR. FOR COLUMBIA RIVER HISTORY, http://www.ccrh.org/river/history.htm#gorge (last visited Jan. 5, 2012).

30. *Endangered Species Act Status of West Coast Salmon and Steelhead*, NAT'L OCEANIC & ATMOSPHERIC ASSOCIATION, http://www.nwr.noaa.gov/ESA-Salmon-Listings/upload/1-pgr-8-11.pdf (last visited Oct. 18, 2011).

31. 16 U.S.C. § 1532(6) (2006).

32. *Id.* § 1532(20).

33. National Oceanic and Atmospheric Administration.

34. *See* § 1533(b)(1)(A).

anadromous fish in the Columbia River Basin had (and have) become a scarce resource.

V. FISHING RIGHTS, ROUND TWO: IS THE RIGHT TO TAKE FISH A RIGHT TO THE OPPORTUNITY TO CATCH FISH, OR IS THE RIGHT SOMETHING MORE?

Similar to many other tribes in the Pacific Northwest, the decline in salmon profoundly affected the Confederated Tribes of the Yakama Nation:

> The spiritual view of the Yakama people is place-based. They believe in the sacredness of all things, but particularly so when things are in their correct places. All things have ordered roles to play within their ecosystems. Changing the content of a place—forcing a species into extinction, for example—changes the order and balance, and disrupts the harmony and sacredness of the place. People are only elements of this integrated wholeness, not owners or masters of it.[35]

In addition to affecting the spiritual existence of the Yakama Nation, the decline in salmon has affected the physical existence of the Yakama as well. In the 1970s the Yakama joined other Pacific Northwest tribes in litigation seeking (1) a declaration of the existence of off-reservation treaty fishing rights; and, (2) relief for the destruction of the treaty fishing rights due to the state's failure to prevent activities that degraded fish habitat.[36] In what the court termed "Final Decision #I,"[37] the court declared the existence of off-reservation treaty fishing rights, but did not address the issue of whether the treaty fishing right was connected to a right from degradation of fish habitat or an instream water right.[38] The State of Washington refused to comply with this ruling, and this refusal was challenged and ultimately reviewed by the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association.*[39]

Fishing Vessel was a case about treaty fishing rights in the face of an increasingly scarce resource.[40] In 1979 the Supreme Court evaluated four potential interpretations of the boilerplate provision, the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with the citizens of the territory."[41] The proposed interpreta-

---

35. NORTHWEST POWER AND CONSERVATION COUNCIL, *supra* note 2, at 61.

36. United States v. Washington, 384 F. Supp. 312, 328 (W.D. Wash. 1974)

37. *Id.* at 409.

38. *Id.* at 328, 405. *See generally* Blumm et al., *supra* note 1, at 1177–81 (discussing the general history of litigation in which the Yakama Nation has been involved).

39. 443 U.S. 658 (1979).

40. *Id.* at 669.

41. *Id.* at 662. Treaties at issue in this litigation included Treaty of Medicine Creek, Treaty of Point Elliot, Treaty of Point No Point, Treaty of Neah Bay, Treaty with the Yakamas, and Treaty of Olympia. *Id.* at 662 n.2.

tions for the right to take fish included the following: (1) as many fish as tribal needs dictated (asserted by the Tribes); (2) a fifty percent allocation of the harvestable fish or tribal needs, whichever was less (asserted by the United States); (3) a "fair and equitable share" (asserted by the Washington Department of Fisheries); or, (4) no assurances for the taking of any fish (asserted by the Game Department).[42] The Supreme Court ultimately adopted the government's interpretation, entirely rejecting the Game Department's interpretation: "In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas."[43]

The Court explained a fundamental concept for interpreting a treaty between foreign nations and then modified the concept according to precedent on Indian treaties. A treaty between two sovereign nations is like a contract.[44] When the contract language is at issue, the intent of the parties controls the interpretation.[45] However, because the United States, as the stronger negotiating party, had a duty not to take advantage of the other side, the treaty should be interpreted in the manner in which it would have been understood by the Indians.[46] The 1979 Supreme Court then applied this concept to the case at hand.

In considering how the Indians would have understood the treaty fishing provisions, the Supreme Court looked to the circumstances surrounding the treaty. It found overwhelming evidence that the Indians understood that the right to take meant more than a mere opportunity to catch fish. First, during the treaty negotiations, the tribal signatories repeatedly emphasized the importance of fish as a subsistence and economic resource.[47] Additionally, Governor Stevens expressed his intention not to exclude tribes from their traditional fishing grounds.[48] The Court found it impossible that either side intended for the tribes to be crowded out of their traditional fishing grounds by settlers, and even less plausible was that "taking fish" meant a chance to fish:

> That each individual Indian would share an "equal opportunity" with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations. Such a "right," along with the $207,500 paid the Indians, would hardly have been sufficient to compensate them for the millions of acres they ceded to the Territory.[49]

In holding that taking fish meant a proportion of the harvestable share, the Supreme Court supported its interpretation with its own on-

---

42. *Id.* at 670–71.
43. *Id.* at 679.
44. *Id.* at 675.
45. *Id.*
46. *Id.* at 675–76 (citing Jones v. Meehan, 175 U.S. 1, 11 (1899)).
47. *Id.* at 676.
48. *Id.*
49. *Id.* at 676–77.

point precedent on fishing rights: *United States v. Winans*.[50] Rights to traditional fishing places were part of a spectrum of unlimited Indian rights before treaties, and the only way to give effect to the reserved right of taking fish was to imply a servitude for access.[51] The *Fishing Vessel* Court concluded that, in *Winans*, "removal of enough of the fishing wheels to enable some fish to escape and be available to Indian fisherman upstream" was evidence that the *Winans* Court interpreted the fish harvest to be some nonzero amount.[52] The *Fishing Vessel* Court held that the Indians were entitled to half of the harvestable share or the Tribes' needs, whichever was less.[53] Whether a treaty fishing right meant an instream water right or protection against habitat degradation was not before the Court and neither discussed nor considered.

Litigation on the treaty fishing right has answered questions about the present right of taking fish, but has not addressed how this right relates to changing riparian conditions. *Winans* interpreted the fishing right to include a servitude on the land appurtenant to usual and accustomed fishing grounds. Perhaps more importantly, *Winans* instructed generally that treaties should be interpreted as rights reserved to Indians and only rights granted to the federal government those rights expressly granted. *Fishing Vessel* demonstrated that the right to take fish meant a share of harvestable fish. In fact, the *Fishing Vessel* Court referred to *Winans* for evidence that taking fish meant a share of the harvest. What is uncertain is the nature of this right in the face of changing natural conditions. The management of water in many western states follows a system where agricultural or urban users typically divert water from the stream, lessening the flow of the river.[54] Some of these rivers are fully appropriated: water users have claims for every cubic foot of water that comprises streamflow.[55] Also, climate change will cause water stored as snowpack to melt, and runoff to happen sooner, which will characteristically affect streams by decreasing streamflow later in the season.[56] Low streamflow is likely to negatively impact fish populations, so the question then becomes whether a treaty fishing right can be translated into a reserved water right that remains in the stream to support fish.

---

50. *Id.* at 679.
51. *Id.* at 680–81 (citing United States v. Winans, 198 U.S. 371, 380–81(1905)).
52. *See id.* at 681.
53. *Id.* at 685.
54. *See, e.g.*, MARK T. ANDERSON & LLOYD H. WOOSLEY, JR., WATER AVAILABILITY FOR THE WESTERN UNITED STATES—KEY SCIENTIFIC CHALLENGES 1–2 (USGS Circular 1261, 2005), *available at* http://pubs.usgs.gov/circ/2005/circ1261/pdf/C1261.pdf.
55. *See, e.g., id.* at 3.
56. *See, e.g., id.* at 1.

VI. THE IMPLIED RESERVATION OF WATER: *WINTERS V. UNITED STATES* AND THE DEVELOPMENT OF THE WINTERS DOCTRINE

Increased water usage has decreased the volume of water in various stretches of the Columbia River and its tributaries, such as the Yakima and Snake Rivers.[57] Water usage that draws water from the rivers consists of irrigation projects developed as early as the 1920s, when agriculture started to become more common in the basin.[58] In fact, water usage on some of the tributaries of the Snake and Columbia Rivers is so intense that there are adjudicative proceedings to determine which parties have a right to use the water.[59]

Adjudicative proceedings are necessary in western water law because of the doctrine by which the right to use water is decided. Many states out West, including Washington and Idaho, follow some form of the doctrine of prior appropriation,[60] which came into existence as early as the 1800s as a system to resolving disputes over water rights.[61] As miners and settlers migrated to the arid West, it became abundantly clear that land without access to water was valueless.[62] Consequently, miners, some of the first water users, began diverting water out of the stream for use on their land.[63] The rule that developed between miners was one of temporal preference; the first in time was the first in right.[64] With a system of appropriation that gives preference to senior users (i.e., parties who were first to use the water), once every cubic foot per second of water is claimed, new arrivals do not have any legal right to water, regardless of whether their property abuts the water source. As a result, the date when water was first used, the priority date, is of paramount importance.[65]

---

57. Bill Lang, *Columbia River*, CENTER FOR COLUMBIA RIVER HISTORY, http://www.ccrh.org/river/history.htm#gorge (last visited Nov. 15, 2011).

58. *See id. Accord Hydroelectric Information for Columbia and Snake River Projects*, COLUMBIA BASIN RESEARCH, http://www.cbr.washington.edu/crisp/hydro/ (last visited Nov. 15, 2011).

