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A Call for Co-Management: Treaty Fishing Allocation in New Zealand and Western Washington

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A CALL FOR CO-MANAGEMENT: TREATY FISHING ALLOCATION IN NEW ZEALAND AND WESTERN WASHINGTON

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Abstract: The Maori tribe of New Zealand and the tribes of western Washington are both subject to quota systems as a result of their treaty rights to fish. While New Zealand's quota system was legislatively imposed, western Washington's was judicially imposed. Nevertheless, the two quota systems are quite similar in that both permit approximately half the allowable catch of fish each year to go to the tribes. However, that amount does not adequately represent what the tribes are entitled to based on their treaty rights. Colonization, over-fishing, and resource deterioration have decreased the amount of fish available to the fishing population as a whole (including commercial fishermen), making it impossible for the tribes to rely on their traditional livelihood. While both tribes have been somewhat involved in co-management plans with their governments, these co-management plans are insufficient. New Zealand and the United States desperately need to adopt legislation setting forth more extensive co-management plans wherein the co-managers are required to cooperate with one another and are prohibited from making unilateral decisions. Such legislation would lead to an improved environment with more available fish to sustain the livelihoods of the tribes as well as that of the commercial fisherman.

I. INTRODUCTION

This Comment compares Native fishing rights and treaties of the Maori tribe in New Zealand and the western Washington[1] tribes in the United States.[2]

Colonization, with its accompanying increase in population and competing demands for resources, has forced Native people in both New Zealand and the United States into a situation of decreasing resources. One of the most contentious battles has been over fishing rights. Often addressed in treaties but rarely recognized in traditional form, fishing rights of indigenous people have been addressed by the governments in several ways, often leading to the deterioration of the Native economy and traditions. In recent years, tribes have invoked their rights to fish under

[1] Western Washington was selected because of its reliance on the fish industry, its declining resources, and a tribal quota system similar to that imposed upon the Maori.

[2] This Comment does not compare any other indigenous rights or issues within the treaties.

existing treaties in order to protect habitats that are critical to the preservation of their livelihood and culture.[3]

Part II discusses the background of discovery in New Zealand and the United States, and also demonstrates the importance of fish in both countries. Part III discusses fishing rights exclusive to the Maori of New Zealand and government action taken in an attempt to satisfy Maori treaty right claims. Part IV explains the situation in western Washington relating to tribal fishing rights and court actions taken to protect these treaty rights. Part V compares the two systems and their policy effects. Finally, because neither system adequately protects tribal treaty rights to fish, Part VI proposes that a new model incorporating co-management of fisheries on a legislative level involving both tribal members and government officials be implemented for both the Maori of New Zealand and the tribes of western Washington.

II. BACKGROUND

New Zealand was discovered in the late 1700s by Britain.[4] Settlers promoting Christianity and trade began to show up in New Zealand followed by fishing vessels.[5] Eventually, the commercial activity grew larger.[6] Missionaries became a dominant part of society, and by 1840 the British knew the Maori people well.[7] Trading went on between the two, and soon the Maori were learning new living habits, adopting Christianity, and adapting their culture to that of the British.[8] As relations continued, more settlers moved to the area and began encroaching on Maori land. The Maori began following the laws of the Crown,[9] which further depleted their group cohesiveness.[10] By this point, Britain wanted to establish sovereignty in New Zealand.[11] Before 1840, Britain had made no legal claim on New Zealand and the Treaty of Waitangi, the New Zealand treaty addressed in this Comment, was Britain's attempt to ensure that claim.[12]

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[3] Michael Blumm & Brett Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 410 (1998).

[4] *See generally* CLAUDIA ORANGE, THE TREATY OF WAITANGI 9 (1987).

[5] *Id.*

[6] *See Id.* at 1-18.

[7] *Id.* at 6.

[8] *Id.* at 7.

[9] *See id.* at 1-18.

[10] *Id.* at 8-31.

[11] *Id.* at 32.

[12] *Id.*

The United States experienced a similar pattern of discovery.[13] The first settlers were European.[14] The Catholic Church created the legal framework for the assertion of European authority over other countries.[15] As time moved on, the theory that non-Catholics were infidels was used to gain access to land. Soon, Europeans were claiming "discoveries" virtually everywhere they went.[16] The relationship between settlers and indigenous populations at that time was mainly in the realm of acquiring land.[17] The control of land acquisitions by the settlers was a means of creating capital.[18] Not long after, the land of the indigenous populations had greatly declined and the land of the settlers had substantially increased.[19] This expansion by the colonies led to the development of treaties.[20] Treaties at that time were aimed at the tribes' giving up their rights to land while still preserving some Native rights.[21] One of the rights included in many of the treaties is the right to fish.[22]

When these treaties were being negotiated, the Native American population in western Washington was the greatest of any area in the United States.[23] Authors and politicians from that time wrote about the rich salmon population in the area.[24] It was a major issue when Governor Stevens was negotiating the treaties with the tribes of western Washington, including the Treaty of Point Elliott.[25]

In both New Zealand and the United States, fish have been and continue to be important to the survival of tribes.[26] The Maori of New Zealand and the various Washington tribes depend on fish for economic survival, cultural identity, and religion.[27] Unfortunately, due to

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[13] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 42 (4th ed. 1998).
[14] *Id.* at 41.
[15] *Id.*
[16] *Id.* at 44-45.
[17] *Id.* at 41-63.
[18] *Id.* at 59-63.
[19] *Id.* at 59-72.
[20] *Id.* at 73.
[21] *Id.*
[22] *See, e.g.*, Treaty with Dwamish, Suquamish, Etc., Jan. 22, 1855, 12 Stat. 927.
[23] BARBARA LANE, BACKGROUND OF TREATY MAKING IN WESTERN WASHINGTON 1 (1977).
[24] *Id.* at 2-3.
[25] *Id.* at 4-11.
[26] WAITANGI TRIBUNAL, REPORT OF WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM, 13-33 (1988) (discussing the importance of fish in New Zealand). *See also* Sohappy v. Smith, 302 F. Supp. 899, 905-906 (D. Or. 1969), *aff'd*, 529 F.2d 570 (9th Cir. 1976) (noting aboriginal use of Columbia River Salmon); United States v. Washington, 384 F. Supp. 312, 350, 358, 367 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (discussing the importance of fish in western Washington examples).
[27] *See supra* note *26* and accompanying text.

