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PUTTING FLESH ON THE BONES OF UNITED STATES V. WINANS: PRIVATE PARTY LIABILITY UNDER TREATIES THAT RESERVE ACTUAL FISH FOR THE TRIBAL TAKING

Lindsay Halm

Abstract: One hundred years ago, in United States v. Winans, the United States Supreme Court announced that private parties are subject to the rights reserved by Indians under treaty. Accordingly, tribes enforce their treaty fishing rights in federal court to halt private and government actions that threaten to impair their reserved right to take a fair portion of fish from usual and accustomed fishing stations. In addition to injunctive relief, federal courts may award monetary relief to tribes where Congress limits the treaty fishing right. In general, monetary relief is a remedy against any defendant actor who impairs non-fishing treaty-reserved rights. Furthermore, courts have long awarded damages to commercial fishers for interference with their vocational rights. Courts in the Ninth Circuit, however, have denied monetary relief to tribes when private projects destroy the treaty right to take fish. This Comment argues that courts should award damages to tribes when private projects proximately cause harm to a tribe’s right to take actual fish.

The right to resort to the fishing places... was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.¹

The right to harvest fish is central to many tribes’ existence, culture, and welfare.² It has existed from time immemorial and continues into perpetuity.³ Notwithstanding the reservation of fishing rights under treaties with the United States, the federal government has listed numerous fish species as threatened or endangered⁴ under the

3. See Fishing Vessel, 443 U.S. at 667 (interpreting the Yakima Tribe’s understanding that they “would forever be able to continue” fishing practices under treaty).
4. See, e.g., Endangered and Threatened Species; Threatened Status for Three Chinook Salmon Evolutionarily Significant Units (ESUs) in Washington and Oregon, and Endangered Status for One Chinook Salmon ESU in Washington, 64 Fed. Reg. 14308-01 (1999) (listing the Puget Sound,
Endangered Species Act following decades of habitat destruction, dam building, and over-fishing. For example, the Columbia River salmon runs, once the largest in the world, have diminished by seventy-five to eighty-five percent due to the dozens of dams that currently impede fish passage. Despite successful suits by Northwest Tribes to secure a fair portion—up to fifty percent—of the available harvest, various fish species continue to decline rapidly, which might suggest that a fair portion of what is available today may soon be worthless. Said another way, the right to half of zero . . . is still zero.

Federal courts, however, must reconcile the dire warning that tribal fishing rights are doomed to nothingness with precedent that contemplates actual fish for the tribal taking. One hundred years ago, the United States Supreme Court in United States v. Winans declared that private landowners are subject to the treaty fishing right and that accommodation is required to ensure continuing exercise of that right. Failure to uphold the treaty right, the Court stated, results in "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

Because the U.S. Supreme Court has likened Indian treaties to


8. See Fishing Vessel, 443 U.S. at 685–86.
9. See United States v. Washington, 759 F.2d 1353, 1356–57 (9th Cir. 1985) (vacating a portion of the district court opinion on the “environmental issue” that declared that the right to take fish necessarily includes the right to have those fish protected from man-made despoliation).
10. “Actual fish” refers to tangible fish that, reduced to possession, can be used to sustain the needs of a given tribe. See infra Part IV.A.
11. See Fishing Vessel, 443 U.S. at 678; Northwest Res., 35 F.3d at 1377.
13. Id. at 380–81.
14. Id. at 380.
contracts between sovereigns,15 only Congress has the power to limit
rights contained therein.16 Thus, government17 and private projects18 that
threaten a tribe’s exercise of fishing rights reserved under treaty cannot
proceed without express authorization from Congress.19 In recent
decades, federal courts have enjoined both governmental and private
projects to protect tribes’ right to harvest fish.20 Treaty tribes have also
secured monetary relief where Congress has limited, or abrogated,
fishing rights reserved under treaty.21 Similarly, where private or
government actors interfere with other treaty-reserved rights, such as
land or mineral rights, courts grant monetary relief to tribes.22 In
contrast, courts within the Ninth Circuit have rejected monetary relief
for the impairment of treaty fishing rights by private projects.23

This Comment argues that courts should award monetary relief to
tribes when private parties impair tribal treaty rights to take actual fish.24

As Winans and its progeny indicate, Indian treaties operate as a
preexisting legal condition on the landscape, which binds the federal

15. Fishing Vessel, 443 U.S. at 675.
17. See Confederated Tribes of Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553,
555–56 (D. Or. 1977) (issuing declaratory relief against a federal project).
18. Winans, 198 U.S. at 380 (enjoining a private project); Muckleshoot v. Hall, 698 F. Supp
1504, 1517 (W.D. Wash. 1988) (same). Because the federal government is the only party that
maintains a special trust relationship with tribes, the term “private” in this Comment refers to any
non-federal projects, including those of municipal corporations.
19. See infra Part II.A (discussing case law that awards relief to tribes in the absence of
congressional authorization).
20. See Northwest Sea Farms, Inc. v. United States Army Corps of Engineers, 931 F. Supp. 1515,
claim for damages based on state and county governments’ unlawful possession of land); United
States v. Shoshone Tribe, 304 U.S. 111, 118 (1938) (upholding an award for just compensation for
unlawful takings of timber and mineral resources); United States v. Creek Nation, 295 U.S. 103,
111 (1935) (upholding an award of just compensation for unlawful takings of land by the federal
government); Pueblo of Isleta v. Universal Constructors, Inc., 570 F.2d 300, 303 (10th Cir. 1978)
(remanding for trial on the issue of damages for trespass from blasting activities of a private
company).
2001), aff’d in part, vacated in part by 332 F.3d 551 (9th Cir. 2003), and vacated by 358 F.3d 1180
(9th Cir. 2004) (granting rehearing en banc); Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791,
24. See infra Part IV.
government, states, and private citizens. Tribes currently may assert their fishing right before a private party proceeds with project construction; tribes should also be able to seek monetary relief in federal courts after private parties implement harmful projects. When a private project violates a treaty, a court should make the tribe whole by awarding monetary relief as calculated by the proximately caused loss of a fair portion of the fish harvest.

Part I of this Comment reviews the scope and enforceability of treaty fishing rights. Part II discusses the relief granted when governmental and private parties interfere with fishing and other rights reserved under treaty. Part III examines claims for monetary relief against private parties who interfere with fishing rights within the Ninth Circuit. Lastly, Part IV argues that United States v. Winans and its progeny reserve actual fish for the tribal taking; thus, where private parties harm this right, courts should award monetary relief to make a tribe whole.