59. *See generally Water Right Adjudications*, STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, http://www.ecy.wa.gov/programs/wr/rights/adjhome.html (last visited Oct. 19, 2011) (River adjudications establish parties' rights in relation to one another in a particular water system).

60. *See* WASH. REV. CODE § 90.03.010 (2008) ("the first in time shall be the first in right"); IDAHO CODE ANN. § 42-106 (2010) ("first in time is first in right").

61. *See, e.g.*, Irwin v. Phillips, 5 Cal. 140 (1855).

62. *Colorado Water Rights*, WATER INFO. PROGRAM, http://www.waterinfo.org/rights.html (last visited Nov. 15, 2011).

63. *Id.*

64. *See Irwin*, 5 Cal. at 147 (holding "the miner, who selects a piece of ground to work, must take it as he finds it, subject to prior rights . . . . [H]e has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.").

65. An example: In 1900 User X, the first person to divert water from Stream S, diverts 1,000 c.f.s. (cubic feet per second). In 1905, User Y, the only other user, begins to divert the remaining 1,000 c.f.s. from Stream S. In 1910, due to lack of rainfall, Stream S has only 1,200 c.f.s. of water in it. User X, with the priority date of 1900, is entitled to her full water

Although establishing a priority date under state water law generally requires express action, such as the physical diversion of water,[66] the Supreme Court has been willing to imply a water right under federal law to satisfy congressional purposes for federally reserved land. The doctrine that recognizes this implied water right is the Winters Doctrine.[67] The Winters Doctrine originated from *Winters v. United States*,[68] which examined the question of water rights for an Indian reservation. The doctrine expanded the holding in *Winters* to imply water rights for federal reservations of land and imposed other limitations,[69] but that very expansion has diverged from the nature of the Supreme Court's original ruling.[70]

A. *Winters v. United States*

Winters v. United States[71] resulted from a water conflict between Indian reservation water users and non-Indian farmers. In 1888 the Fort Belknap Reservation was created in the Milk River Basin in Montana.[72] Federal Indian policy of this era was to convert Indians to an agrarian society.[73] Additionally, federal policy of this region was to encourage non-Indians to settle and establish small farms.[74] These two policies conflicted with each other when the needs of both exceeded the water available in the Milk River.[75] In 1904 and 1905 the Milk River Basin suffered a drought, and water failed to reach the point where the reservation diverted water from the river.[76] In response to the shortage of water for agricultural and domestic purposes on the reservation, the United States brought suit on behalf of the Gros Ventre and Assiniboine Tribes located on the Fort Belknap Reservation.[77]

United States v. Winans[78] proved influential to the outcome of *Winters* in both the lower court and the Supreme Court. The upstream de-

---

right: 1,000 c.f.s. User Y, with a junior date of 1905 gets the remaining of what is available: 200 c.f.s. Essentially, junior users absorb losses in dry years when there is less water available.

66. *See, e.g.*, *Water Glossary*, WESTERN RESOURCE ADVOCATES, http://www.westernresourceadvocates.org/water/waterglossary.php (last visited Jan. 11, 2012).

67. *See, e.g.*, Barbara Cosens, The Legacy of *Winters v. United States* and the Winters Doctrine, One Hundred Years Later (2008), http://www.americanbar.org/content/dam/aba/migrated/environ/fallmeet/2008/bestpapers/Cosens.authcheckdam.pdf.

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

69. *See* Arizona v. California, 373 U.S. 546 (1963); Cappaert v. United States, 426 U.S. 128 (1976); United States v. New Mexico, 438 U.S. 696 (1978); Wyoming v. United States, 492 U.S. 406 (1989).

70. *See* Cosens, *supra* note 67, at 8.

71. 207 U.S. 564 (1908).

72. Act of May 1, 1888, ch. 213, 25 Stat. 113.

73. *See, e.g.*, Cosens, *supra* note 67, at 1, 3.

74. *Id.* at 3.

75. *Id.*

76. JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE WINTERS DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880s-1930s 29 (2000).

77. Winters v. United States, 207 U.S. 564, 565 (1908).

78. 198 U.S. 371 (1905)

fendant farmers had perfected an earlier priority date of water use than did the Tribes, which meant that the Tribes would lose if prior appropriation were applied.[79] The attorney arguing on behalf of the United States in *Winters* had to argue another theory.[80] One potential theory was the adoption of the riparian doctrine over that of prior appropriation.[81] Another theory was expanding the interpretation of treaty rights to include reserved water rights. *Winters* was initially filed approximately a month and a half after the Supreme Court decided *Winans*.[82] Although it is uncertain as to whether the attorney who argued the case on behalf of the government had access to the *Winans* decision when he first filed *Winters*, the federal district judge in Montana did rely on *Winans* in finding a reserved water right for the Tribes on the Fort Belknap Reservation.[83] More importantly, the Supreme Court relied on *Winans* as well.[84]

The Supreme Court in *Winters* considered the fact that the reservation's downstream irrigation diversion was not a historic practice of the Gros Ventre and Assiniboine Tribes, and did not exist prior to the creation of the reservation.[85] In light of these unfavorable factors for the Tribes, the Court began its analysis by considering the 1888 agreement that created the Fort Belknap Reservation.[86] Part of the policy driving the creation of the reservation was to convert the "nomadic and uncivilized" tribes to a "civilized" agrarian society, and the arid tract of land reserved to the Indians was valueless without water.[87] The Court considered two possible alternatives: (1) water rights were lost when the Indians ceded their lands and agreed to reservation life; or, (2) water rights for the reservation had been preserved so as to maintain the value of the land.[88] There is an arguable connection between *Winters* and *Winans* because of how the court considered the two alternative interpretations of the agreement:

> The key language in *Winters* indicating the Court's reliance on [*Winans*] is: "[t]he Indians had command of the lands and the waters—command of all their beneficial use, whether kept for

79. SHURTS, *supra* note 76, at 35.
80. *Id.*
81. *Id.* at 43. The riparian doctrine recognizes water rights for all landowners appurtenant to the waterway, and generally water may not be diverted to land not abutting the water. *See* A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 111, 113 (5th ed. 2002). In Montana in 1905, litigation had not decidedly established the prior appropriation or the riparian doctrine, thus this was a possible argument. SHURTS, *supra* note 76, at 43.
82. SHURTS, *supra* note 76, at 56.
83. *Id.* at 57.
84. *Id.* at 58.
85. Cosens, *supra* note 67, at 5.
86. Winters v. United States, 207 U.S. 564, 565 (1908).
87. *Id.* at 576.
88. *Id.*

> hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this?"[89]

In answering its own question, the Court dismissed the first alternative.[90] It was highly unlikely that Tribes would have given away the one commodity that provided sustenance and worth to the land.[91]

Additionally, the Supreme Court did not entertain the first unlikely alternative because, when it came to matters of treaty interpretation, "ambiguities occurring will be resolved from the standpoint of the Indians."[92] Applying this rule, if treaty language gives rise to two possible inferences, and one inference would support the purpose behind the treaty, then it is the inference that supports the treaty that should be adopted.[93]

The second alternative considered was the inference that supported the treaty.[94] Since implying a right to water would support farming, and the government had the power to reserve water for an Indian reservation, the Supreme Court upheld the injunction so water would reach the reservation's downstream diversion.[95] By applying the rules of treaty interpretation, the Court established that when Congress creates an Indian reservation, it impliedly reserves the water necessary to satisfy the purposes of the Indian reservation.

The take-away from the *Winters* decision included two important concepts, but one of those concepts is vastly better known in water law.[96] The *Winters* decision is more commonly known for the proposition that when Congress creates an Indian reservation, it impliedly reserves water for the purpose of that reservation with a priority date being the date that the reservation was created.[97] The less common take-away from the case is the process that the Court employed to get to its proposition, which was by applying the rules of treaty interpretation from *Winans*. *Winters* is still oft cited in Federal Indian law as a rule of Indian treaty interpretation: ambiguities will be resolved in favor of the Indians.[98]

---

89. Cosens, *supra* note 67, at 4 (citing Winters v. United States, 207 U.S. 564, 576 (1908)).

90. *Winters*, 207 U.S. at 576.

91. *Id.*

92. *Id.*

93. *Id.* at 577.

94. *Id.*

95. *Id.*

96. *See* Cosens, *supra* note 67, at 5.

97. *See Winters*, 207 U.S. 564.

98. *See, e.g.*, Keweenaw Bay Indian Cmty. v. Naftaly, 452 F.3d 514, 524 (6th Cir. 2006); Oneida Indian Nation of N.Y. v. New York, 860 F.2d 1145, 1166 (2d Cir. 1988); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 350 (7th Cir. 1983). *See also* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 37 (1958).

B. The Winters Doctrine

Since *Winters*, the Supreme Court has expanded the concept of implied water rights to all federal reservations of land, not just Indian reservations. The series of cases that collectively mold and develop this original concept and apply it to federal reservations are collectively known as the Winters Doctrine.[99] Two cases that mold the Winters Doctrine are worth noting, as these precedents have resurfaced in instream water right analysis.