colonization, their rights have been confiscated.[28] The Maori and the tribes in Washington have had to give up property rights in both land and fish ownership.[29] They have been victims of quota systems, which, while functioning differently,[30] have a similar effect on tribal economy and custom. The quota systems give back a certain limited right to fish but do not return tribal rights regarding fish to traditional quantities.[31]

III. MAORI FISHING RIGHTS

Fishing is important to the Maori people.[32] As a result, the Maori people have struggled to maintain their treaty right to fish. The Treaty of Waitangi gave the Maori the treaty right to fish, but that treaty is not legally recognized in New Zealand. Instead, the treaty is given deference, and that treatment has led to legislation over a period of several years. The legislation is designed to focus on the Maori rights accorded in the Treaty of Waitangi. First, a court was developed by the legislature to hear Maori claims. Second, a quota system was developed on a small scale. Third, in order to address Maori concerns over the unfairness of the quota system, the Settlement Act was enacted, which extinguished all Maori treaty right fishing claims, and in return, granted the Maori a commercial fishing company. Finally, the Settlement Act was amended in the Fisheries Act of 1996 to further address Maori concerns regarding the right to fish. Nevertheless, the Maori people are still dissatisfied.

A. *Maori Fishing*

The Maori do not have tribal sovereignty or territorial control but do have a treaty right to water resources such as fisheries.[33] The Maori tribes

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[28] ORANGE, *supra* note 4, at 8-31 (discussing New Zealand); GETCHES ET AL., *supra* note 13, at 59-72 (discussing western Washington).

[29] ORANGE, *supra* note 4, at 8-31 (discussing New Zealand); GETCHES ET AL., *supra* note 13, at 59-72 (discussing western Washington).

[30] *See* discussion *infra* Parts III.D, IV.C.

[31] For proof of the declining levels of fish, see generally William H. Rodgers, Jr., *Symposium on Salmon Recovery: What a Salmon Czar Might Hope For*, 74 WASH. L. REV. 511 (1999); Christine Gregoire & Robert K. Costello, *Symposium on Salmon Recovery: The Take and Give of ESA Administration: The Need for Creative Solutions in the Face of Expanding Regulatory Proscriptions*, 74 WASH. L. REV. 697 (1999).

[32] Species of fish in New Zealand that are important to the Maori include: mullet, kahawai, trevalli, parore, kingfish, piper, karehe, herring, flounder, tuna, snapper, shark, and shellfish. *See* WAITANGI TRIBUNAL, *supra* note 26, at 13-33.

[33] Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 STAN. J. INT'L L. 49, 53 (1999).

ceded sovereignty but retained authority over their fisheries.[34] However, the Treaty of Waitangi is not legally enforceable under New Zealand law unless adopted through legislation.[35] Thus, some have interpreted these facts to mean that American Indians have an advantage over the Maori in their pursuit of water resources.[36] This Comment will demonstrate that this interpretation is flawed.

Fishing has a great deal of significance to the Maori people in terms of food supply, religion, and culture.[37] "Fishing is a source of food, an occupation, a cornerstone of the rural mixed economy, a part of the relationship between the Maori, their ancestral lands and waters, and a source of income."[38] In the traditional Maori fishing culture "fish from the sea (*ika moana*) and from the rivers, lakes, and streams (*ika wai whenua*) provided a rich food supply."[39] Religious ceremonies were an essential part of fishing.[40] "The first fish taken, *Te Ika Tuatahi*, was returned to the sea to invite the gods to bring an abundance of fish to the hooks."[41] Maori ownership rights, especially of fish, were communal. Normally, rights to resources were owned by a number of people rather than owned privately.[42]

The nature of traditional land and fishing rights has been the subject of many judicial determinations. In *Keepa v. Inspector of Fisheries*,[43] the court emphasized ownership of fishing grounds and stated:

> [T]he Maori recognized no individual or personal right of title or ownership of land. All land was held on a communal basis. So, too, I believe with rights such as fishing rights: they were at a human level exercised by individuals but they were the right of the whole tribe.[44]

This system of property ownership is common to tribes but uncommon to European settlers.[45] Thus, the Maoris had to adjust to a new system of

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[34] WAITANGI TRIBUNAL, *supra* note 26, at 164.

[35] Kahn, *supra* note 33, at 53.

[36] *Id. See also* Tamihana Korokai v. Solicitor-General, 1962 N.Z.L.R. 600.

[37] For a discussion of ceremonial and mythological significance, see WAITANGI TRIBUNAL, *supra* note 26, at 31-35. For a discussion of personal recollections regarding fishing traditions, see *id.* at 13-24.

[38] WAITANGI TRIBUNAL, *supra* note 26, at 146.

[39] *Id.* at 32.

[40] *Id.* at 33.

[41] *Id.*

[42] *Id.* at 35.

[43] *Id.* at 36 (*citing* Keepa v. Inspector of Fisheries, 1965 N.Z.L.R. 322).

[44] *Id. See also* In re the Bed of the Wanganui River, 36 N.Z.L.R. 600 (1962).

[45] WAITANGI TRIBUNAL, *supra* note 26, at 35-36.

property ownership. The Maori economic system also differed from that of the Europeans.[46] Instead of a barter system, the Maoris used a gift-exchange system.[47] They would give a gift to someone (often fish) and expect something in return.[48] The system included exchange within and between communities.[49] "In short, water resources have historically represented and continue to offer tremendous economic value to the Maori."[50]

The Maori are concerned with resource depletion due to development and overfishing.[51] The Maori complain that some of the fish present years ago are no longer present.[52] These include crayfish, scallops, cockles, snapper, flounder, and other species.[53] Problems causing the habitat despoliation include: dumping at sea, trollers close to the beach, nets dragging the bottom of the sea and destroying the reef, erosion of soil due to pastoral farming, a decline in surface water quality; silitation of waterways, extensive agricultural development, recent urban growth, sewage disposal,[54] and over-fishing.[55]

B. *The Treaty of Waitangi*

New Zealand's Treaty of Waitangi is the basis for Maori claims to land and water rights. The text of the Treaty of Waitangi consists of English and Maori versions.[56] The treaty presupposed the legal and political capacity of the Chiefs of New Zealand.[57] It was signed in 1840 by over 500 chiefs.[58] The treaty in English "ceded to Britain the sovereignty of New Zealand and in return guaranteed full rights to the Maori ownership of lands, forests, and fisheries and their prized possessions."[59] However, most