I. BY TREATY, TRIBES RESERVED THE RIGHT TO ACCESS USUAL AND ACCUSTOMED PLACES AND TAKE FISH

Occupying a unique niche in U.S. Supreme Court jurisprudence, Indian treaties trigger rules of construction that unmistakably favor tribal rights. To date, the Court has interpreted the fishing clause that appears in several Pacific Northwest treaties to include both a tribal right to access "usual and accustomed places" and a "right of taking fish" in common with other nontreaty citizens. Neither governmental nor


27. See infra Part IV.B.

28. See infra Part IV.B; see also Memorandum from the Associate Solicitor, Indian Affairs, to Solicitor 1 (May 25, 1982) (outlining elements of fish damage claims against private parties).


30. Fishing Vessel, 443 U.S. at 674 (discussing the right of taking fish); Seufert Bros. v. United States, 249 U.S. 194, 199 (1919) (discussing the right of access); Winans, 198 U.S. at 384 (discussing both the right of access and the right of taking fish).

private parties\textsuperscript{32} have authority to limit treaty fishing rights; only
Congress can abrogate or modify the terms.\textsuperscript{33}

A.  \textit{Federal Courts Liberally Construe Treaties that Reserve Tribal
Fishing Rights}

When tribes granted land to the United States by treaty, they reserved
the traditional right to hunt and fish.\textsuperscript{34} For example, each of the nine
Stevens Treaties of the Washington territory read, with scant variation:
“[t]he right of taking fish at all usual and accustomed places, in common
with all citizens of the Territory... [is secured to said Indians].”\textsuperscript{35}
Tribes in other parts of the country similarly reserved in their respective
treaties the right to hunt and fish.\textsuperscript{36} Indeed, these historic rights persist,
even if not explicitly stated under treaty.\textsuperscript{37}

To determine the scope of rights contained in Indian treaties, the U.S.
Supreme Court employs unique canons of construction to account for the
circumstances of historical treaty negotiations.\textsuperscript{38} The canons instruct
courts to construe terms liberally in favor of establishing Indian rights,\textsuperscript{39}
resolve ambiguities in favor of protecting tribal interests,\textsuperscript{40} and interpret
provisions as Indians would have naturally understood them at the time
of the treaty’s signing.\textsuperscript{41} Though the full scope of treaty fishing rights

\textsuperscript{32} See Winans, 198 U.S. at 384; Muckleshoot v. Hall, 698 F. Supp. 1504, 1514 (W.D. Wash.
1988) (“The federal, City and private defendants here do not have the ability to qualify or limit the
Tribes’ geographical treaty fishing right.”).

\textsuperscript{33} See United States v. Dion, 476 U.S. 734, 738–40 (1986); Lone Wolf v. Hitchcock, 187 U.S.
553, 565–66 (1903) (noting that Congress’s abrogation of Indian treaty rights derives from a long-
standing plenary power over Indian affairs).

\textsuperscript{34} Winans, 198 U.S. at 377–78 (quoting from the Yakima Treaty); id. at 381 (“[T]he treaty was
not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not
granted.”).

\textsuperscript{35} Id. at 378.

\textsuperscript{36} See, e.g., Mille Lacs Band of Chippewa Indians v. Minnesota, 853 F. Supp. 1118, 1122 (D.
Minn. 1994) (interpreting a treaty guaranteeing “the privilege of hunting, fishing and gathering the
wild rice upon the lands, the rivers and the lakes included in the territory ceded”), aff’d, 124 F.3d
904 (8th Cir. 1997), and aff’d, 526 U.S. 172 (1999).


\textsuperscript{38} See Fishing Vessel, 443 U.S. 658, 676 (1979); Choctaw Nation v. United States, 318 U.S.

\textsuperscript{39} See Choctaw, 318 U.S. at 431–32.

\textsuperscript{40} See McClanahan v. State Tax Comm’n, 411 U.S. 164, 174 (1973); Winters v. United States,

\textsuperscript{41} See Fishing Vessel, 443 U.S. at 676 (citing Jones v. Meehan, 175 U.S. 1, 11 (1899)).
remains untested, the U.S. Supreme Court has placed a “broad gloss” on tribal fishing rights.

B. Federal Courts Recognize Two Treaty-Reserved Rights: The Right to Access Usual and Accustomed Places and the Right to Take Fish

Indian treaty fishing rights include a “geographic right,” or the right to access “usual and accustomed grounds and stations,” both on and off reservation land. In the 1905 landmark Winans case, the U.S. Supreme Court first construed the scope of the access right against a private party. The Winans, upstream landowners, held claim to shore land along the Columbia River under patents from the United States. The Court interpreted the Yakima Treaty as running against the United States and its grantees; the treaty therefore survives the subsequent private acquisition of federal lands. The Court reasoned that the right to access fishing stations established in the land an easement—a “servitude upon every piece of land”—enabling the Tribe’s continual exercise of its

42. See United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985) (vacating part of the district court opinion because of insufficient factual support for declaratory judgment that the right to take fish necessarily includes the right to have those fish protected from man-made despoliation). The scope of the treaty fishing right remains uncertain in the Ninth Circuit following United States v. Washington; several commentators have argued for an expansive reading of treaty rights on various theories. See, e.g., Michael C. Blumm & Brett M. Swift, The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach, 69 U. COLO. L. REV. 407, 412 (1998) (arguing that courts should consider that the treaty fishing right includes a “habitat right”); O. Yale Lewis III, Treaty Fishing Rights: A Habitual Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties, 27 AM. INDIAN L. REV. 281, 304–11 (2002–03) (arguing that courts should consider that the treaty fishing right includes a “habitual right”); Brian J. Perron, Note, When Tribal Treaty Fishing Rights Become a Mere Opportunity to Dip One’s Net into the Water and Pull It out Empty: The Case for Money Damages when Treaty-Reserved Fish Habitat Is Degraded, 25 WM. & MARY ENVTL. L. & POL’Y REV. 783, 799–803 (2001) (arguing that courts should provide a remedy for habitat destruction); Allen H. Sanders, Damaging Indian Treaty Fisheries: A Violation of Tribal Property Rights?, 17 PUB. LAND & RESOURCES L. REV. 153, 154 (1996) (arguing that the treaty fishing right is a compensable property interest); Mary Christina Wood, The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species, 25 VT. L. REV. 355, 359 (2001) (arguing that tribes maintain a property right as a sovereign entity to protect habitat).

43. See Fishing Vessel, 443 U.S. at 679.

44. See Seufert Bros. v. United States, 249 U.S. 194, 199 (1919); United States v. Winans, 198 U.S. 371, 381–82 (1905). Hereinafter, the term “usual and accustomed places,” as it appears in the Stevens Treaties, is referred to as either “fishing stations” or “historic grounds.”