The first of these cases is *Cappaert v. United States*.[100] In this case, at issue was whether Congress had impliedly reserved water rights when it established Devil's Hole as a national monument.[101] Devil's Hole was made a national monument in 1952 to preserve unique scenic and scientific features, including an underground pool from Pleistocene-era lakes that comprised the Death Valley Lake System.[102] This underground pool was home to a species of desert fish found nowhere else on earth.[103] In 1968 defendant Cappaert, a nearby landowner, began pumping groundwater that shared its source with the Devil's Hole pool.[104] The pumping decreased the water level of the pool, which affected the habitat of the fish and put it at risk of eventual extinction.[105] The Supreme Court held that the United States impliedly reserved a water right to preserve the pool when the United States reserved Devil's Hole to preserve its scientific value.[106] With this decision, the Supreme Court defined reserved water rights for federal land as only those necessary to satisfy the purpose of the federal reservation.

The second case worth noting restricted the amount of water that could be implied for federal land. In *United States v. New Mexico*,[107] the Court examined whether the federal government reserved water from the Rio Mimbres when it established the Gila National Forest.[108] That the government had the power to do this was clear: "Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes."[109] Instead, the real question was how to determine the amount of water reserved for future needs.[110]

---

99. *See, e.g.*, Cosens, *supra* note 67, at 1. Cases include Arizona v. California, 373 U.S. 546 (1963); Cappaert v. United States, 426 U.S. 128 (1976); United States v. New Mexico, 438 U.S. 696 (1978); and, Wyoming v. United States, 492 U.S. 406 (1989).

100. 426 U.S. 128.

101. *Id.* at 131.

102. *Id.* at 132.

103. *Id.*

104. *Id.* at 133–34.

105. *Id.*

106. *Id.* at 147.

107. 438 U.S. 696 (1978).

108. *Id.* at 698.

109. *Id.* (citing Winters v. United States, 207 U.S. 564 (1908) and Cappaert v. United States, 426 U.S. 128 (1976)).

110. *Id.* Court precedent for determining the quantity of water reserved for future needs on an Indian reservation was Practicably Irrigable Acreage, the amount of land on an

The Court held that Congress intended to reserve the amount of water necessary to fulfill the primary purpose of the reservation.[111] Water needs for secondary purposes were subject to the state rules of prior appropriation, just as they would be for any other public or private appropriator.[112]

Decisions from cases like *Cappaert v. United States* and *United States v. New Mexico* developed into the Winters Doctrine, but the fundamental analysis governing this doctrine has diverged from its namesake case. In expanding the concept of implied water rights to include all federal land, this resulting doctrine has strayed from Indian treaty interpretation. In *Winters*, the Supreme Court used rules for Indian treaty interpretation to develop the concept of implied water rights. Through treaty interpretation, *Winters* demonstrated that it was possible to imply a water right from a treaty. In expanding the concept of reserved water rights to all federal land, analysis applying the rules of treaty interpretation was lost, separating the Winters Doctrine from *Winters*. *Winters* and the Winters Doctrine are different. *Winters* asks how the tribe would have understood its rights under a treaty. The Winters Doctrine asks what the primary purpose of the reservation was.

The difference between *Winters* and the Winters Doctrine suggests that it is perhaps inappropriate to rely on the Winters Doctrine in cases involving federal Indian reservations, specifically, reservations created by an agreement or a treaty. One of the problems with expanding the rule of reserved water for federal land is that federal land comprises so much of the West. Excluding Indian reservations, approximately 46 percent of land in the West is federally held, and 60 percent of water yield originates from these federal lands.[113] *New Mexico* restricted implied water rights to the primary purpose of the reservation in order to limit the government's competition for water in arid parts of the country.[114] When an original rule has evolved into a new doctrine as it has here, it does not logically follow that the new doctrine should necessarily be applied to a case better served by application of the original rule. Nonetheless, courts have applied the new doctrine to all reserved water right analysis,[115] and this application could become a point of criticism if the Winters Doctrine ever determines the outcome of a case involving an Indian reservation. However, what has typically happened in cases where the Winters Doctrine has been applied is that *New Mexico* guides the court to ascertain the purpose of a reservation, which is determined by interpreting the document creating the reservation, and for Indian

---

Indian reservation that could reasonably be irrigated. Arizona v. California, 373 U.S. 546, 600–01 (1963). This standard is not applicable to instream reservations of water.

111. *New Mexico*, 438 U.S. at 702.

112. *Id.*

113. *New Mexico*, 438 U.S. at 699.

114. *See id.*

115. *See, e.g.*, Wash. Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1315–16 (Wash. 1993); United States v. Adair, 723 F.2d 1394, 1408–09 (9th Cir. 1983); Colville Confederated Tribes v. Walton, 647 F.2d 42, 46–47 (9th Cir. 1981).

reservations this document is often a treaty or agreement.[116] As a result, the court will inevitably be led to back to *Winans*, *Winters*, and rules of Indian treaty interpretation.

VII. INSTREAM WATER RIGHTS TO SUPPORT FISHING RIGHTS: RIGHTS APPURTENANT TO LAND

After the *Fishing Vessel* decision, which stopped at a broad interpretation of what was meant by the provision "the right to take fish," the Yakama continued to pursue the issue of instream water rights for fish. In 1982 the Ninth Circuit reviewed a Washington district court decision ordering the release of reservoir-stored water from Cle Elum Dam.[117] At issue were the treaty fishing rights reserved to the Yakama and the rights of farmers to preserve water for application to their crops later in the season.[118] If the release of water from the dam, according to plan, was to cease after the irrigation season, the minimal streamflow would destroy nests of salmon eggs.[119] As a necessary response to preserving the redds in an emergency situation, the court ordered the release of water to augment streamflow until the redds could be transplanted elsewhere.[120] Because the Yakama Nation's interest in treaty fishing rights pre-dated the water rights of the irrigators and it was absolutely necessary for water not to be cut off before alternative measures could be taken, the Ninth Circuit affirmed the district court's order to release water to preserve the redds.[121] The Ninth Circuit did point out, however, that this conflict was not a general adjudication of water rights in the Yakima River Basin.[122] The court had recognized the treaty right and the water right as distinct and different rights, and the treaty right could provide only temporary relief until alternative solutions could be found. In order to establish a water right, the tribe would have to pursue it through the general adjudication, which was happening in a different jurisdiction (the Washington State court system) at approximately the same time.[123]

At roughly the same time the Yakama were pursuing water rights to preserve the redds downstream of Cle Elum Dam, the Colville Confederated Tribes were pursuing instream water rights for fish in Washington State. In 1981 the Ninth Circuit Court of Appeals determined an instream water right to sustain replacement fisheries.[124] The Colville Reservation was created in 1872, in part, to protect land the Indians

---

116. *See, e.g.*, Yakima Reservation Irrigation Dist., 850 P.2d at 1317; Adair, 723 F.2d at 1409; Colville Confederated Tribes, 647 F.2d at 47.

117. Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1033 (9th Cir. 1985).

118. *Id.*

119. *Id.* at 1033–43.

120. *Id.* at 1035. The term "redds" refers to nests of salmon eggs. *Id.* at 1033.

121. *Id.* at 1034.

122. *Id.* at 1035.

123. *See id.*

124. Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981).

were farming from the encroachment of settlers.[125] In 1892 Congress took 1.5 million acres of the reservation land for public domain and opened it to settlers.[126] In 1906 the remaining reservation lands were divided up and distributed to tribal members pursuant to the General Allotment Act of 1887.[127] Water had been allocated for irrigation purposes on allotments, but not all of the allotted water for irrigation was being used.[128] The court looked to the purpose of the Indian reservation to determine the existence and extent of a water right under the theory of implied reservation.[129] The Ninth Circuit found two purposes for the reservation. Not only was the reservation established for the Indians to pursue agriculture, it also was established to preserve the Colville Tribe's access to their fishing resource at Omak Lake, which had replaced traditional fishing places lost to dams on the Columbia River.[130] Ultimately, since fishing was a purpose for the reservation, the court granted the Colville Tribes the right to apply their unused water right to sustain replacement fisheries.[131]

VIII. THE YAKIMA RIVER ADJUDICATION

Approximately the same time that the Colville Confederated Tribes were arguing for water rights to sustain fish and the Yakama were seeking emergency measures to preserve nests of salmon eggs, the Yakima River Basin adjudication was underway.[132] Adjudication of water rights for the Yakima River and its tributaries began in 1977 when the Washington State Department of Ecology filed an action.[133] The adjudication was divided into four parts, the first of which was to determine the reserved rights for Indian claims.[134] There was no dispute that the Yakama had treaty rights to water in the Yakima Basin. Rather, the issue was how to determine the amount of water and what priority date to give the water right. The Supreme Court of Washington reviewed the

---

125. *Id.* at 44–45.

126. *Id.*

127. *Id.* at 45. The General Allotment Act furthered a federal Indian policy between the 1880s and 1920s of dividing up reservation lands and distributing them to heads of households. ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 106 (2d ed. 2010). Although conceived by reformers who thought they were helping the Indians, allotment was a complete failure of a policy: the Indians lost about two thirds of their land base during this period. *Id.* at 109.

128. *Colville Confederated Tribes*, 647 F.2d at 46.

129. *Id.* at 47.

130. *Id.* at 48.

131. *Id.* at 46, 48.

132. Wash. Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306, 1309 (Wash. 1993). The Supreme Court of Washington reviewed matters of the Yakima River Basin adjudication several times. The first appeal concerned the procedural matter of serving process for the adjudication, the second appeal reviewed the quantity of water for the Yakama Nation, and the third appeal reviewed a water award to some private claimants. Wash. Dep't of Ecology v. Acquavella, 935 P.2d 595, 597 (Wash. 1997).