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[46] *Id.* at 5.
[47] *Id.* at 45.
[48] *Id.* at 44-45.
[49] *Id.* at 49.
[50] WAITANGI TRIBUNAL, *supra* note 26, at 59.
[51] *Id.* at 25-28.
[52] *Id.* at 25.
[53] *See* Whaingaroa Environment Catchment *Background*, *at* http://www.converge.org.nz/nbio/catchments/whaingaroa/webackground.html (last visited on May 18, 2002).
[54] *Id.*
[55] WAITANGI TRIBUNAL, *supra* note 26, at 25-28, 116-119.
[56] ORANGE, *supra* note 4, at 1.
[57] IAN BROWNLIE, TREATIES AND INDIGENOUS PEOPLES: THE ROBB LECTURES (F.M. Brookfield, ed. 1991).
[58] ORANGE, *supra* note 4, at 1. The English version of the treaty was only signed by thirty-nine chiefs, while the Maori version was signed by 512 chiefs. *See* GETCHES ET AL., *supra* note 13, at 1008.
[59] ORANGE, *supra* note 4, at 1.

of the chiefs signed the treaty in the Maori language, which did not specify what the English version said.[60] The Maori version cedes "*kawanatanga*" to the Crown, which means "government" to the Maori people.[61] The English interpretation of "*kawanatanga*" is "sovereignty."[62] Thus, while the Maori believed they were sharing a government system with the Crown, the English version actually cedes complete sovereignty to the Crown. As a result, the two versions of the treaty express different views of sovereignty.[63] The English version transfers sovereignty, while the Maori version indicates shared government.[64] Because the Maori do not constitute a sovereign nation according to the Crown, the treaty is the Maoris' sole source of guidance for their rights preserved at the time of British conquest.

The effects of the treaty are greatly debated.[65] It is not enforceable in the New Zealand legal system except by implementing statutes.[66] "[T]he provisions of Article 2 apply to fisheries and the problem outstanding is not the entitlement but the absence of a statutory mechanism for the effective vindication of rights of fisheries."[67]

In addition, these rights are also intended to protect cultural values.[68] Article 2 of the English version of the Treaty of Waitangi[69] reads:

> Her majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right to Preemption over such lands as the Proprietors thereof may be disposed to alienate at such prices as may be

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[60] *Id.*

[61] *Id.* at 46-50.

[62] *Id.* at 46.

[63] *See* Jeanette Jameson, *Indigenous People: An American Perspective on the Case for Entrenchment of Maori Rights in New Zealand Law*, 2 PAC. RIM L. & POL'Y J. 345, 347 (1993).

[64] *Id.* at 349; *see also* GETCHES ET AL., *supra* note 13, at 1008.

[65] *See generally* BROWNLIE, *supra* note 57.

[66] *Id.* at 10.

[67] *Id.* at 95-96. Article 2 of the Treaty deals with the confiscation and claims in respect of land received by the Crown, as well as the right to fish.

[68] *Id.* at 97.

[69] Treaty of Waitangi, Feb., 1840, art. 2, http://www.govt.nz/aboutnz/treaty.php3 (last visited on May 18, 2002).

> agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.[70]

While Article 2 of the treaty protects cultural values, it does not provide guarantees for maintaining Maori customs.[71]

Because of the Maori version and interpretation of the treaty, the Maori believe they possess ownership and management rights over their lands and resources.[72]

C. *The Waitangi Tribunal*

The Waitangi Tribunal makes judicial recommendations relating to the treaty rights from the Treaty of Waitangi based on performance or non-performance of the Treaty's provisions by the Crown. The Waitangi Tribunal was established by the New Zealand legislature in 1975 through the Treaty of Waitangi Act.[73] The Act is designed "to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are consistent with the Treaty."[74] Thus, the Tribunal makes decisions relating to land and fishing rights, but does not enforce the entire treaty.[75] Even though the tribunal can only make recommendations, New Zealand courts have tended to give the recommendations deference.[76]

D. *The Quota System*

Legislation for the Quota Management System was passed in 1986 to provide the Maori with a percentage of the fish caught each year.[77] The

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[70] *Id.* The Maori version of Article 2, uses the term "*te tino rangatirantanga*," which to the Maori means that the lands, villages, and property be sold to the Crown on terms agreed on by the Maori. *See also* GETCHES ET AL, *supra* note 13, at 1008.

[71] BROWNLIE, *supra* note 57, at 97.

[72] *See generally* BROWNLIE, *supra* note 57.

[73] Treaty of Waitangi Act, 1975 (no. 114) (N.Z.).

[74] BROWNLIE, *supra* note 57, at 83.

[75] *See* Treaty of Waitangi Act, *supra* note 73.

[76] BROWNLIE, *supra* note 57, at 84.

[77] The boundaries for this quota allocation system are 200 miles from New Zealand land. *See* Felicity Cogan, *Maori Activists and Fishermen Discuss How to Protect Fish Stocks in New Zealand*, 61 THE MILITANT (Sept. 22, 1997), http://hartford-hwp.com/archives/24/062.html. Other countries are allowed to come in to New Zealand to catch a share of the allocation but only if they are under a joint venture with a

system provides a compromise between the treaty rights of the Maori and modern fishermen.[78] It also provides new management ideas for fisheries.[79] The Quota Management System may accommodate Maori concerns by giving them more access to their fishing rights than they had prior to its passage.[80] Its purpose is to protect the fish resource.[81] Under this system, the total amount of any species of fish that may be safely caught between the Maori and commercial fishermen per year is called the "total allowable catch."[82] "To ensure that the total allowable catches are not in excess of that required to maintain stocks . . . it is provided that an allowance must be made for that share taken by recreational and other non-commercial users. [T]he Fisheries Act of 1983 provides for this . . . "[83]

The Quota Management System fails to address the fishing rights as provided by the treaty. Maoris believe their rights should stand outside the Quota Management System or above it.[84] They believe the treaty secured these rights for them.[85] As a result, the Maori were still displeased with the legislature's attempt to rectify the treaty right to fish.[86] This dissatisfaction led to a settlement act in 1992.