45. Winans, 198 U.S. at 371.

46. Id. at 379.

47. Id. at 381–82.
right.\textsuperscript{48} In addition, the U.S. Supreme Court has interpreted the treaty fishing clause to include a separate-but-related “right to take fish.”\textsuperscript{49} In \textit{Winans}, farmers had obtained a license from the State of Washington to operate fish wheels, contraptions that effectively gave them exclusive possession of the fishery.\textsuperscript{50} The Court rejected the argument that Indian treaty rights could be excluded by a state-licensed device and remanded the case to determine an appropriate “adjustment and accommodation” of the harvest between the Winans and the Yakimas.\textsuperscript{51}

In \textit{Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n},\textsuperscript{52} the Court held that the right to take fish in common with all citizens of the Territory reserved to tribes up to fifty percent of the total harvest.\textsuperscript{53} In a six-to-three decision, the \textit{Fishing Vessel} majority construed the fishing right in no uncertain terms: “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.”\textsuperscript{54} Citing undisputed evidence of historically abundant and reliable fish runs, the Court concluded that both parties to the treaty had no doubt that the signatory Indians would continue to take as many fish as they needed.\textsuperscript{55} Indeed, the Tribes assented to cede and peacefully grant millions of acres of land precisely because Washington Territory Governor Stevens recognized that the Tribes reserved, into perpetuity, life-sustaining fish.\textsuperscript{56} Governor Stevens avowed to the signatory Tribes, “[t]his paper secures your fish.”\textsuperscript{57}

The Court held that the treaties secured a tribal catch as necessary to

\textsuperscript{48} \textit{Id.} at 381, 384.
\textsuperscript{49} See \textit{Fishing Vessel}, 443 U.S. 658, 674 (1979); \textit{Winans}, 198 U.S. at 382, 384.
\textsuperscript{50} \textit{Winans}, 198 U.S. at 382.
\textsuperscript{51} \textit{Id.} at 382, 384.
\textsuperscript{52} 443 U.S. 658 (1979).
\textsuperscript{53} \textit{Id.} at 686–88; see also \textit{United States v. Washington}, 384 F. Supp. 312, 343–48 (W.D. Wash. 1974) [hereinafter \textit{Boldt}] (holding that treaty tribes are entitled to a fair portion of the harvestable fish), aff’d, 520 F.2d 676 (9th Cir. 1975). The case is uniformly referred to as the “\textit{Boldt}” decision in reference to the name of the federal district court judge who authored the opinion. See Ed Goodman, \textit{Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right}, 30 ENVTL. L. 279, 289 n. 42 (2000).
\textsuperscript{54} \textit{Fishing Vessel}, 443 U.S. at 679.
\textsuperscript{55} \textit{Id.} at 675–76.
\textsuperscript{56} See \textit{id.} at 667, 675–77.
\textsuperscript{57} See \textit{id.} at 667 n.11.
provide for a livelihood or “moderate living.” In doing so, the Court summarily rejected the State and commercial fishers’ assertion that the “in common with” clause of the treaty promised only equal opportunity to fish. An equal opportunity fishing right, which resulted in the Tribes’ paltry two percent of the catch prior to Fishing Vessel, was not only categorically inadequate, but a derision of treaty negotiations that reserved to Tribes a meaningful compensation for the millions of acres they peacefully ceded. Moreover, the Court reasoned that it was inconceivable that either party would have agreed to crowd the Tribes out of their fishing rights to accommodate future settlers. Hence, the Court interpreted the intent of the signatory parties as reserving to the Tribes an enforceable right to “take” an actual, fair portion of fish, not “merely the chance, shared with millions of other citizens, occasionally to dip their nets.” The commercial harvest allocation was reasoned to subsume the Tribes’ existing ceremonial and subsistence needs, though the Court recognized the possibility that future adjustment would be required if the fifty-percent divide did not accommodate such purposes.

C. Federal Courts Enforce Treaty Fishing Rights Against Governmental and Private Parties

Neither private parties nor government actors may undertake actions that reduce or eliminate a tribe’s treaty fishing right. Indeed, a court’s limitation of a treaty right is reversible error. Congress alone has the

58. Id. at 670–71, 686–88.
59. Id. at 676–78.
60. Id. at 676–77 n.22.
61. Id.
62. Id. at 678–79.
63. Id. at 688 (“We need not now decide whether priority for such ceremonial and subsistence uses would be required in a period of short supply in order to carry out the purposes of the treaty.”).
64. Puyallup Tribe v. Dep’t of Game, 391 U.S. 392, 398 (1968) (stating the treaty fishing right “may, of course, not be qualified by the state”); Muckleshoot v. Hall, 698 F. Supp 1504, 1514 (W.D. Wash. 1988) (“[T]he federal, City and private defendants here do not have the ability to qualify or limit the Tribes’ geographical fishing right (or to allow this to occur through permits) by eliminating a portion of an Indian fishing ground for a purpose other than conservation.”).
65. See United States v. Washington, 157 F.3d 630, 650 (9th Cir. 1998) (reversing trial court decision where the lower court had improperly limited the treaty right); Cree v. Waterbury, 78 F.3d 1400, 1405 (9th Cir. 1996) (remanding for a full investigation into the historical context at the time of treaty signing where the district court had summarily assumed a treaty highway right as analogous to a previously litigated fishing right).
power to abrogate or limit treaty fishing rights.\textsuperscript{66} Moreover, Congress’s abrogation of a treaty fishing right must be express and specific.\textsuperscript{67} The only exception to the rule is a narrow one in which states may issue neutral regulations pursuant to a “conservation necessity.”\textsuperscript{68}

Even if Congress approves funding for a government project, such approval does not amount to express abrogation of the treaty right.\textsuperscript{69} For example, in \textit{Confederated Tribes of the Umatilla Indian Reservation v. Alexander},\textsuperscript{70} the U.S. District Court for the District of Oregon refused to infer congressional abrogation from general project authorization, and granted declaratory relief to the Tribes.\textsuperscript{71} The court found that, if constructed, the federal agency’s dam would prevent wild fish from swimming upstream to spawn and would destroy access to some of the Tribes’ fishing stations by flooding them with up to two hundred feet of water.\textsuperscript{72} Because Congress had authorized the dam without apparent knowledge of such impacts, the federal agency’s action constituted an unauthorized, actual taking of fishing rights.\textsuperscript{73} Notably, the dam was never constructed.\textsuperscript{74}

Just as federal projects cannot qualify a tribe’s treaty fishing right, the \textit{Fishing Vessel} Court echoed, in accord with \textit{Puyallup Tribe v. Department of Game},\textsuperscript{75} that governments cannot regulate away treaty rights.\textsuperscript{76} Because the salmon harvest proved at once lucrative and diminishing, state agencies leading up to \textit{Fishing Vessel} attempted to exclude tribal fishers through regulations that favored non-Indian

\textsuperscript{66} See \textit{Confederated Tribes of Umatilla Indian Reservation v. Alexander}, 440 F. Supp. 553, 555 (D. Or. 1977) (citing \textit{Menominee Tribe of Indians v. United States}, 391 U.S. 404, 413 (1968)). Abrogation occurs where Congress expressly legislates to eradicate or otherwise alter the terms of a treaty. See, e.g., United States v. Dion, 476 U.S. 734, 738–39 (1986) (requiring express abrogation of possessory land title); Boldt, 520 F.2d 676, 693 (9th Cir. 1975) (noting that “[o]nce a tribe is determined to be a party to a treaty, its rights under that treaty may be lost only by unequivocal action of Congress”).