133. *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1309.

134. *Id.*

adjudication court's determinations of the quantity and dates of water rights.[135]

The Yakama sought water rights amounts on the basis of the 1855 treaty, which created the Yakama Indian Reservation.[136] The Yakama sought reserved water rights for different categories of water uses. One use was for irrigation; the other water use was to support fish to satisfy their treaty fishing right.[137]

One of the adjudication court's holdings granted the Yakama Tribe some water rights for fish. The court awarded the Tribe the following water rights to support treaty fishing rights: "The maximum quantity to which the Indians are entitled as reserved treaty rights is the minimum instream flow necessary to maintain anadromous fish life in the river, according to annual prevailing conditions."[138] This minimum instream flow had a priority date of "time immemorial."[139] However, the court also held that any water rights for fish that were beyond the minimum would have priority dates junior to the non-Indian irrigator appellants.[140] The reason for this, the adjudication court held, was because the treaty fishing rights had been "diminished."[141] Both sides appealed. The Yakama contended that there was no diminishment of treaty fishing rights, and non-Indian irrigators contended that the tribe was entitled to no water rights for fish.[142] On appeal, the Supreme Court of Washington decided that the fishing treaty rights of the Yakama were, indeed, "diminished."[143]

In diminishing the Yakama's fishing rights, the Supreme Court of Washington began its analysis with the text of the treaty, considered the Winters Doctrine, and finally evaluated whether the treaty had been abrogated. In reviewing the text of the treaty, the court found that the treaty did not expressly reserve a water right for either fishing or irrigation.[144] After determining that there was no express reservation, the court considered the application of *Winters.*[145] However, instead of looking to the rule of treaty interpretation as the *Winters* Court did, the Supreme Court of Washington opted for the popular holding which led to the Winters Doctrine, which was that water rights for the needs of a reservation are implied.[146] In proceeding to determine the quantity of the water right, the court applied *Cappaert*—part of the Winters Doctrine, which limits water rights to the primary purpose of a federal res-

135. *Id.*
136. *Id.*
137. *See id.* at 1309–10.
138. *Id.* at 1310.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1310–11.
143. *Id.* at 1332.
144. *Id.* at 1315.
145. *Id.*
146. *Id.*

ervation.[147] Although it was questionable whether it was appropriate to apply the Winters Doctrine due to its divergent nature, looking to the purpose of the reservation led the court back to interpreting the instrument that created the reservation—the Treaty with the Yakama.

Although the Supreme Court of Washington reviewed the rules of Indian treaty interpretation, these rules weighed little into the final holding about treaty fishing rights. The Treaty with the Yakama expressly reserves a fishing right appurtenant to reservation lands: "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes . . . ."[148] The court began with lip service that ambiguities should be resolved in favor of the Indians and that treaties must be construed in favor of the Indians.[149] However, the court then focused on treaty abrogation. As the court noted, treaty provisions may be abrogated unilaterally by Congress.[150] Courts should be reluctant to find abrogation of a treaty because the Supreme Court has required clear evidence of Congressional intent to abrogate a treaty.[151] In other words, Congress must have considered the conflict which involved treaty rights and, after considering the conflict, chose to eliminate those rights.[152] The Supreme Court of Washington then considered several arguments for the abrogation of the Yakama's treaty right to fish.

The irrigation parties argued that one or a combination of several factors diminished the Yakama's treaty fishing rights. The first argument was that fishing treaty rights were diminished in 1906 when the Secretary of the Interior quantified Yakama water rights at 147 cubic feet per second (c.f.s.) during low flow.[153] The Supreme Court of Washington disagreed with this argument. The low-flow allotment established by the Secretary was to ensure the success of the Yakima Irrigation Project.[154] All water users would have had to agree to limit their water usage during low flow, and 95 percent of the other water claimants had agreed to similar restrictions.[155] The court held that the standard in finding treaty abrogation by Congress should also apply to the Secretary's actions; he must have considered that a water right quantification would extinguish treaty rights, and then must have intentionally chosen to eliminate the treaty rights.[156] Since there was nothing in the record that evidenced any sort of consideration or intent, the court held that the Secretary's act did not abrogate treaty rights.[157]

---

147. *Id.* at 1316 (citing Cappaert v. United States, 426 U.S. 128 (1976)).

148. Treaty with the Yakama, *supra* note 8, at 953.

149. *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1317 (citing Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943)).

150. *Id.*

151. *Id.* at 1318.

152. United States v. Dion, 476 U.S. 734, 739–40 (1986).

153. *Yakima Reservation Irrigation Dist.*, 850 P. 2d at 1318–19.

154. *Id.* at 1319.

155. *Id.*

156. *Id.* at 1320.

157. *Id.*

The irrigation districts' second argument was that the Act of August 1, 1914 abrogated the Yakama's treaty fishing rights.[158] When the Secretary limited the Yakama's water rights to 147 c.f.s. in low water flow, it did not take long for all to realize that this was a gross inequity for the Yakama, and 147 c.f.s. was inadequate for even domestic irrigation.[159] The Act of August 1, 1914 authorized and directed the Secretary to augment the low-flow water right to an amount at least enough for the irrigation of forty acres on each Indian allotment.[160] The Act did not, the irrigation districts argued, address fishing rights, which would make fishing rights junior in priority to the irrigation districts' water rights.[161] Again, the court called for clear evidence that Congress weighed its action against treaty fishing rights and chose this action knowing it would eliminate those rights.[162] There was some evidence that individuals who testified before a congressional committee had mentioned fishing, and the government inconsistently limited instream flow, while at the same itme advocating for water rights for fish.[163] However, the court found that inconsistent actions were not enough to determine that Congress considered the conflict between water for irrigation and water for fish, and then purposefully chose water rights only for irrigation.[164]

The Supreme Court of Washington agreed with the irrigation districts that two arguments provided a basis for diminishing, although not extinguishing, the Yakama's fishing rights. The first was the accumulation of actions by all branches of the government (Congress, the executive and its agencies, and the judiciary) between 1905 and 1968.[165] During these years, the government focused on irrigation projects.[166] During roughly these same years, however, the government continued to recognize the Indians' treaty fishing rights and was constructing fish ladders and fish screens at dams to ensure fish movement up and downstream.[167] The court then held that these inconsistent acts were not enough to extinguish treaty fishing rights, but the acts "encroached" upon the rights, and in damaging the rights, consequently diminished them.[168] Despite rejecting the previous argument that inconsistent government actions abrogated treaty rights, despite stating the treaty rule was that ambiguities that would be construed in favor of the Yakama, and despite acknowledging the continual recognition of treaty fishing rights by the federal government, the Supreme Court of Washington nonetheless found an impairment of treaty fishing rights.[169] The court

158. *Id.* at 1321.
159. *Id.* at 1319, 1321.
160. *Id.* at 1321.
161. *Id.*
162. *Id.*
163. *Id.* at 1322.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 1323.
168. *Id.*
169. *Id.*

offered no further insight into how governmental actions might diminish but not abrogate a treaty.[170] The court also did not specify what kind of standard would apply for ruling that a treaty had been diminished,[171] but it was certainly not the standard requiring clear evidence that the government, as an aggregate whole, at least considered the fact that its cumulative actions were encroaching upon treaty fishing rights and chose to diminish them in the face of conflicting interests.

The Supreme Court of Washington also found that treaty fishing rights had been diminished due to a 1968 settlement from the Indian Claims Commission.[172] In 1951 the Yakama Nation brought four claims against the United States to the Indian Claims Commission.[173] One of the claims, Docket No. 147, sought compensation for lost fishing rights attributed in part to the Yakima Irrigation Project.[174] Specifically, the Yakama alleged that the United States destroyed all of the usual and accustomed fishing locations by constructing dams without fish passageways and by polluting the stream.[175] The four claims were settled together, and as part of that settlement, which included money damages for other claims, Docket No. 147 was dismissed with prejudice.[176] In consideration of the treaty encroachment by the government and the dismissal of Docket No. 147, the Supreme Court of Washington held that the Yakama's treaty fishing rights had been reduced to the current minimal flow with additional instream rights assuming a junior priority date to irrigation.[177]

The Yakama Nation's fight for fishing rights has extended over a century. The Yakama have litigated for appurtenant and non-appurtenant fishing rights, both on and off the reservation. Over the past decade, there have been negotiations and water right settlements with other private parties regarding riparian management to preserve off-reservation instream flow.[178] Although an off-reservation instream water right for fish has not otherwise been litigated in the State of Washington, the issue has been litigated in the State of Idaho.

---

170. *See id.*

171. *See id.* at 1319–20.

172. *Id.* at 1323 (citing Yakima Tribe of Indians v. United States, 20 Indian Claims Comm'n Dec. 76 (1968)). The Indian Claims Commission was formed in 1946 and waived United States sovereign immunity so that Indians could bring suit for damages against the United States for claims of wrongdoing that arose earlier than 1946. ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 210–11 (2d ed. 2010).

173. *Yakima Reservation Irrigation Dist.*, 850 P.2d at 1323.

174. *Id.* (citing Yakama Tribe of Indians v. United States, 20 Indian Claims Comm'n Dec. 76 (1968)).

175. *Id.*

176. *Id.* at 1323.

177. *Id.* at 1318, 1331–32.