E. The Settlement Act

The Settlement Act of 1992 "settled Maori claims to commercial fishing, clarified Maori rights to customary or non-commercial fishing, and discharged the Crown's obligations in respect to Maori commercial fishing interests under the Treaty of Waitangi."[87] It terminated all past, present, and future Maori commercial fishing claims and ordered the government to pay 150 million in New Zealand currency to assist the Maori in a purchase of

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New Zealand company. *Id.* The New Zealand company's allocation will be reduced by the fish caught. *See* WAITANGI TRIBUNAL, *supra* note 26, at 144.

[78] WAITANGI TRIBUNAL, *supra* note 26, at 140.

[79] MINISTRY OF FISHERIES: Maori Fisheries Today, http://www/starfish.govt.nz/geography/acts/fact-maori-fisheries.htm.

[80] WAITANGI TRIBUNAL, *supra* note 26, at 140.

[81] *Id.* at 141.

[82] *Id.* The total allowable catch is the total amount of any species that may be safely caught, without impairing its continued fecundity or its necessary recovery. *Id.* The accurate measure of the total allowable catch has been disputed and is outside the scope of this Comment.

[83] *Id.* at 142-43.

[84] *Id.* at 147.

[85] *Id.*

[86] *See* Maori Fisheries Act, 1989 (N.Z.); Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992 (N.Z.).

[87] MINISTRY OF FISHERIES, *supra* note 79.

Sealord Products Ltd., New Zealand's largest fishing company.[88] The Maoris now get half of all commercially caught fish.[89] With the adoption of the Settlement Act, the Waitangi Tribunal can no longer hear claims relating to Maori commercial fishing rights,[90] as these claims are now considered settled. However, urban Maori and individual Maori are not included in the Settlement Act.[91] Consequently, the Settlement Act still does not fully solve the Maori fishing rights.[92]

F. The Fisheries Act

The Fisheries Act of 1996 supported the obligations of the 1992 Settlement Act and involved Maori fishery management.[93] This amendment to the Settlement Act was needed because the Maori were also commercial fishermen and wanted more rights according to that status.[94] Additionally, they wanted to be involved in the management of fisheries.[95] The Fisheries Act limited Maori customary fishing while increasing the allocation for commercial fishing.[96] Under this Act, Maori can help regulate customary practices and be involved in the management of local, non-commercial fisheries.[97]

The Maori's claims to fishing rights are controlled by statutes that are in conflict with the language in the Treaty of Waitangi itself.[98] Because some of those rights were bargained away, and because the legislation is controlling, the Crown has little incentive to resolve the conflict between the Treaty of Waitangi and the statutes. Presently, the treaty seems to be considered and given deference by the courts in deciding claims, but it does not provide precedent.[99] The Fisheries Act is now being reconsidered due to Maori pressure to improve rights for all fishers, not just commercial fishermen. As a result, the Maori may have more opportunities for co-management.[100]

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88 GETCHES ET AL., *supra* note 13, at 1010.
89 MINISTRY OF FISHERIES, *supra* note 79.
90 *Id.*
91 GETCHES ET AL., *supra* note 13, at 1011.
92 *Id.*
93 MINISTRY OF FISHERIES, *supra* note 79.
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 WAITANGI TRIBUNAL, *supra* note 26, at 140.
99 *See generally* ORANGE, *supra* note 4.
100 MINISTRY OF FISHERIES, *supra* note 79.

In conclusion, while the New Zealand government has passed several legislative acts to try to settle the treaty fishing claims, these actions have not sufficiently addressed the right to fish as guaranteed in the Treaty of Waitangi. In addition, resource depletion has played a major role in the limited number of fish available, which reduces the total allowable catch each year. As a result, the quota numbers allowed have dwindled, making economic hardship commonplace among the Maori fisher.[101]

IV. THE WASHINGTON TRIBES' FISHING RIGHTS

A. *Washington Tribal Fishing*

For Washington Indians, fishing has been not only a traditional source of food, but also a significant part of the trading economy, a basis for social stratification, and a part of religion and ceremony.[102] The first salmon ceremony was an important religious ceremony to pray for more salmon.[103] This ceremony and other attitudes and rites were designed to make sure that salmon were never wasted and that water was not polluted.[104] "The symbolic acts, attitudes of respect, and concern for the well-being of the salmon reflected a conception of interdependence and relatedness of all living things which was a dominant feature of the Native world view."[105] The tribes of western Washington also had a trade and gift-exchange system among tribes and settlers alike,[106] as well as direct sales and exchange of goods extending far distances.[107]

Coming from a vast area of rich resources, resource depletion is a major issue for the tribes of western Washington. Salmon runs are now a

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[101] In addition, bans on certain types of fishing due to depleted resources have caused such economic hardships. In 1997, the Maori unemployment rate was 12.2 percent greater than that of white New Zealanders. *See* Cogan, *supra* note 77. The decline in fish stocks is common in many different species of fish, especially snapper. *Id.* In 1997, the New Zealand government imposed a forty percent cut in the snapper quota. *Id.* Scientists estimate that the number of snapper has decreased from approximately 100,000 tons in the 1950s to 36,000 tons today. *Id.*

[102] Sohappy v. Smith, 302 F. Supp. 899, 905-906 (D. Or. 1969), *aff'd*, 529 F.2d 570 (9th Cir. 1976) (noting aboriginal use of Columbia River Salmon). United States v. Washington, 384 F. Supp. 312, 350, 358, 367 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

[103] LANE, *supra* note 23, at 3.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 4.

[107] *Id.*

fraction of the size they were before the time of the treaties.[108] The consequences are devastating to tribes whose economy is based on fishing.

B. The Treaty of Point Elliott

Tribal fishing rights in western Washington are governed by the Treaty of Point Elliot. Unlike the Treaty of Waitangi, the Treaty of Point Elliott is a constitutionally enforceable compact, although the terms of the treaty are not clear and have been the source of considerable litigation.[109] The Treaty of Point Elliott was signed by a group of about twenty-two tribes[110] in western Washington in 1855.[111] The treaty guaranteed the Indians rights off the reservation.[112] The Indians agreed to part with most of their land, but wanted to preserve their fishing practices and rights on the land where they fish.[113] The tribes received payments and were allowed to keep small parcels of land in order to live.[114] However, many of the Indians did not understand what the treaty said or meant.[115] "There is no knowledge that any Indian present understood English."[116] Many of them did not understand the commonly-used Chinook Jargon either.[117] The language obstacle led to confusing interpretations of the treaty.[118] Article 5 of the treaty retains off-reservation fishing rights:

> [T]he right to taking fish, at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for

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[108] *See generally* Puyallup Tribe v. Dept. of Game, 391 U.S. 392 (1968); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).