\textsuperscript{67} \textit{Umatilla}, 440 F. Supp. at 555 (citing \textit{Menominee}, 391 U.S. at 413).

\textsuperscript{68} See \textit{Puyallup}, 391 U.S. at 398.

\textsuperscript{69} See \textit{Umatilla}, 440 F. Supp. at 555.

\textsuperscript{70} 440 F. Supp. 553 (D. Or. 1977).

\textsuperscript{71} \textit{Id.} at 555 (citing \textit{Menominee}, 391 U.S. at 413).

\textsuperscript{72} \textit{Id.} at 555–56.

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} See Blumm & Swift, supra note 42, at 465.

\textsuperscript{75} 391 U.S. 392 (1968).

commercial operations. Tribal members who exercised their treaty rights were subject to harassment, violence, and often arrest in an all-out “fish war.” Though the Tribes prevailed in federal court, the Washington State Supreme Court, employing its own interpretation of the area’s historic Indian treaties, upheld state regulations in defiance of federal orders. On appeal to the U.S. Supreme Court, the majority and dissenting justices agreed that it is the federal courts’ duty and province to construe an Indian treaty.

In sustaining federal jurisdiction in *Fishing Vessel*, the Court enforced the treaty fishing right against the state and against private party fishers. The enforceability of treaties against private parties, however, long predates *Fishing Vessel*. Summarizing the relevant precedent, the *Fishing Vessel* Court recognized that it stood on the shoulders of *United States v. Winans*: “The purport of our cases is clear. Nontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area.” In *Winans*, the private farmers could not employ an absolute land title or a state fish wheel license to trump the Yakima Tribe’s treaty rights. Instead, the Winans’s exercise of rights was “subject to the treaty” just

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77. See id. at 669–74; *Puyallup*, 391 U.S. at 398 (rejecting a state’s attempt to qualify or limit the treaty fishing right, except by conservation necessity); Tulee v. Washington, 315 U.S. 681, 684 (1942) (rejecting a state’s attempt to charge a license fee as an unlawful limitation of the treaty fishing right).

78. See *Fishing Vessel*, 443 U.S. at 674; Perron, supra note 42, at 792 n.69 (citing Alex Tizon, 25 Years After the Boldt Decision—the Fish Tale that Changed History, SEATTLE TIMES, Feb. 7, 1999, at A1).

79. See *United States v. Washington*, 459 F. Supp. 1020, 1129–30 (W.D. Wash. 1978), aff’d, 573 F.2d 1123 (9th Cir. 1978) (upholding federal district court orders in the face of state regulations); Boldt, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (holding that treaty Tribes are entitled to a fair portion of the harvestable fish), aff’d, 520 F.2d 676 (9th Cir. 1975).


81. See *Fishing Vessel*, 443 U.S. at 693–96; id. at 707 (Powell, J., dissenting) (“To be sure, if it were necessary to construe the treaties to produce these results, it would be our duty so to construe them.”).

82. See id. at 676–77.


85. Id. at 684.

86. See *Winans*, 198 U.S. at 381, 384.
as it was "to the other laws of the land."\textsuperscript{87} Similarly, in \textit{Muckleshoot v. Hall},\textsuperscript{88} the U.S. District Court for the Western District of Washington reasoned that permitting the private project at issue would, in effect, determine the "time and manner of [tribal] fishing" and the "size of the take"—a power reserved to Congress and, more narrowly, to states regulating under a conservation necessity.\textsuperscript{89} Thus, the court summarized, "[t]he federal, City and private defendants here do not have the ability to qualify or limit the Tribes’ geographical treaty fishing right (or to allow this to occur through permits) by eliminating a portion of an Indian fishing ground."\textsuperscript{90}

In sum, courts liberally construe treaty fishing rights by interpreting treaties in favor of tribal interests.\textsuperscript{91} Courts reject arguments that interpret fishing rights as a mere opportunity to pursue a catch; rather, treaties reserve to tribes the right to access all historic grounds in order to take a fair portion of the harvest from historic stations.\textsuperscript{92} The U.S. Supreme Court has determined that the fifty-percent apportionment to tribes and the accompanying easement are consistent with treaty negotiations that guarantee continuing cultural and economic vitality.\textsuperscript{93} As a consequence, courts enforce the treaty fishing right against states, the federal government, and private parties.\textsuperscript{94}

II. TRIBES SECURE INJUNCTIVE AND MONETARY RELIEF TO PROTECT TREATY RIGHTS IN FEDERAL COURT

Tribes secure injunctive and declaratory relief in federal court to defend their treaty fishing rights against governmental and private projects that, if developed, would interfere with the exercise of fishing rights.\textsuperscript{95} Additionally, because the treaty fishing right includes a property interest, courts award tribes just compensation where Congress

\textsuperscript{87} Id. at 382.
\textsuperscript{88} 698 F. Supp. 1504 (W.D. Wash. 1988).
\textsuperscript{89} Id. at 1512 (citing \textit{Puyallup}, 391 U.S. at 398).
\textsuperscript{90} Id. at 1514.
\textsuperscript{92} See \textit{Fishing Vessel}, 443 U.S. at 686–88.
\textsuperscript{93} Id.
\textsuperscript{94} See \textit{Puyallup}, 391 U.S. at 398; \textit{Muckleshoot}, 698 F. Supp. at 1514.
abrogates a fishing right. Other rights secured under treaty are likewise entitled to monetary relief, whether interference with that right results from federal government taking, state interference, or private party action. Moreover, courts have long afforded monetary relief to non-Indian fishers at common law.

A. Federal Courts Enjoin Any Project that Threatens a Tribe’s Treaty Fishing Right

Like treaties with foreign nations, Indian treaties operate as the supreme law of the land. Consequently, absent express congressional enactment dictating otherwise, courts enjoin private and government projects that, if constructed, would impair treaty fishing rights. Indeed, projects must comply with treaties as they must with other federal and state laws.