178. Blumm et al., *supra* note 1, at 1181–82.

IX. FISHING RIGHTS, ROUND THREE: AN OFF-RESERVATION INSTREAM WATER RIGHT TO SUPPORT THE NEZ PERCE TREATY FISHING RIGHT

The Snake River Basin Adjudication (SRBA) court has been the only court thus far to address the issue of off-reservation instream water rights for an Indian tribe. And the SRBA held that such a right did not exist.[179] In the reasoning that led to the rejection of water rights, the SRBA court limited itself where doing so might not have been entirely necessary and ignored precedents that should have been better considered.

Similar to the Confederated Tribes of the Yakama Nation, the Nez Perce traditionally relied on fish as a significant component of their diet.[180] The Nez Perce Tribe's treaty with the United States Government was also a product of Washington Territory Governor Isaac Stevens and contains practically identical language to the Treaty with the Yakama: "The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory . . . ."[181] The court examined this provision to determine whether it supported an off-reservation instream water right.

A. SRBA Analysis

The SRBA commenced its analysis of the Nez Perce off-reservation instream right by categorizing the nature of the water right. The first category of water right that the court discussed was the federal reserved water right.[182] Within the discussion of this first category, the SRBA court recited the rules from *United States v. New Mexico*[183] and *Cappaert v. United States*:[184] when the government reserves land, it implicitly reserves the amount of water necessary to satisfy the primary purpose of the reservation.[185]

The SRBA court then discussed the category into which the Nez Perces' right fell: the aboriginal reserved right.[186] Aboriginal rights are rights that the Indians originally possessed and never granted to the

---

179. *In re* Snake River Basin Adjudication, No. 39576, Consolidated Subcase 03-10022, at 47 (Idaho 5th Jud. Dist. Ct., Twin Falls Cnty. Nov. 10, 1999) [hereinafter *In re* SRBA, Consolidated Subcase 03-10022] (order on motions to strike, motion to supplement the record, and motions for summary judgment).

180. *Frequently Asked Questions*, NEZ PERCE TRIBAL WEB SITE, http://www.nezperce.org/Official/FrequentlyAskedQ.htm (last visited Nov. 15, 2011).

181. Treaty with the Nez Perces, *supra* note 8, at 958. For substantially similar language in the Yakama treaty, see Treaty with the Yakama, *supra* note 8, at 953.

182. *In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 24.

183. 438 U.S. 696, 699–700 (1978).

184. 426 U.S. 128, 138 (1976).

185. *In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 24.

186. *Id.* The court referred to this aboriginal right as an "Indian reserved water right."

United States.[187] These rights (e.g., hunting or fishing) were never ceded by a treaty and date back to time immemorial.[188] In the SRBA proceeding, the Nez Perce and the federal government contended that a water right could be implied from the language in the treaty, specifically, the right to take fish at usual and accustomed places.[189]

The SRBA court then examined the Treaty with the Nez Perce. The first issue that the court addressed was whether the question of treaty interpretation to support an instream water right could be resolved as a matter of law at summary judgment.[190] The court decided that it could.[191] The court began with the premise that treaty interpretation was like contract interpretation; interpreting an Indian treaty was a question of law for the court and a question that could be decided without considering history relevant to the treaty.[192]

In determining the issue to be a question of law and understanding history surrounding treaty negotiations with the Nez Perce to be merely an aid, the SRBA court held that the "fishing in common" language of the treaty had settled legal meaning.[193] This meaning originated out of the Supreme Court's interpretation in *Fishing Vessel*.[194] The tribes in *Fishing Vessel* were all parties to treaties negotiated by Isaac Stevens, and all treaties shared identical language.[195] Likewise, the Treaty with the Nez Perce was also a Stevens treaty with similar language.[196] Fish were traditionally and culturally important to both the *Fishing Vessel* tribes and the Nez Perce.[197] Finally, both the *Fishing Vessel* tribes and the Nez Perce were impacted by changes to the natural and human world that were not anticipated in the treaties.[198] Because of these similarities, the SRBA court concluded that it was appropriate to import the holdings of *Fishing Vessel* to the instream water right issue before it.[199]

With what the SRBA court concluded to be a completely relevant and binding precedent, the court identified several features of *Fishing Vessel* that essentially decided the Nez Perce water right issue because

---

187. *See* United States v. Winans, 198 U.S. 371, 381 (1905) ("In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.").

188. *See In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 24–25 (citing United States v. Winans, 198 U.S. 371 (1905), and acknowledging that rights not expressly granted in a treaty to the government are reserved by the Indians).

189. *Id.* at 27 (referring to the Treaty with the Nez Perces, art. III, June 11, 1855, 12 Stat. 957).

190. *Id.* at 29.

191. *Id.*

192. *Id.*

193. *Id.* at 30.

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

195. *Id.* at 30–31.

196. *See id.* at 32.

197. *Id.*

198. *Id.* The court listed the examples of the development of fishing wheels, right of access issues, and conservation laws.

199. *Id.* at 30–31.

it limited the SRBA court by scope. *Fishing Vessel* held that the right to take fish was broader than a right of access; the right included a proportional share of fish.[200] First, the SRBA court held that interpreting a share of fish to imply a water right inappropriately broadened the *Fishing Vessel* holding: "Now the Nez Perce [Tribe] asks this Court to take the additional leap and by judicial fiat declare a water right for that purpose."[201] Second, the SRBA court interpreted *Fishing Vessel* not to guarantee any amount of fish, focusing on the language that "[b]oth sides have a right, secured by treaty to take a fair share of the available fish."[202] Finally, fishing rights could be limited by conservation regulations that the state had the authority to implement.[203] If the state could regulate and provide for the survival of fish, then there need not be an instream water right belonging to the Nez Perce to do the same.[204]

In addition to being limited by the scope of *Fishing Vessel*, the SRBA court determined that the 1855 treaty did not support an aboriginal right. The court reviewed history to support this legal determination and found two circumstances surrounding the treaty that undermined an aboriginal right.[205] The first circumstance was that the Stevens Treaties were intended to resolve disputes over land opened to settlers by the Oregon Donation Act of 1850.[206] The SRBA court thought it "inconceivable" that the Nez Perce would have been permitted to reserve instream flow for water appurtenant to lands not on the reservation and lands which were yet to be settled.[207] The second circumstance, as both the Nez Perce and the United States in the SRBA litigation acknowledged, was the absence of expressly reserved instream water rights or intent to reserve instream water rights in the 1855 treaty.[208] If neither party had expressly or impliedly intended to reserve an instream water right, the court reasoned, then the most liberal interpretation of what the treaty did secure was that off-reservation fishing rights would be unimpaired.[209]

Relying primarily on *Fishing Vessel* to support the rejection of an instream water right, the SRBA court dismissed any consideration of other cases involving Indian fishing rights that have implied a water right.[210] The court first acknowledged that there have been cases where

---

200. *Id.* at 33; Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979).

201. *In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 33.

202. *Id.* at 31 (citing Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684–85 (1979)).

203. *See id.* at 34 (citing Puyallup Tribe v. Dep't of Game of Wash., 433 U.S. 173 (1977)).

204. *See id.*

205. *See id.* at 38.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 39.

courts were willing to imply a water right from a treaty fishing right.[211] However, the court understood there to be a common feature that distinguished these cases from the case at issue; water in the cases finding for implied water rights was appurtenant to reservation land.[212] The SRBA court cited *Colville Confederated Tribes v. Walton*[213] and *United States v. Adair*.[214] Both courts found a federal reserved water right and reserved an instream flow for an on-reservation fishing right.[215] But, because cases like these addressed seemingly appurtenant rights, the SRBA court held that these holdings could not guide off-reservation instream water right analysis.[216]

Using only what *Fishing Vessel* provided, the SRBA court limited itself from making logical steps toward an instream water right. The SRBA court also dismissed other cases examining the existence of instream water rights as too dissimilar to be compared. Relying on these two self-imposed boundaries, the SRBA court decided that there could not be an off-reservation implied instream water right for the Nez Perce's treaty fishing right.[217]

B. A Critique of the SRBA Analysis

The SRBA court might have handicapped itself in the analysis of whether there could be an off-reservation instream water right to support a fishing treaty right. The court limited itself to what it thought was the scope of the *Fishing Vessel* decision, and in doing so misinterpreted suggestions in the holding. The court dismissed all cases, such as *United States v. Adair*,[218] that considered treaties and crossed the gap from fish to water for fish. Finally, the SRBA court largely ignored rules of Indian treaty interpretation, which would have led it to find an implied water right.

In adhering to *Fishing Vessel*, the SRBA court misconstrued some aspects of the holding. The SRBA court interpreted the Supreme Court's refusal in *Fishing Vessel* to determine an amount of fish that could be taken as fairly significant and inferred that, without a minimal limit, the proportion of fish that could be taken would be nothing.[219] A water right would be inconsistent with a proportion equal to nothing.[220] Alt-

---

211. *Id.* Some of the cases cited included United States v. Adair, 723 F.2d 1394 (9th Cir. 1983) and Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032 (9th Cir. 1985).

212. *Id.*

213. 647 F.2d 42 (9th Cir. 1981) (applying an unused irrigation water right for replacement fisheries); *In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 39.

214. 723 F.2d 1394 (9th Cir. 1983) (determining an instream water right for fish because fishing was among the purposes of the Klamath Reservation); *In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 39.

215. *In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 39.

216. *Id.*

217. *Id.* at 47.

218. 723 F.2d 1394 (9th Cir. 1983).

219. *See In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 33.