[109] Kahn, *supra* note 33, at 53.

[110] Tribes listed include: "Dwamish, Suquamish, Sktahlmish, Samahmish, Smalhkamish, Skopeahmish, Stkahmish, Snoqualmoo, Skaiwhamish, N'Quentlmamish, Sktahlejum, Stoluckwhamish, Snohomish, Skagit, Kikiallus, Swinamish, Squinahmish, Sahkumehu, Noowhaha, Nookwachahmish, Neeseequaguilch, Chobahahbish, and other allied tribes and subordinate trines and bands of Indians occupying certain lands . . . ." These are tribes of the Puget Sound area of Washington State.

[111] Treaty with Dwamish, Suquamish, Etc., Jan. 22, 1855, 12 Stat. 927.

[112] *Id.*

[113] *See generally* LANE, *supra* note 23.

[114] United States v. Washington, 641 F.2d 1368, 1370 (1981).

[115] United States v. Washington, 384 F. Supp. 312 (1974); *see also supra* LANE, *supra* note 23, at 3.

[116] LANE, *supra* note 23, at 11.

[117] *Id.* at 11. Chinook jargon is a trade medium of limited vocabulary and simple grammar. *Id.* It was used by the Indians of the Pacific Northwest when dealing with traders. *Id.* It is inadequate to express the legal language within the treaties. *Id.*

[118] *Id.*

> the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.[119]

The courts have established canons of construction for treaty cases. First, the treaty terms are to be interpreted as the Native Americans themselves would have understood them.[120] Second, treaties are to be interpreted to promote their central purposes, and ambiguities are to be resolved in favor of the Native Americans.[121] Last, all treaties are to be liberally construed in favor of the Native Americans.[122] In a 1998 case, *Minnesota v. Mille Lacs Band of Chippewa Indians,* the Supreme Court set a standard for recognition of treaty rights.[123] The Court emphasized that Congress may abrogate Indian treaty rights, but it must clearly express its intent.[124] The Court also provided that Indian treaty rights and state management of resources should co-exist.[125] The Court stated: "Although states have an important interest in regulating wildlife and natural resources, this authority is shared with the Federal Government when it exercises a Constitutional power such as treaty making."[126] But the court reemphasized that treaty rights do not allow Indian tribes to go unregulated by the state and that state regulation may be required in the case of conservation.[127]

C. *The Case of United States v. Washington*

"The tribes of the Point Elliott Treaty engaged in extensive litigation on a number of fronts to preserve their treaty rights."[128] On September 18, 1970, the United States, on behalf of seven treaty tribes, filed a complaint against Washington State.[129] The complaint was based on the right to fish off the reservation in the tribe's usual and accustomed places but in

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[119] Treaty with Dwamish, Suquamish, Etc., January 22, 1855, 12 Stat. 927. For a full text of the treaty *see* INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 74-80 (Charles F. Wilkinson et al. eds., 8th ed. 1998).

[120] United States v. Winans, 198 U.S. 371, 380-81 (1905).

[121] Winters v. United States, 207 U.S. 564, 576-77 (1908).

[122] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 351 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983).

[123] 526 U.S. 172 (1999).

[124] *Id.* at 202, *citing* United States v. Dion, 476 U.S. 734, 738-740 (1986).

[125] Voight, 700 F.2d at 204.

[126] *Id.*, U.S. CONST., art. VI, cl. 2.

[127] Voight, 700 F.2d at 204-205.

[128] INDIAN TRIBES AS SOVEREIGN GOVERNMENTS, *supra* note 119 at 72. In *United States v. Winans*, 198 U.S. 371 (1905), where fish wheels were at issue on the Yakama Reservation in central Washington. The United States brought the action on behalf of the Yakama Nation to enjoin Winans and other non-Indians from blocking off-reservation fishing at usual and accustomed fishing sites. *Id.* The court held they could not block the usual and accustomed fishing places granted by the treaty. *Id.*

[129] United States v. Washington, 384 F. Supp. 312, 327 (1974).

common with the rights of non-Indians.[130] In *United States v. Washington*, the famous "Boldt decision," the court enforced the guaranteed treaty rights by holding that the rights were constitutionally enforceable and could not be abridged by state law.[131]

The court ruled that the tribes were entitled to up to fifty percent of the harvestable stock.[132] Judge Boldt[133] excluded from this formula fish harvested by tribes on reservations, fish not destined to pass the tribes' historic fishing sites, and fish caught outside of Washington waters even if they were bound for the tribes' fishing grounds.[134] Judge Boldt also established Fisheries Advisory Boards ("FABs") to resolve disputes as they arose and before they went to court.[135] They consisted of three individuals: one tribal representative, one state representative, and a chairperson.[136] The chairperson would remain unchanged but both the tribal and state representative would change depending on the issue and parties involved in a particular dispute.[137] It is important to note that property ownership may have been overlooked in *United States v. Washington*. Under the tribal

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[130] *Id.* at 331. The suit was brought because the states were refusing to recognize the rights of the tribes given by the treaty. The United States asked for both declaratory and injunctive relief. *Id.*

[131] *Id.* at 330-31, United States v. Washington, 520 F.2d at 693. On appeal, the Ninth Circuit confirmed that the treaties are constitutionally enforceable. United States v. Washington, 520 F.2d 676, 693 (1975).

[132] In *United States v. Washington*, the court noted:

> Harvestable stock is defined as the approximate number of anadromous fish which is surplus beyond adequate production escapement and Indian needs; that is, the number remaining when the adequate production escapement and Indian needs are subtracted from the run size. Anadromous fish are fish that spawn or are artificially produced in freshwater, reaches mature size while rearing in salt water and returns to freshwater to reproduce, and which spends any portion of its life cycle in waters within the Western District of Washington.