Courts consider any limitation on a tribe’s treaty fishing right sufficient grounds for halting the permitting process or denying permits altogether to government and private parties. For example, even though the government project in Umatilla included proposed mitigation efforts to trap and haul chinook salmon from below the proposed dam, the project could not proceed without express congressional action because access to a steelhead fishery would be eliminated. Likewise,

99. See Pueblo of Isleta v. Universal Constructors, Inc., 570 F.2d 300, 303 (10th Cir. 1978); Mescalero Apache Tribe v. Burgett Floral Co., 503 F.2d 336, 338 (10th Cir. 1974).
100. See Columbia River Fishermen v. City of St. Helens, 87 P.2d 195, 197–98 (Or. 1939).
101. U.S. CONST. art. VI, cl. 2. (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”); see also Settler v. Lameer, 507 F.2d 231, 238 n.16 (9th Cir. 1974) (“The various Indian treaties constitute the Supreme Law of the Land. Upon entering the union, the State of Washington and all other states were bound by those treaties.”) (citing Missouri v. Holland, 252 U.S. 416, 432–33 (1920)).
104. See Muckleshoot, 698 F. Supp. at 1516; see also United States v. Winans, 198 U.S. 371, 379 (1905) (holding that absolute land title did not insulate defendants from treaty enforcement).
in *Northwest Sea Farms v. United States Army Corps of Engineers*,\(^{107}\) the district court rejected the justification that a proposed private fish farm would have only a de minimis effect on the Lummi Tribe’s rights where the Indian fishers could still harvest fish at other stations.\(^{108}\) The site did not need to be the most primary or most productive; rather, the court reasoned that access to *all* usual and accustomed fishing stations was reserved under treaty.\(^{109}\) Similarly, in *Muckleshoot v. Hall*, though the Tribes could continue to catch the *same* fair portion of fish at stations outside of the proposed private project area, the district court denied an injunction against the tribe based, in part, on evidence that the Tribes would have to expend more money and time to catch “the same number of fish.”\(^{110}\)

Because treaties operate as an independent source of federal law, a tribe’s fishing right can serve as the sole ground on which a federal agency may deny a project permit.\(^{111}\) For example, in *Northwest Sea Farms*, the district court upheld a federal agency’s determination that denied a permit to the fish farm on the basis that it would impede the Lummi Tribe’s treaty-reserved right to access historic fishing stations.\(^{112}\) The court specifically refused to defer to an earlier state administrative proceeding that, if binding on the district court, would unilaterally extinguish a treaty right by means of a permitting process, rather than through congressional enactment.\(^{113}\)

Adherence to other federal or state laws does not indicate that a project complies with relevant Indian treaties.\(^{114}\) For example, the


\(^{108}\) Id. at 1522.

\(^{109}\) Id. at 1521.


\(^{111}\) See *Northwest Sea Farms*, 931 F. Supp. at 1522.

\(^{112}\) Id.

\(^{113}\) Id. at 1523 n.8. It should also be noted that statutory causes of action are not dispositive of treaty claims unless a comprehensive statute “speaks directly” to the question of remedies for treaty right impairment. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 237 (1985) (citing *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981)). Likewise, where Congress does not authorize an administrative agency to award monetary compensation for past or present injury to a tribe, the fact that an agency reviews the impact of a contested project does not preempt a tribe’s claim for monetary relief in federal court. See *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 800-01 (D. Idaho 1994) (“FERC [Federal Energy Regulatory Commission] did not, and indeed could not, order monetary compensation for past or present injury to the fish runs . . . . Such an action is properly brought in the courts, not before FERC.”).

\(^{114}\) See *Muckleshoot*, 698 F. Supp. at 1516; *see also* *United States v. Winans*, 198 U.S. 371, 379 (1905) (holding that absolute land title did not insulate defendants from treaty enforcement).
federal district court in *Muckleshoot* enforced the Muckleshoot and Suquamish Tribes’ treaty rights, even though the proposed private marina contractors conducted an extensive environmental review, procured long-sought-after federal and local permits, and would face significant financial harm.\(^\text{115}\) The Tribes sued the City of Seattle, the Army Corps of Engineers (the Corps), and a private developer to enjoin construction of a marina sited atop an historic fishing station just north of the already densely developed Seattle waterfront.\(^\text{116}\) The Corps estimated the Tribes’ financial losses at between $9,335 and $40,000; the Tribes calculated the potential loss to Indian fishers as over $255,000 annually, which accounted for impacts of the marina itself.\(^\text{117}\) Resting its decision to grant injunctive relief solely on the possibility of irreparable injury to the treaty right, the court did not reach the federal statutory claims alleged under the National Environmental Policy Act.\(^\text{118}\) The treaty fishing right alone provided grounds to enjoin the private project.\(^\text{119}\)

Similarly, in *No Oilport! v. Carter*,\(^\text{120}\) the district court granted the Tribes’ request for an evidentiary hearing to determine whether a private company’s proposed oil pipeline would proximately cause a decline in the “size or quality” of the fish run.\(^\text{121}\) Granting summary judgment for the defendant on all other statutory environmental claims, the court characterized the Tribes’ claims as “the most troublesome of all the issues.”\(^\text{122}\)

**B. Federal Courts Award Monetary Relief Against the Federal Government for Interference with the Treaty Fishing Right**

In *Menominee Tribe of Indians v. United States*,\(^\text{123}\) the U.S. Supreme Court recognized that a treaty reserves to tribes a fishing interest equivalent to a bona fide property right.\(^\text{124}\) In doing so, the Court held

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116. *Id.* at 1505–06.
117. *Id.* at 1506.
118. *Id.* at 1517.
119. *Id.*
121. *Id.* at 372.
122. *Id.* at 371.
124. *Id.* at 413.
that the Menominees’ treaty entitled the Tribe to just compensation for any unlawful taking by the federal government.\textsuperscript{125} The Tribe’s right survived as a separate and cognizable property right despite assimilationist legislation by Congress that had previously terminated the Tribe’s official status.\textsuperscript{126} That is, even though Congress extinguished the federal trust supervision of tribal property and services, the Court refused to imply that the legislation likewise vanquished fishing and hunting rights.\textsuperscript{127}