220. *See id.*

hough the Supreme Court in *Fishing Vessel* did not set a minimum limit because of the need to respond to "changing circumstances,"[221] there is little to suggest that the changing circumstances that the Court contemplated referred to riparian conditions or instream flow. The Supreme Court gave two examples to support why changing circumstances could not permit a guaranteed minimum limit of fish for the Tribes. The first example was in a situation where a population of a tribe decreased to only a handful of members.[222] The second example described a situation where a tribe would find resources that resulted in completely replacing the role of the fisheries.[223] In both of these examples, the Supreme Court opined that perhaps a fifty-percent allocation would be excessive.[224] It is noteworthy and seminal that both of these examples were socio-economic in nature. The court never contemplated habitat or biology as a compelling reason to refrain from establishing a predetermined minimum amount of fish for tribal harvest.

In fact, the Supreme Court holding in *Fishing Vessel*, contrary to the SRBA court's interpretation of that holding, may be consistent with a water right. In *Fishing Vessel*, the Washington Game Department proffered the interpretation of the fishing in common language to mean no guarantee to any fish.[225] The Game Department's interpretation was rejected when the Supreme Court adopted the federal government's position that fishing in common meant the lesser of either a fifty-percent allocation or tribal needs.[226] If the interpretation of no guarantees to fish was rejected, then there must be some impliedly guaranteed amount, and any guarantee to a proportion of a fish run exceeding nothing would be consistent with a water right to support fish.

The SRBA court concluded that implying a water right in connection to the proportionate share of the fish run would be a "judicial fiat."[227] However, the SRBA court dismissed potentially helpful cases where courts found instream rights to support fishing rights and could have provided the step in logic that the SRBA court decided was improper to take. One such case that might have been instructive, but which the SRBA court dismissed,[228] was *United States v. Adair.*[229] At issue in *Adair* were water rights to the Williamson River for the Klamath Indian Tribe.[230] The Treaty with the Klamath reserved the exclusive right of fishing, hunting, and gathering sustenance on the Tribe's

221. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686–87 (1979).
222. *Id.* at 687.
223. *Id.*
224. *Id.* at 686–87.
225. *Id.* at 670.
226. *See id.* at 679.
227. *In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 33.
228. *See id.* at 39.
229. 723 F.2d 1394 (9th Cir. 1983).
230. *Id.* at 1399.

reservation.[231] As with the Nez Perce and the Yakama, fish were an important resource to the Klamath.[232] The court looked to the Winters Doctrine as modified by *New Mexico*[233] and *Cappaert*,[234] and considered the primary purpose of the reservation.[235] Referring to the treaty language, the Ninth Circuit found support for dual purposes.[236] One purpose, the court found, was to transition the Klamath to an agrarian society.[237] The second purpose, the court found, was to ensure that the Tribe could continue to hunt, fish, and gather.[238]

After determining fishing to be one purpose of the reservation, the court was faced with how to attribute water to that right. The doctrine of prior appropriation is most typically used for diversions, not for water remaining in the stream.[239] The court looked to how the *Cappaert* Court framed the right: instead of a right to divert, it was the right to stop other appropriators from diverting water from the stream.[240] It is a right to an amount of water in the stream that is free from impediment. This is the very nature of an instream water right. Accordingly, the Ninth Circuit affirmed a district court decision finding implied instream water rights to protect the fishing right.[241]

The SRBA court's use of the *Fishing Vessel* holding was appropriate because of the similarities, but the dismissal of *Adair* may not have been as necessary. Although the Treaty with the Klamath was not a product of the Stevens era, the Ninth Circuit found dual purposes of agriculture and fishing on the Klamath reservation.[242] These dual purposes, supported by several treaty articles,[243] suggest similar policy objectives.

The SRBA court recognized the fishing right in *Adair* to be appurtenant to the land and therefore uninstructive,[244] but the 1864 Klamath Treaty provides compelling evidence for characterizing the fishing right as an aboriginal right, and not as a right appurtenant to the reservation. Specifically, it is the very treaty language that reserves the right to

---

231. Treaty with the Klamath, art. I, Oct. 14, 1864, 16 Stat. 707 ("[T]he exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians . . . .").

232. *Adair*, 723 F.2d at 1409 n.14.

233. United States v. New Mexico, 438 U.S. 696 (1978).

234. Cappaert v. United States, 426 U.S. 128 (1976).

235. *Adair*, 723 F.2d at 1408.

236. *Id.* at 1409.

237. *Id.* at 1410 (citing Treaty with the Klamath, art. II, Oct. 14, 1864, 16 Stat. 707).

238. *Id.* at 1409 (analyzing judicial constructions of Treaty with the Klamath, art. I, Oct. 14, 1864, 16 Stat. 707).

239. *Id.* at 1410.

240. *Id.* at 1411 (citing Cappaert v. United States, 436 U.S. 128, 143 (1976)).

241. *Id.*

242. *Id.*

243. *See* Treaty with the Klamath, *supra* note 231, at art. I ("[T]he exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits, is hereby secured to the Indians . . . ."). *See also id.* art. III (reserving a part of the payment promised the Klamath Tribe for farm equipment).

244. *See In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 39.

fish.[245] And while a federal reserved water right may be appurtenant to the land, an aboriginal right need not be. Despite the characterization and regardless of appurtenance, *Adair* could have been instructive in the move from a fishing right to an implied instream water right. However, the SRBA chose to adhere to only what *Fishing Vessel* was able to resolve.

The role of state regulation for species conservation was the third and determinative way the SRBA court interpreted *Fishing Vessel* to limit the scope of off-reservation fishing rights.[246] The SRBA court interpreted *Fishing Vessel* to be consistent with earlier Supreme Court holdings which "stated that the power of the State was adequate for protection of the fish."[247] The SRBA court argued that it was the responsibility of the State to regulate for conservation—this responsibility did not fall to the tribes.[248] However, any argument emphasizing the State's police power for conservation is peripheral to the issue. The Nez Perce Tribe's primary interest is in a water right to support the fish that the Tribe could harvest per its treaty right. It would go against rules of treaty interpretation to consider instream flow to conserve a species and instream flow for harvestable fish to be the same instream flow.

The SRBA court's overarching treatment of the treaty bafflingly failed to apply any rules of Indian treaty interpretation. Although the SRBA court held otherwise, the 1855 treaty did support an aboriginal right. The motive behind the Stevens treaties was more multi-layered than merely a land conflict, as the SRBA court suggested.[249] The purpose of the Stevens-era treaties across the Pacific Northwest was to ensure the Indians' traditional sustenance (i.e., hunting, fishing, and gathering)[250] while attempting to convert them to agrarian societies and assimilate them into American societies.[251] Whether the Treaty with the Nez Perce impliedly reserved a water right is a question that could have been resolved by *Winters* and the rules of treaty interpretation. The treaty does not expressly reserve a water right.[252] However, the treaty did expressly reserve to the Nez Perce the right to take fish in traditional off-reservation fishing locations.[253] *Winters* dictates ambiguities to be resolved in favor of the Indians: "[T]he rule should certainly be applied

---

245. *See id.*

246. *Id.* at 33.

247. *Id.* at 34 (referencing Puyallup Tribe v. Dep't of Game of Wash., 433 U.S. 173 (1977)).

248. *Id.* at 35.

249. *Id.* at 38.

250. Washington v. Wash. State Commercial Passenger Fishing Vessel, 443 U.S. 658, 667 ("The Governor's concern with protecting the Indians' continued exploitation of their accustomed fisheries was reflected in his assurances to the Indians during the treaty negotiations that under the treaties they would be able to go outside of reservation areas for the purpose of harvesting fish.").

251. Kent Richards, *The Stevens Treaties of 1854–1855*, 106 OR. HIST. Q. 342, 346–47 (2005).

252. *See* Treaty with the Nez Perces, *supra* note 8, at art. III.

253. *Id.*

to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."[254] The implication that off-reservation water might one day be completely diverted from a stream, creating an inhabitable environment for fish, does not support the purpose of a fishing right. Alternatively, the implication that there is an implied reservation of water to create a habitable environment for fish does support a fishing right. The ambiguity should have been resolved in favor of the Nez Perce. Despite the Supreme Court's consideration of the rules of treaty interpretation in *Fishing Vessel*,[255] the SRBA court, which emphasized the *Fishing Vessel* decision, failed to incorporate the rules of treaty interpretation into its own analysis.[256]

The SRBA decision was handed down in 1999.[257] It was never appealed. Instead, the Nez Perce were able to settle with other parties, avoiding a binding judgment.[258] Even though the issue of a reserved water right has not been taken head-on again in any other case, a court decision has stepped towards a reserved instream water right by protecting habitat to support current fish levels for treaty-based fishing rights.

X. FISHING RIGHTS, ROUND FOUR: TREATY-BASED DUTY TO REFRAIN FROM IMPAIRING FISH RUNS (A STEP TOWARDS INSTREAM WATER RIGHTS)

Within the past ten years, the right to take fish in common with citizens of the territory was the central focus of more litigation. In 1970 the United States filed suit as trustee for various tribes in western Washington for a declaratory judgment regarding off-reservation treaty fishing rights and for relief regarding the impairment of the streams where the fishing rights existed.[259] The Washington district court separated the issues into two phases.[260] In 2001 the United States and the Tribes initiated a subproceeding of the second phase to obtain a declaratory judgment that the State of Washington had a treaty-based duty to

---

254. Winters v. United States, 207 U.S. 564, 576–77 (1908).

255. *Fishing Vessel*, 443 U.S. at 676.