384 F. Supp. at 404.

[133] There have been suggestions that Judge Boldt suffered from Alzheimer's disease at the time of this opinion. *See* Paul Shukovsky, *Tribal Fate in Hands of a Few Federal Employees*, SEATTLE POST-INTELLIGENCER, Nov. 24, 2001, *LEXIS, News Library, Seattle PI File.* To be fair, however, in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, the Court suggested that perhaps the speculation regarding his illness was a result of state defiance and non-Indian fisher attitudes:

> The state's extraordinary machinations in resisting the decree [of *United States v. Washington*] have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees . . . the district court has faced the most concerted official and private efforts to frustrate the decree of a federal court witnessed in this century . . .

443 U.S. 658, 695 n.36 (1979).

[134] *Passenger Fishing Vessel*, 443 U.S. at 671.

[135] United States v. Washington, 384 F. Supp. 312, 412-420 (1974).

[136] *Id.*

[137] *Id.*

fishery scheme, tribal members owned the fish. "But in only recognizing a tribal right to the opportunity to take off-reservation fish, the court approved the elimination of private ownership by tribes."[138] This decision ignited a new round of controversy[139] that led to *Washington v. Washington State Commercial Passenger Fishing Vessel Association.*[140]

In *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* the Supreme Court decided to review *United States v. Washington* with several other cases because the commercial fishermen's cases had created a clash between the state and federal court systems, the non-Indian fishermen's defiance of the Boldt decision, and the United States Justice Department, which had brought *United States v. Washington* on behalf of the tribes. The Court upheld virtually all of Judge Boldt's decisions and overruled the state court decision where it was contrary to federal court orders.[141] Writing for the court, Justice Stevens affirmed the fifty-fifty allocation but stated that this should be viewed as a maximum that would be reduced if tribal needs could be satisfied by a lesser amount.[142] The Court further held that fish taken by Indians on the reservations and fish taken for ceremonial and subsistence needs should not be included in their fifty percent share.[143]

"As a result of the *Washington* decision, the Indian tribes can claim a reserved treaty right . . . to as many fish as can be caught on [the] reservation."[144] They are also allowed fifty percent of anadromous fish passing through off-reservation sites that are the tribes' usual and accustomed places.[145] While *United States v. Washington* determined that "the Constitution and recognition of vestigial tribal sovereignty give [the United States judiciary] a clear, unarguable basis for the recognition and enforcement of Indian treaties,"[146] its impact on fishing rights is controversial and the conflict over fishing rights was not solved by its

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[138] *Id.* at 332. The Court held that off-reservation fishing by non-Indians is not a right but merely a privilege, which may be granted, limited, or withdrawn by the state. *Id.* at 407-408. The court further ruled that the treaties reserve for the tribes a treaty right to the opportunity to fish, not to own the fish as property. *Id.* at 407.

[139] *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979).

[140] *Id.*

[141] Puget Sound Gillnetters Assoc. v. Moos, 88 Wash. 2d 677 (1977); Wash. State Commercial Passenger Fishing Vessel Assoc. v. Tollefson, 89 Wash. 2d 276 (1977).

[142] Wash. State Commercial Passenger, 443 U.S. at 685-86.

[143] *Id.* at 688.

[144] Kahn, *supra* note 33, at 98.

[145] *Id.*

[146] *Id.* at 98-99.

allocation.[147] In some cases, the tribal share of fish has been increased; in other cases, the decision has caused strife amongst tribes.[148]

V. ANALYSIS

A. *Comparison of the Treaties*

In order for the tribes to survive economically as well as to preserve Native customs, changes must be made. Neither the New Zealand nor the United States model adequately deals with the rights of Native people. Courts must acknowledge that the tribes did not speak English, and therefore, did not have the language skills and legal knowledge to know what the treaties meant or to know their binding effect. In order to adequately account for the Native right to fish, courts and legislatures must also acknowledge the rights they had prior to white settlement.

1. *Resource Allocation*

The Maori retained their natural resource rights in exchange for ceding governmental authority over New Zealand.[149] The English version of the Treaty of Waitangi guarantees to the tribe full, exclusive, and undisturbed possession.[150]

In contrast, western Washington tribes traded away natural resource rights in exchange for retaining a small degree of sovereignty.[151] The Treaty of Point Elliott reserved an exclusive right to fish within the area and boundary waters of the reservation and off the reservation in areas in common with all the citizens of the territory.[152]

Thus, the Maori treaty model and the western Washington treaty model are essentially opposites. While it may seem that the western Washington tribes are given more power regarding their rights, the New Zealand government gives the Treaty of Waitangi more deference than the tribes of western Washington receive from the United States government.

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[147] While *United States v. Washington* addressed the allocation of anadromous species, it failed to consider other species. *See* United States v. Washington, 459 F. Supp. 1020, 1037 (1975).

[148] *See* United States v. Washington, 235 F.3d 438 (2001); Muckleshoot Indian Tribe v. Lummi Indian Nation, 234 F.3d 1099 (2000); United States v. Muckleshoot Indian Tribe, 235 F.3d 29 (2000).

[149] Kahn, *supra* note 33, at 53.

[150] WAITANGI TRIBUNAL, *supra* note 26, at 163. The treaty fails to say what it is the tribes have the undisturbed possession of. Most assume it is the right to fish.

[151] Kahn, *supra* note 33, at 52-53.

[152] Treaty with Dwamish, Suquamish, Etc., January 22, 1855, 12 Stat. 927.

2. *Sovereignty*

Maori live throughout New Zealand.[153] This is why the Settlement Act in New Zealand did not apply to urban or individual Maori. The Maori did not obtain sovereignty with their treaty rights. They also were not placed within a reservation system.

American Indian tribes have political sovereignty even though it is at the expense of giving up many resources. Under Article VI, Clause 2 of the United States Constitution, the treaties with the Indians form part of the supreme law of the land. They are constitutionally enforceable compacts.[154] The United States government continued recognizing the tribes' sovereign status and rights to natural resources in order to maintain peace with the tribes.[155] The acts retaining sovereignty were not created out of respect for the tribes. Rather, they were a result of the government's efforts toward white settlement.[156] "Whether they initially wanted to or not, United States' courts had to recognize some degree of retained Indian sovereignty because the tribes maintained control over vast natural resource bases."[157] Further, in the United States, Indian tribes and their jurisdictions are based on reservations, which are bound geographically.[158]

Because of the reservation system in the United States, sovereignty may run more smoothly, where, if it existed in New Zealand, it would be very complicated.[159] It seems that treaty rights would be easier to enforce and establish in the United States than in New Zealand because of the limited area where the rights exist. For example, most Natives in the United States live on or close to the reservation.[160] It is likely that the rights of the Natives in the United States are close to where they live, even though some reservations are hundreds of miles from where treaty rights existed, whereas in New Zealand, Natives can live further from their usual and accustomed places of fishing. Thus, the rights should be easier to apply to individuals living close to or on a reservation.