Tribes have also secured monetary relief before the Indian Claims Commission, which Congress established to vindicate Indian rights via a waiver of U.S. sovereign immunity.\textsuperscript{128} As in the proceedings leading up to and affirmed by \textit{Menominee}, for example, the Commission has awarded compensation for abrogation of treaty fishing rights.\textsuperscript{129} Short of full abrogation, the Commission also awarded monetary relief for the partial limitation of a treaty fishing right in \textit{Confederated Tribes of the Colville Reservation v. United States}.\textsuperscript{130} In \textit{Colville}, the Tribes brought suit against the United States for authorizing dams and commercial operations that depleted the on-reservation supply of fish.\textsuperscript{131} The Commission granted compensation for the retail value of fish to which the Tribe was entitled, less the value of fish actually received.\textsuperscript{132}

\subsection*{C. Federal Courts Award Monetary Relief Against Any Party that Interferes with Other Rights Reserved Under Treaty}

As with the treaty fishing right, tribes are entitled to just compensation where the United States takes tribal property interests in

\textsuperscript{125} \textit{id.}
\textsuperscript{126} \textit{id.} at 411–13.
\textsuperscript{127} \textit{id.}
\textsuperscript{129} \textit{Menominee}, 391 U.S. at 413 (1968), aff’g 388 F.2d 998 (Ct. Cl. 1967).
\textsuperscript{130} 43 Indian Cl. Comm’n 505, 525 (1978).
\textsuperscript{131} \textit{id.}
\textsuperscript{132} \textit{id.} To be sure, if such judgments operate as a one-time buy out, tribes today would be reluctant to assert similar claims in federal court. See State Dep’t of Ecology v. Yakima Reservation Irrigation Dist., 121 Wash. 2d 257, 291, 850 P.2d 1306, 1325 (1993) (holding Indian Claims Commission final judgment barred the Yakima Indians from subsequently protecting their treaty fishing rights under the doctrine of res judicata).
land that are reserved under treaty or recognized by statute.\textsuperscript{133} The federal government may not take a tribe’s treaty-reserved land by appropriating title to third parties without payment to the tribe as if the tribe owned the land in fee simple.\textsuperscript{134} Compensation is likewise due for federal taking of timber or mineral rights secured through the possessory rights inherent in treaty-reserved land.\textsuperscript{135}

Federal courts also award monetary relief where state or local governments interfere with treaty rights in land.\textsuperscript{136} For example, in \textit{County of Oneida v. Oneida Indian Nation},\textsuperscript{137} the Oneida Tribes sued the New York counties of Oneida and Madison for damages, alleging interference with their possessory right to occupy the area inhabited by the county citizenry.\textsuperscript{138} The U.S. Supreme Court sustained the Tribe’s common law trespass claim—although it arose 175 years prior\textsuperscript{139}—as a live federal issue and awarded damages to the Oneidas for the unlawful possession by the Counties.\textsuperscript{140} Against this backdrop, in \textit{United States v. Pend Oreille Public Utility District No. 1},\textsuperscript{141} the United States Court of Appeals for the Ninth Circuit sustained federal question jurisdiction\textsuperscript{142} and remanded the case to determine the appropriate injunctive and


\textsuperscript{134} Tribes acquire property interests by treaty, aboriginal possession, executive order, congressional establishment of Indian reservation, and other mechanisms. COHEN’S HANDBOOK, supra note 128, at 471–86. Underlying these forms of property interests is the assumption that, by virtue of discovery, the federal government holds land title in trust for tribes and thus retains legal “ownership”; however, a tribe’s right to “use” and “occupy” the land is exclusive and enforceable. \textit{Id.} at 523–28. For property guaranteed by treaty, tribes are entitled to just compensation for its appropriation. \textit{See Creek Nation}, 295 U.S. at 111.

\textsuperscript{135} \textit{Creek Nation}, 295 U.S. at 110 (stating that the power of the United States to control and manage “did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that would not be an exercise of guardianship, but an act of confiscation”) (internal citation omitted).


\textsuperscript{137} 470 U.S. 226 (1985).

\textsuperscript{138} Id. at 229.

\textsuperscript{139} Id. at 241 (“We think the borrowing of a state limitations period in these cases would be inconsistent with federal policy. Indeed, on a number of occasions Congress has made this clear with respect to Indian land claims.”).

\textsuperscript{140} Id. at 230.

\textsuperscript{141} 28 F.3d 1544 (9th Cir. 1994).

\textsuperscript{142} Id. at 1549 n.8 (noting that federal jurisdiction is not disputed). Though such disputes would typically be relegated to state courts, federal jurisdiction is sustained as arising under an Indian treaty and thus is within “the exclusive province of federal law.” \textit{See Oneida}, 470 U.S. at 234–36.
monetary relief for the public utility’s flooding of the Kalispel Tribe’s land, which constituted a trespass.\textsuperscript{143}

Likewise, tribes have a federal common law cause of action for damages to protect real property interests from private party interference.\textsuperscript{144} As early as 1850, in \textit{Marsh v. Brooks},\textsuperscript{145} the U.S. Supreme Court assumed an action for ejectment and remanded a case for trial based on the issue of interference with Indian possessory rights in land.\textsuperscript{146} Over a century later, two cases from the United States Court of Appeals for the Tenth Circuit recognized actions for damages to protect tribal lands from private parties.\textsuperscript{147} In \textit{Mescalero Apache Tribe v. Burgett Floral Co.},\textsuperscript{148} the court sustained claims for ejectment and recovery of monetary relief against a private party that harvested timber on reservation land.\textsuperscript{149} Similarly, in \textit{Pueblo of Isleta v. Universal Constructors, Inc.},\textsuperscript{150} the Tenth Circuit considered a treaty-based damages claim for injury to property resulting from nearby blasting activities of a private company.\textsuperscript{151} Rejecting the private defendant’s argument that tribes could not base a claim on land title held in trust by another,\textsuperscript{152} the \textit{Pueblo} court reasoned that it was “not appropriate to bring into play subtle principles of English common law” to overlay a treaty right which stands uniquely apart from such constraints.\textsuperscript{153} Instead, as the \textit{Pueblo of Isleta} court summarized, tribes are entitled to damages against a private party given the difficulty for individual tribal members to assert their rights in court, the property interests held in common by the Tribe, and the strong interest of the United States to ensure that the Tribe and its members receive “even-handed justice.”\textsuperscript{154}