256. However, the SRBA court did mention the rules of treaty interpretation. *See In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 24–25.

257. *See id.*

258. *The Nez Perce Water Rights Settlement*, IDAHO WATER RESOURCE BOARD, http://www.idwr.idaho.gov/waterboard/WaterPlanning/nezperce/default.htm (last visited Nov. 16, 2011).

259. United States v. Washington, 384 F. Supp. 312, 327 (W.D. Wash. 1974).

260. *Id.* Judge Boldt, the judge who issued the decision, held the "in common with" language in the treaty to mean "sharing equally the opportunity to take fish" and held this right meant an opportunity to take up to fifty percent of the available harvest. *Id.* at 343. For an interesting discussion of the controversy up to and following this decision, see Angelique EagleWoman, *Tribal Hunting and Fishing Lifeways & Tribal-State Relations in Idaho*, 46 IDAHO L. REV. 81, 103–05 (2009). Judge Boldt's decision preceded the Supreme Court's *Fishing Vessel* decision by five years.

the Tribes to maintain culverts under state roads.[261] The Yakama Nation was a party to this litigation, the *Culverts* litigation.[262]

The Tribes sought three judgments from the *Culverts* litigation. First, they requested a declaratory judgment that the treaty right to take fish imposed on the State of Washington a duty to construct or maintain culverts so as not to diminish numbers of fish en route to or from usual and accustomed tribal fishing grounds.[263] The Tribes also requested a declaratory judgment establishing that the State was in violation of the treaties.[264] In addition to declaratory judgments, the Tribes sought injunctions as well, including an injunction to prohibit the State from constructing culverts that would impair fish runs, and an injunction to maintain culverts built or maintained by the State so that culverts would not impair fish runs.[265]

Evidence to support these requests for declaratory and injunctive relief turned on the language from the Stevens Treaties. Specifically, the prayers for relief turned on the provision in which the Tribes reserved "[t]he right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory . . . ."[266] The Tribes asserted that the State violated this provision with habitat modification; the placement of culverts where roads cross streams blocked fish passage and prevented migration, which resulted in diminishing fish numbers.[267]

In beginning to analyze what the treaty fishing right included, the court examined what the treaty right did not include. In 1980, a federal district court in Washington State held that the treaty right to fish included protection from environmental degradation,[268] but this holding was reversed by the Ninth Circuit Court of Appeals because "environmental degradation" was just too ambiguous: "The legal standards that will govern the State's precise obligations . . . that may affect the environment of the treaty area will depend . . . upon concrete facts which underlie a dispute in a particular case."[269] Although the Ninth Circuit held that the treaty fishing right did not include a broad, undefined environmental servitude, the court supported the existence of treaty-based obligations on the part of the State.[270] Since culverts under state roads were a narrow issue, and the Tribes presented sufficient facts of the effects of culverts on fish migration, the court returned to the treaties for evidence of State duty to maintain fish passageways under culverts.[271]

---

261. United States v. Washington (*Culverts*), No. CV 9213RSM, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007).
262. *See id.*
263. *Id.* at *2.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at *3.
268. United States v. Washington, 506 F. Supp. 187, 190 (W.D. Wash. 1980).
269. United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985).
270. *See Culverts*, 2007 WL 2437166, at *5.
271. *Id.* at *6.

The court began its analysis with rules of Indian treaty interpretation. First, the court acknowledged that the intention of the parties controlled treaty interpretation.[272] Treaties are not interpreted by the understanding of the party who drafted the treaty with a mastery of the language.[273] Rather, treaties are interpreted as to how the Indian signatories understood the treaty provisions.[274] The court then looked to the intent of both sides to the treaty and found assurances from Governor Stevens to the Indians that their fish sustenance would not be taken away at some future time.[275] The court concluded with strong support for the Indians' understanding that they would continue to exercise their fishing rights at usual and accustomed places per the treaty's guarantee.[276]

The *Culverts* holding turned on the Tribes' understanding of the treaty language. Once that understanding was determined, the analysis that followed was rather brief. The impairment of fishing rights was limited to the construction or maintenance of culverts that blocked the fish passage.[277] The Tribes were entitled to exercise their fishing rights and access their fish resource, and the diminishment of fish would exclude the Tribes from their treaty rights.[278] Since the impairment of culverts prevented fish from reaching the accustomed fishing places of the Tribes, thereby excluding them from their fishing right, the State of Washington had a duty to refrain from diminishing fish numbers.[279]

The holding in *Culverts* added a new dimension to the fishing litigation. With a sufficiently defined scope, treaty fishing language includes a right to protection from environmental degradation. A right to protection from the degradation of water quality in fish passages compels the presumption of water in fish passes. This is essentially an implied instream right.

XI. FISHING RIGHTS, THE NEXT ROUND: INSTREAM FLOW

Given the lengthy legal history of treaty fishing rights in the Northwest, how would a Washington or Pacific Northwest court decide whether an off-reservation instream water right is supported by treaty fishing language? A court could adopt one of several legal analyses in arriving at the answer, each of which would most likely affirm an off-reservation instream water right. Courts could examine the recent cases and piece logic and holdings together from each case. The problem with this method, as the SRBA court demonstrated, is that if a scope is too narrowly framed, there could be gaps between holdings that a court

272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at *9.
276. *See id.* at *10.
277. *Id.*
278. *Id.*
279. *Id.*

might shy away from bridging because the holdings vary by degree of analogy. Another, perhaps more convincing, analysis is utilizing the same procedure as various Supreme Court decisions have used. This analysis begins with the rules of Indian treaty interpretation and then asks whether an action excludes the Indians from the right guaranteed by the treaty.

There is enough case precedent to easily piece together an implied off-reservation instream water right. The Supreme Court's holding in *Fishing Vessel* regarding the right to the harvest of fish is very similar to an earlier Supreme Court holding over seventy years earlier. The Court itself in *Fishing Vessel* recognized this fact: "The Court has interpreted the fishing clause in these treaties on six prior occasions. In all of these cases the Court placed a relatively broad gloss on the Indians' fishing rights and—more or less explicitly—rejected the State's 'equal opportunity' approach . . . ."[280]

Winans and *Fishing Vessel* denote what off-reservation fishing rights directly include. These fishing rights include a right to access locations and to take a non-zero number of fish, not merely the chance to fish.[281] However, both cases may be understood as affirming what the treaty rights directly include and not what might be implied to support those treaty rights.

Colville Confederated Tribes v. Walton and *United States v. Adair* added implied water rights to the right of taking fish. The Ninth Circuit in *Colville* acknowledged that fish need water and implied a water right to support replacement fisheries.[282] The court emphasized that the Tribes were entitled to use the water reserved to them for purposes of the reservation, and one purpose was for the Indians to continue feeding themselves.[283] Despite this expansion to what treaty rights impliedly included, there is a gap between *Colville* and the instream water right question. The Tribe in *Colville* already owned the water right for irrigation, but the water was going unused.[284] The water right was also understood by the court to be appurtenant to the Colville Reservation.[285]

Adair potentially creates a similar gap between instream water rights for fish and off-reservation instream water rights, but this gap can be resolved. *Adair* held that, since the tribe was entitled to fish, there must be water to support the existence of fish in the stream; this gave rise to an instream water right.[286] From one possible interpretation of the holding, the instream water right in *Adair* arose from a fishing

---

280. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979).

281. *Id.* at 679–80; *see also* United States v. Winans, 198 U.S. 371, 381–82 (1905).

282. Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981). The Ninth Circuit noted that the Colville Tribes no longer had claims to the historical fisheries on the Columbia River because of the "replacement" that had been developed in Omak Lake. *Id.*

283. *Id.*

284. *Id.* at 45–46.

285. *See id.* at 46.

286. *See* United States v. Adair, 723 F.2d 1394 (9th Cir. 1983).

right appurtenant to reservation land.[287] However, there is a second way to categorize this fishing right. The fishing right in *Adair* happened to be on the reservation, seemingly appurtenant, and therefore not analogous to the question of off-reservation fishing rights. However, the fishing right might also be more broadly categorized as a treaty right to fish as reserved by language in the Treaty with the Klamath.[288] Categorizing the fishing right as a treaty right makes *Adair* analogous and therefore applicable. The Klamath's on-reservation fishing right is treaty-based, and the court implied an instream water right. Because the Yakama's off-reservation fishing right is also treaty-based, a court should imply an instream water right as well.

Even if a court were to distinguish the Klamath's water rights as appurtenant to the land and decline to compare *Adair* as an analogous case, holdings from cases like *Winans*, *Fishing Vessel*, and *Adair* complement each other and are not mutually exclusive. *Fishing Vessel* held that the treaty right to fish reserved a non-zero proportion of fish.[289] *Adair* expanded that scope by making the logical step from a right to fish to the conclusion that water must be included to sustain fish for that right.[290] In addition to the cases forming a logical chain, the Supreme Court denied certiorari in *Adair*, a Ninth Circuit case.[291] If the Ninth Circuit's step in logic was, in fact, a leap and an error, the Supreme Court might well have corrected it, but the Court instead declined to hear the case.