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[153] Kahn, *supra* note 33, at 80.
[154] *Id.* at 53.
[155] *Id.* at 73.
[156] *Id.*
[157] *Id. See also* Johnson v. McIntosh, 21 U.S. 543, 574 (1979).
[158] Kahn, *supra* note 33, at 80.
[159] *Id.* at 80-81.
[160] While this may be true, it is off-reservation rights that are a large part of the issue.

3. *Ownership*

Prior to the Treaty of Waitangi, Maoris had communal property rights to natural resources.[161] The New Zealand government confiscated Maori land and depleted Maori ownership rights.[162] "This dilution of Maori ownership rights to land impacted Maori water resource rights as well. Under the New Zealand legal system at the time, the access and use of any water body bordered by land depended on ownership of the adjoining land parcels."[163]

Prior to the Treaty of Point Elliott, the Washington tribes had individual property rights to natural resources.[164] The tribes of western Washington also experienced the taking of land by settlers. In the United States today, "almost no land is now owned tribally."[165]

Due to years of depleting Maori and Washington tribes' ownership rights, land parcels are very small and have too many owners, which leads to disagreement over the use of the land and access to fishing sites.[166] This can create a real problem among different tribes and within the tribe itself.[167]

4. *Treaty Enforcement*

Under British law, treaties do not bind the courts.[168] Thus, New Zealand treaties do not have the same binding effect as the United States treaties do.[169] "Maoris have no legal guarantee of rights to natural resources pursuant to the Treaty of Waitangi."[170] Nonetheless, the Treaty of Waitangi, which is not legally binding, is given great deference and respect in the New Zealand courts:

> Despite the theoretical legal benefits that American Indians possess in their quest to enforce water resource claims, the Maori have negotiated a comprehensive water resource claim

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[161] Kahn, *supra* note 33, at 99.
[162] *Id.* at 88.
[163] *Id.* at 90-91.
[164] LANE, *supra* note 23, at 7.
[165] Kahn, *supra* note 33, at 93.
[166] *Id.*
[167] *See* United States v. Washington, 235 F.3d 438 (2001); Muckleshoot Indian Tribe v. Lummi Indian Nation, 234 F.3d 1099 (2000); United States v. Muckleshoot Indian Tribe, 235 F.3d 29 (2000).
[168] Jameson, *supra* note 63, at 356.
[169] *Id.*
[170] Kahn, *supra* note 33, at 99.

> settlement . . . American Indians have not witnessed a similar effort by the United States government to come to terms with a comprehensive facet of Indian natural resource claims.[171]

Since United States' treaties are constitutionally enforceable, they are honored within the court system. Native American claims to natural resources occur in a legal environment where treaties are enforced.[172] Thus, the Native Americans should have an advanced right in treaty rights cases. However, the tribes of Washington have not obtained the high recognition of treaty rights that the Maori in New Zealand have obtained.[173]

In both New Zealand and the United States, the governments' reactions to water resource claims indicate the legal intention of the governments to control the water resources while confiscating the rights of the tribes. Both situations involve treaties that have been violated. Both involve violations of Native rights before the treaties even existed and suggest manipulation and dishonesty towards relations with Native people.

Further, even though the treaties in the United States are constitutionally enforceable compacts, and tribes are supposed to have a higher status than states, Native rights and claims continue to be brushed aside, manipulated, and in some cases simply ignored. Treaties in New Zealand are not simply brushed aside like treaties in the United States rather, they are accorded deference. No matter what the status, courts should give deference to the treaties and to the traditional rights Natives had prior to the treaties. The treaties gave rights to the Natives that should be honored and preserved. The treaties are essentially contracts that should not be easily disposed.

B. Comparing Quota Systems

The New Zealand quota system does not address the fishing rights in the Treaty of Waitangi.[174] "While conservation was the scheme's rationale, and the basis on which it was promoted, the more radical feature of the scheme was the creation of a property interest in an exclusive right of commercial fishing."[175] Thus, Maori rights are overlooked in a system that

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[171] *Id.* at 168.
[172] *Id.* at 97.
[173] *But see* Kahn, *supra* note 33, at 52.
[174] *See generally* WAITANGI TRIBUNAL, *supra* note 26.
[175] WAITANGI TRIBUNAL, *supra* note 26, at 142.

favors large commercial fishing corporations.[176] Due to this allocation disparity, the Maori must give up some traditional non-commercial rights to compete commercially. The Maori must also bear the economic expense of trying to compete with the larger companies such as the buying of equipment and supplies. In addition, the competition is further increased due to the decrease in the number of fish resulting from the deterioration of the environment.[177] Even though they have a property interest in the commercial fishing company Sealords, it is just one of the many commercial fishing companies throughout the world that fish the Maori waters.[178] Because the resource has dwindled[179] the Maori share is even smaller.

The United States quota system is not in conflict with the Treaty of Point Elliott. The system is a fifty-fifty sharing formula.[180] However, as previously pointed out, the quota does not include non-anadromous fish.[181] In addition, tribes are fighting over allocations.[182] Further, the creation of the quota system has led to the destruction of tribal and family ownership of fishing rights.[183] Additionally, similar to the Maori, the Washington tribes have difficulties economically because of the declining number of fish available.[184] In order to compete in the commercial industry and survive economically, the tribes need additional equipment and supplies, which they can rarely afford. In addition, as a consequence of resource depletion, the tribes' number of fish for religious and ceremonial purposes is also decreased.[185]

Even though there are differences, the main similarity of the treaty right to fish in New Zealand and western Washington, is the quota system. Although adopted in two different ways, in New Zealand through legislation and in the United States through the judicial system, the quota systems are quite similar. They provide the tribes with a certain percentage of the fish harvest. However, they tend not to take other factors relating to fish and tribal viability into account, favor larger commercialized fishing companies, deplete resources for small-fishers, downplay customs and traditions, pit

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[176] *Id.*

[177] *See infra* Part III for discussion.