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\textsuperscript{143} \textit{Pend Oreille}, 28 F.3d at 1549–52.
\textsuperscript{144} \textit{See} \textit{Marsh v. Brooks}, 49 U.S. 223, 232 (1850).
\textsuperscript{145} 49 U.S. 223 (1850).
\textsuperscript{146} \textit{Id.} at 232 (citing \textit{Johnson v. McIntosh}, 21 U.S. 543 (1823)).
\textsuperscript{147} \textit{See} \textit{Pueblo of Isleta v. Universal Constructors, Inc.}, 570 F.2d 300, 301–02 (10th Cir. 1978); \textit{Mescalero Apache Tribe v. Burgett Floral Co.}, 503 F.2d 336, 338 (10th Cir. 1974).
\textsuperscript{148} 503 F.2d 336 (10th Cir. 1974).
\textsuperscript{149} \textit{Id.} at 338.
\textsuperscript{150} 570 F.2d 300 (10th Cir. 1978).
\textsuperscript{151} \textit{Id.} at 302–03.
\textsuperscript{152} \textit{Id.} at 302 (“The United States is actually the title owner.”).
\textsuperscript{153} \textit{Id.} at 301 (citing \textit{Oneida Indian Nation v. County of Oneida}, 414 U.S. 661, 677 (1974)); see also \textit{Mescalero}, 503 F.2d at 338 (citing \textit{Oneida} to protect a broad set of property interests under treaty in federal court, which included an action for damages against a trespasser).
\textsuperscript{154} \textit{Pueblo of Isleta}, 570 F.2d at 302–03.
D. Courts Award Monetary Relief to Commercial Fishers at Common Law

The case law awarding monetary relief to tribes for interference with certain treaty rights is consistent with the remedies secured by fishers at common law. Although ownership over wildlife does not arise until the creature is reduced to capture, a fisher need not “own” fish in order to assert a compensable legal interest therein. For example, in *Columbia River Fishermen v. City of St. Helens*, the Oregon State Supreme Court awarded damages to commercial fishers where a town and a paper mill polluted river waters, which interfered with the commercial catch. The claim was not one based on ownership of the fish, but rather involved a claim to protect the right of fishers to pursue their vocation. In turn, this common-law right of fishers imposes a corollary duty on others to avoid imperiling fish populations; such interference presents a cause of action for damages in trespass, negligence, or nuisance.

In short, federal courts grant injunctive relief to halt government and private projects that, if constructed, would limit a tribe’s treaty fishing right. As an independent source of federal law, courts require treaty compliance notwithstanding a project’s conformity with state and other federal laws. In addition to injunctive relief, federal courts award monetary relief to tribes where the federal government interferes with a

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155. See *Columbia River Fishermen v. City of St. Helens*, 87 P.2d 195, 197–98 (Or. 1939); *Bales v. City of Tacoma*, 172 Wash. 494, 498–504, 20 P.2d 860, 863–64 (1933); see also *Sanders, supra* note 42, at 166 nn.79–83 (discussing the history of cases illustrating the common law cause of action for damages for injury caused by interruption or interference with a person’s fishing rights). It should be noted, however, that harm to the treaty right is distinct from harm to commercial fishers at common law where the right to fish is held by the Tribe on behalf of its members, not individuals. *See Whitefoot v. United States*, 293 F.2d 658, 661–63 (Ct. Cl. 1961) (holding that a $15 million payment to Tribe for abrogation of treaty fishing rights included compensation of individual Indians).


157. See *St. Helens*, 87 P.2d at 197–98; see also *Geer*, 161 U.S. at 529 (affirming the state “ownership” doctrine to regulate wildlife within borders).

158. 87 P.2d 195 (Or. 1939).

159. *Id.* at 196–97.

160. *Id.*


162. See * supra* Part II.A.

163. See * supra* notes 114–122 and accompanying text.
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treaty fishing right. Likewise, federal courts award monetary relief for interference with other rights reserved under treaty, regardless of the defendant actor. Finally, commercial fishers may secure damages at common law for interference with their vocational rights.

III. IN THE NINTH CIRCUIT, COURTS HAVE REJECTED TRIBAL FISH DAMAGE CLAIMS AGAINST PRIVATE PARTIES

With reservations in the shadow of hydroelectric dams, the Nez Perce and Skokomish Tribes each brought damage claims in federal court for past harms to their respective treaty fishing rights, which resulted from dam operations. Under the Federal Power Act (FPA), Congress exempts the United States from liability for any harm that results from dam operation and construction, leaving power companies alone to compensate for downstream harms. The Ninth Circuit granted a rehearing en banc in Skokomish Indian Tribe v. United States in February 2004 to consider the question of whether tribes have a cause of action for damages in trespass where a private company has interfered with their treaty right to fish.

A. Nez Perce Tribe v. Idaho Power Co.

In the first case of its kind, the U.S. District Court for the District of Idaho in Nez Perce Tribe v. Idaho Power Co. found jurisdiction to hear a tribe’s treaty claim for damages for the reduction in number of fish and access to customary stations caused by a private company’s

164. See supra Part II.B.
165. See supra Part II.C.
166. See supra note 155 and accompanying text.
168. See 16 U.S.C. § 803(c) (2000). Whether the federal government, in the first instance, can delegate away its trust obligation to tribes is beyond the scope of this Comment.
169. See Skokomish, 161 F. Supp. 2d at 1183 (dismissing claim against a federal defendant).
170. 161 F. Supp. 2d 1178 (W.D. Wash. 2001), aff’d in part, vacated in part by 332 F.3d 551 (9th Cir. 2003), and vacated by 358 F.3d 1180 (9th Cir. 2004) (granting rehearing en banc).
171. Id. As of this writing, the Ninth Circuit has not yet published its en banc decision.
Adopting the magistrate judge’s report to stand in for its own, the court reasoned that the FPA, under which the federal government licensed the dam, did not preempt the treaty-based claim where the available administrative process could not grant damage awards, but could only impose future mitigation measures on the dam license. The court denied that the Tribe has a right to preservation of fish runs as they stood at the 1855 treaty signing. Thus, the court reasoned that the Tribe has no modern-day right on which to base a claim for monetary relief. The tribe, however, prayed for monetary relief based on harm caused by construction and operation of the dam since 1955. Despite acknowledging the protection afforded to fishing rights in Winans, Umatilla, and Fishing Vessel, the Nez Perce court nevertheless denied damages on the grounds that injunctive relief awarded in prior cases could be distinguished from the monetary relief sought by the Nez Perce tribe. The court, via the magistrate, cited no authority for this proposition. Notably, monetary relief is the default remedy at common law; injunctive relief is granted only where the plaintiff shows that damages are inadequate at law.

Notwithstanding the Oneida Court’s expansive reading of a tribal cause of action, the Nez Perce court reasoned that the Tribe could not sustain a claim for damages based on its treaty fishing right. The court reasoned that the right to take fish was not plainly a “property interest” because the Tribe lacked ownership over “the fish runs themselves.”

173. Id. at 794, 799. The court stated that federal question jurisdiction existed, as “it is beyond any reasonable dispute that the Tribe’s fishing rights and their claims in this regard are derived from the 1855 treaty.” Id. at 799 (citing 28 U.S.C. § 1362 (1988); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 676–78 (1974)). Indeed, federal jurisdiction over tribal claims is expressly provided for in 28 U.S.C. § 1362. See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 472 (1976) (stating that the act was intended “to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason, were not so brought”).