An even more compelling and stronger argument for finding an off-reservation instream water right is to find an implied water right as the Supreme Court did in *Winters*, which was by treaty interpretation. Circuit and Supreme Court decisions have started analyses with the rules of Indian treaty interpretation. One of the first rules established by the Supreme Court is that treaties should be interpreted according to the understanding of the Indians who signed the treaty.[292] *Winans* relied on this rule and coined another fundamental concept: a right is a right reserved by the Indians, not a right granted from Congress.[293] *Winans* is precedent that *Winters* relied upon to find implied water rights, and *Winans* is precedent that *Fishing Vessel* relied upon to find that fishing rights meant to take a harvestable share of fish. The holdings from *Winans*, *Winters*, and *Fishing Vessel* were all outcomes of treaty interpretation. *Winans* found that there was an implied servitude so that the Yakama could access their traditional fishing places.[294] *Winters* resolved

---

287. *Id.* at 1418–19.

288. *See* Treaty with the Klamath, *supra* note 231.

289. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679, 682 (1979).

290. *See Adair*, 723 F.2d at 1415.

291. United States v. Adair, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

292. *See* Jones v. Meehan, 175 U.S. 1 (1899).

293. United States v. Winans, 198 U.S. 371, 381 (1905).

294. *Id.*

the ambiguity over whether the agreement creating the reservation included water to make the land viable, in favor of the Indians.[295] *Fishing Vessel* began its analysis with the intention, or understanding, of the signing parties to control the interpretation of the treaty.[296] Likewise, the Ninth Circuit in *Adair* examined the fishing rights reserved in the Treaty with the Klamath and found that instream water could be implied to support fish.[297] Cases that have begun analyses with treaty rights have found implied water rights in favor of tribes.

In examining the treaty right, treaty interpretation would require the court to ask if the effect of denying the relief sought would harm the treaty right. This analysis, explicitly stated in *Winters*,[298] directs that if there are two implications, one that would support the treaty and the other that would undermine it, the court must adopt the implication that favors the treaty. This analysis originated in *Winans*. Allowing the fishing wheels to remain would have completely excluded the Yakama from exercising their treaty fishing right, whereas implying a servitude to access the fishing location (i.e., enjoining the construction of fishing wheels) would support the right.[299] Based on this exercise, the Supreme Court in *Winans* enjoined the obstruction from fishing wheels at usual and accustomed Yakama fishing grounds.[300] Years later, the Supreme Court in *Fishing Vessel*, opted for an interpretation that ensured the tribe a right to the proportion of a fish harvest and denied the one interpretation offering no assurances to any fish.[301] This holding declined an interpretation that would have completely undermined a treaty fishing right. Finally, the *Culverts* court looked at the effect of blocking or impairing fish passages.[302] Implying that there was no duty to maintain culverts would impair fish runs, diminish fish numbers, and exclude the Tribes from full enjoyment of treaty fishing rights. This interpretation would undermine the treaty provision. However, implying a duty to maintain culverts would not impair fish runs and would enable the Tribes to fully enjoy treaty fishing rights. This would support a treaty fishing right. The court held that the State had a duty to refrain from

---

295. *See* Winters v. United States, 207 U.S. 564 (1908).

296. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675–76 (1979).

297. United States v. Adair, 723 F.2d 1394, 1408 (1984).

298. *Winters*, 207 U.S. at 576–77.

299. *See Winans*, 198 U.S. at 381–82.

300. *See id.* The Supreme Court followed a very similar framework three years later in *Winters*, even though the analysis in *Winans* had begun with a water right appurtenant to the reservation. *See Winans*, 198 U.S. at 381. The Court in *Winters* began analysis with the creation of the reservation, which included the purpose of promoting agriculture on the reservation. *Winters*, 207 U.S. at 575–76. With this purpose in mind, the Supreme Court considered what the Indians would have without a water right to irrigate their crops. *Id.* at 576. The answer, the Court held, would be nothing; with no water, the land was worthless. *Id.*

301. *See Fishing Vessel*, 443 U.S. at 670, 672, 679.

302. United States v. Washington (*Culverts*), No. CV 9213RSM, 2007 WL 2437166, *1, *10 (W.D. Wash. Aug. 22, 2007).

activities that would "diminish the number of fish that would otherwise be available for Tribal harvest."[303]

The treaty between the government and the Yakama, the history surrounding the signing of the treaty, and judicial precedent strongly suggest that there should be an off-reservation instream water right to support fish for a treaty fishing right. *Winans* and *Fishing Vessel* are precedent and have already determined that the Yakama have the treaty right to access fishing spots and to take a non-zero amount of fish. A court should consider whether the Yakama would be excluded from their treaty right to take fish if there were no instream water right. If most of the users of the Yakima River Basin are diverting the water from the stream, then fish would need an instream water right to survive. An instream right for conservation purposes does not overlap with an instream right to support a treaty fishing right because the instream right would be one right for two opposite purposes: preserving fish is the opposite of harvesting fish. Denying an instream water right in a completely appropriated river basin would constructively exclude the Yakama from exercising their treaty right. Because an implied water right would support the treaty, and the alternative would undermine it, there should be an implied water right.

A. What About Changed Conditions?

Courts are often faced with having to determine how to include changed conditions in treaty analysis. The SRBA court was unwilling to entertain changed conditions, holding that consideration of such conditions in treaty interpretation exceeded the scope of the treaties.[304] This uncertainty might create a gap in some approaches, but if the analysis begins by looking at the intent of the treaties and then asks whether the Indians have been excluded from a treaty right, there is no gap. *Winans* and *Culverts* are examples of court decisions that have ruled on treaty rights in the face of changed conditions. In *Winans*, the condition was the new technology, the fish wheel; because this new technology denied the Yakama access and impaired the exercise of their fishing right, it had to be removed or modified so that fish could escape upstream.[305] In *Culverts*, the changed condition was the effects that culverts had on fish habitat; because this new habitat condition impeded fish migration and resulted in diminished fish available for harvest, the construction and maintenance of the culverts had to be rectified. Addressing a changed condition is simply asking whether the new condition would exclude the exercise of a treaty fishing right. If so, then duties or rights to prevent that exclusion might justifiably be implied.

---

303. *Id.*
304. *In re* SRBA, Consolidated Subcase 03-10022, *supra* note 179, at 1, 38–39.
305. United States v. Winans, 198 U.S. 371, 381–82 (1905).

B. A Note on Jurisdiction

The type of court deciding the off-reservation instream water right issue may affect the outcome. In general, federal courts or courts with appellate jurisdiction, such as the Ninth Circuit or Supreme Court, have been more likely to apply rules of Indian treaty interpretation. *Winans* and *Fishing Vessel*, decisions defining the right to take fish, are Supreme Court decisions.[306] *Adair* and *Colville*, where courts were willing to imply an instream water right for fish, have been Ninth Circuit decisions.[307] And the recent *Culverts* decision came from a Washington federal district court.[308] Heavily criticized or enigmatic decisions have more often arisen from state courts. The Snake River Basin Adjudication court, for example, was heavily criticized for its decision denying the Nez Perce off-reservation instream water rights.[309] The Yakima Basin Adjudication, involving the Yakama Tribe, began as a filing in state court.[310] The trial court ruled that fishing rights were not extinguished, yet somehow diminished, and the Supreme Court of Washington affirmed this decision without articulating how such a result might have happened.[311]

XII. CONCLUSION

Treaty-based fishing rights have seen a century of litigation. In dissecting the nature of the right, courts have determined that the right includes a right to access off-reservation fishing locations and a right to take a harvestable amount of fish. How might a Washington court address the question of whether the treaty right to take fish might include an off-reservation instream water right? The strongest approach is to apply the rules of Indian treaty interpretation. If an off-reservation water right is not expressed in a treaty, a court might consider that (1) rights not expressly granted in treaty language are reserved to the Indians; and, (2) if there are two inferences, the inference which would support the treaty should be adopted. These considerations are grounded in Supreme Court precedent. A water right that could maintain fish runs would support a treaty fishing right. No water right could result in water users diverting all the water from the stream, destroying fish and consequently destroying a treaty fishing right. Courts have not gone so

---

306. *See id.*; *Fishing Vessel*, 443 U.S. 658.

307. *See* United States v. Adair, 723 F.2d 1394 (9th Cir. 1983); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981).

308. United States v. Washington (*Culverts*), No. CV 9213RSM, 2007 WL 2437166, at *1, *10 (W.D. Wash. Aug. 22, 2007).

309. *See, e.g.*, Michael Blumm, Dale D. Goble, Judith V. Royster & Mary Christina Wood, *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449, 451–52 (2000).

310. *See* Dep't of Ecology v. Yakima Reservation Irrigation Dist., 850 P.2d 1306 (Wash. 1993).

311. *See, e.g.*, Blumm et al., *supra* note 1, at 1179 (suggesting that, by diminishing fishing rights, the court avoided having to order restoration of historical streamflows).

far as to determine an instream water right to protect fish, but the most recent case has established a treaty-based right of protection from habitat degradation. The holding which declared a treaty-based duty to prevent habitat degradation resulted from applying the rules of Indian treaty interpretation. Perhaps if courts continue to follow precedential rules for Indian treaty interpretation, finding an implied instream water right reserved by treaty language is not far off.

*Katheryn A. Bilodeau**

* J.D. Candidate, University of Idaho College of Law, May 2012; M.S. Water Resources: Law, Management and Policy, 2009, University of Idaho; B.A. Japanese, 2002, University of Notre Dame. I would like to thank Professor Barbara Cosens for her outstanding help on this comment; her wisdom and commitment to her students make her among the best of advisors. I also would like to thank Jeremiah Busch and my family, whose unfailing love and support make law school possible.