[178] GETCHES ET AL., *supra* note 13, at 1008-11.

[179] *See infra* Part III for discussion.

[180] United States v. Washington, 384 F. Supp. 312, 343 (1975).

[181] *Id.* at 407.

[182] *See* United States v. Washington, 235 F.3d 438 (2001); Muckleshoot Indian Tribe v. Lummi Indian Nation, 234 F.3d 1099 (2000); United States v. Muckleshoot Indian Tribe, 235 F.3d 29 (2000).

[183] *See generally* LANE, *supra* note 23.

[184] *See* GETCHES ET AL., *supra* note 13, at 894.

[185] Fish for religious and ceremonial purposes are considered in the fifty-fifty sharing formula.

Natives against one another, and push the tribes to adopt the view of the dominant society.[186]

C. *Assessment of the Systems*

Even though the Maori currently rely on the Settlement Act, this could only be a short-term fix. The advancement of the quota system leaves the Maori rights in direct conflict with the Treaty of Waitangi. The Fisheries Act of 1996, for example, further limited Maori customary fishing.[187] It has also pitted one Maori against another.[188] While the Maori are expected to co-manage due to the 1996 Act, the number of fish has decreased, having a substantial impact on the livelihood of the Maori.

The decision in *United States v. Washington* was also a short-term fix. Ultimately, the Indians' rights are conditioned on the decision of whether or not to assimilate and adopt the views and ways of the controlling society. The sharing formula provided by the government, the environmental degradation, and competition with commercial fishermen all support that the sharing formula is not an effective means of resolving treaty fishing right allocations.

Further, in both countries the impact of favoritism to large companies has left many small fishers with quotas that are not economically viable.[189] Moreover, the decline of salmon runs and further depletion of other fish populations due to environmental degregation has led to a short supply of fish.[190] Thus, there is not an abundance of fish to satisfy the grants of fishing rights under the treaties. Overall, the quota systems in both areas are insufficient.

In short, it is inspiring that the governments have at least tried to implement solutions regarding Native peoples' fishing rights, but the systems they have used are not without fault. In fact, they are nowhere near

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[186] United States v. Washington, 235 F.3d 438 (2001); Muckleshoot Indian Tribe v. Lummi Indian Nation, 234 F.3d 1099 (2000); United States v. Muckleshoot Indian Tribe, 235 F.3d 29 (2000).

[187] MINISTRY OF FISHERIES, *supra* note 79.

[188] *Maori Fishing Rights Row Goes to Privy Council*, ANANOVA, May 21, 2001, http://www.ananova.com/news/story/sm_299732.html. Maoris who live away from the traditional land want a share of the rights. *See also Maori Exploit Fishing Permit Row*, THE NEW ZEALAND HERALD Nov. 11, 2001 *available at* http://www.nzherald.../storydisplay.cfm?thesection=news&thesubsection=& storyID=22763.

[189] *See* Janet Roth, *New Zealand Government Tries to Limit Maori Fishing Rights*, MILITANT, Feb. 16, 1998, http:// www.hartford-hwp.com/archives/24/055.html.

[190] *See infra* Part V for analysis.

being long-term. They seem to provide short-term solutions to never-ending problems, which tends to diminish Native rights even further.

VI. PROPOSAL

Fish conservation is important to everyone, but the tribes have not been treated fairly in their allocations. Colonization, with its accompanying increase in population and competing demands for resources, has led to this fundamental unfairness because of the destruction of natural resources relied on by Natives.[191] Unfortunately, salmon runs in Washington and snapper in New Zealand, which were included in the treaty right to fish, have dwindled to a fraction of their previous size.[192] Because of resource loss, many Natives feel that the rights secured by the treaty must include habitat protection.[193]

> [T]he despoliation of Washington streams has severely reduced the number of fish available for taking. Some of the historic runs have been destroyed altogether. A primary cause of this destruction has been environmental change accompanying non-Indian settlement of the Pacific Northwest. . . . Over 141 dams have blocked access to salmon habitat. [A]gricultural, industrial, and sewage disposal has degraded the water quality. Logging and irrigation practices have reduced streamside. Vegetation. . . . Finally, river channelization projects . . . have decreased available shelter needed by salmon.[194]

As the natural resources that Natives depend on have continued to be depleted by consequences of colonization, the governments' responses are inadequate. Native people were not the major cause of the environmental problem and they should not have to suffer disproportionately for it. Natives have been limited in their customary use of fish, all fish have not been included in the quota allocations, and property rights have been

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[191] For a list of threatened species of fish see *Too Many People Chase Too Few Fish, at* http://seawifs.gsfc. nasa.gov/OCEAN_PLANET/HTML/peril_overfishing.html.

[192] *See* Puyallup Tribe v. Dept. of Game, 391 U.S. 392 (1968); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974). *See also* Roth, *supra* note 189.

[193] Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Co-management as a Reserved Right*, 30 ENVTL. L. 279, 289 (2000).

[194] GETCHES ET AL., *supra* note 13, at 894.

extinguished. A new formula for allocation should be calculated. If conservation is of concern, why favor the corporate fisherman?

Lastly, Native populations were self-sufficient prior to white settlement. Forcing them to adhere to colonialist societal norms has not only weakened their rights to natural resources, but also weakened them as a culture. In order to preserve their culture, their people, and their economies, Natives should be co-managers in land and resource decisions affecting their reserved rights, both on and off reservations. "The tribal call for co-management with the federal government [is] a call for [the] recognition of their participation in a power-sharing arrangement . . . [and] is rooted in the prerogative of tribes . . . to care for their people, their culture, and their economic well-being."[195] This co-management should be more collaborative than other co-management systems. Tribes often know the historical background of the land and the resources and are also local experts.[196] They have substantial knowledge about the species and the habitat within their areas because of reliance upon them for resources and survival.[197] Consequently, their participation in discussions and conservation planning should be a stated goal within the co-management solution. Tribes' off-reservation treaty rights should also include the right to participate in the management of resources. This right was explicitly contained within the treaties and should be honored. New Zealand and the United States should establish a co-management solution with their indigenous populations and include them in decisions affecting their treaty rights.

[195] Goodman, *supra* note 193, at 282.
[196] *Id.* at 283.
[197] *Id.*