175. Id. at 807.

176. Id. at 807–13.

177. Id. at 794, 812.

178. Id. at 809.

179. See id. at 806–10.

180. See, e.g., Knaebel v. Heiner, 663 P.2d 551, 553 (Alaska 1983) (holding that injunctive relief is proper where damages are inadequate) (citing Coffman v. Breeze Corps., 323 U.S. 316, 322 (1945)).


182. Id.
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In a lengthy footnote, the court noted that if the Tribe had a property interest in the fish, the Tribe would have a cause of action against “any private party who intentionally or negligently injured the fish.” Because the U.S. Supreme Court in Menominee held that, indeed, fishing rights are property rights entitled to just compensation, the Nez Perce court then necessarily distinguished its holding, which denied monetary relief. The district court distinguished compensation for action taken by Congress to “deprive” a tribe of its fishing rights from a “reduction” of that same resource caused by a dam. Having thus characterized the case, the court applied institutional capacity arguments and cited disfavor for judicial activism to support its refusal to grant a “new” common law cause of action. Ultimately, the Nez Perce Tribe secured a multi-million dollar settlement from Idaho Power.

B. Skokomish Indian Tribe v. United States

Although the courts sustained jurisdiction in Nez Perce and Oneida for claims arising under treaty, the U.S. District Court for the Western District of Washington dismissed all treaty-based claims in Skokomish Indian Tribe v. United States. As the Nez Perce Tribe did, the Skokomish Tribe sued for damages to its treaty fishing right caused by an upstream hydroelectric project, which for eighty years had nearly eliminated the stream flow both on- and off-reservation. The district court dismissed the pleaded claims arising under treaty, after concluding that the claims sounded in state common law or arose from the Tribe’s objection to the facility license. The FPA, however, dictates the contours of the dam license and carries no private cause of action. Considering state common law claims, the court reasoned that harm to the fish runs did not pose a continuing injury, but a permanent and long-

183. Id. at 810 n.22.
184. Id. at 811 (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968)).
185. Id.
186. Id. at 815.
190. Skokomish, 161 F. Supp. 2d at 1179.
191. Id. at 1179–80.
standing one; thus, the statutes of limitations foreclosed any remaining claims. The court did not discuss the continuing harm to the treaty right itself as defeating a state time bar.

IV. FEDERAL COURTS SHOULD AWARD DAMAGES WHERE PRIVATE PARTIES IMPAIR A TREATY FISHING RIGHT

The treaty right to take a fair portion of available fish, together with the right of access, ensures that tribes have actual fish to harvest. The use of injunctions to protect the treaty right before projects destroy fish runs indicates that monetary relief is necessary to make the tribe whole after the harmful action is taken. Such a remedy is consistent with the U.S. Supreme Court’s characterization of the treaty fishing right as a compensable property interest, with precedent that awards compensation for interference with other treaty rights, and with common law claims available to commercial fishers.

A. The Right to Take Fish from Historic Fishing Stations Assumes that There Are Actual Fish to Take.

Only in-the-flesh, actual fish can fulfill a tribe’s reserved right to take a fair portion of fish. The Fishing Vessel and Winans Courts both rejected attempts to reduce the fishing right to abstraction in the face of

193. Skokomish, 161 F. Supp. 2d at 1181–83. In contrast, in Mille Lacs Band of Chippewa Indians v. Minnesota, 853 F. Supp. 1118, 1124–25 (D. Minn. 1994), aff’d, 124 F.3d 904 (8th Cir. 1997), and aff’d, 526 U.S. 172 (1999), the court declined to borrow a state statute of limitations where the Band asserted a claim for injunctive and declaratory relief directly under a treaty fishing right. Id. Instead, because the State of Minnesota continued to enforce natural resource regulations against the Band, a wrong to their fishing and hunting rights was likely “continuing,” and thus the limitations period for the treaty claim had not expired. Id. (citing 28 U.S.C. § 1262 (1988), which conferred original jurisdiction over Indian treaty claims).


195. Fishing Vessel, 443 U.S. 658, 676–79 (1979); United States v. Winans, 198 U.S. 371, 382 (1905); see also Northwest Res. Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371, 1376 n.6 (9th Cir. 1994) (“The Court [in Fishing Vessel] also noted that the treaty guarantee of ‘the right of taking fish’ was meaningful only if fish were available for the taking.” (emphasis in original)).

196. See infra notes 213–216 and accompanying text.


198. See supra Part II.C.

199. See Columbia River Fishermen v. City of St. Helens, 87 P.2d 195, 196 (Or. 1939).

200. See supra Part I.B.
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competition from nontreaty fishers. The rights of access and fair apportionment work in tandem to ensure that tribal fishermen have actual fish to harvest in order to sustain a moderate livelihood. Guaranteeing access to fishing stations is the means to ensure the end of securing steady supplies of fish. In both Fishing Vessel and Winans, the Court contemplated actual numbers of fish for the tribal taking. Although the Fishing Vessel Court declined to specify a bare number of fish beyond a fifty-percent ceiling, presumably, where the Tribal harvest was at the time two percent of the total, the numbers spoke for themselves. The court reserved the future possibility of adjusting the percentage if needed to protect ceremonial and subsistence values, which further supports the conclusion that the treaties guarantee the right to take actual fish.

On the shoulders of Winans, federal courts should enforce the full extent of fishing rights—regardless of the defendant actor. Indeed, whether a treaty fishing right binds any particular party relates to the scope of the right. Federal courts are bound by U.S. Supreme Court precedent to broadly interpret the extent of the right, according to canons of construction which uniquely favor Tribal interests. Since the Winans decision a century ago, private parties are unquestionably subject to Indian treaties. More recently, federal courts have held that no party is authorized to limit a treaty fishing right without congressional authorization. The district courts in Sea Farms,

203. See Fishing Vessel, 443 U.S. at 676–78.
204. See id. at 676–79; Winans, 198 U.S. at 382; see also Northwest Res. Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371, 1376 n.6 (9th Cir. 1994) (“The Court [in Fishing Vessel] also noted that the treaty guarantee of ‘the right of taking fish’ was meaningful only if fish were available for the taking.” (emphasis in original)).
205. Fishing Vessel, 443 U.S. at 685–86.
206. Id. at 688.
207. See supra Part LB (discussing the enforcement of easements (one element of fishing rights) against the government and private parties).
208. See Fishing Vessel, 443 U.S. at 676–77.
Muckleshoot, No Oilport!, and Umatilla uniformly granted injunctive or declaratory relief to protect treaty fishing rights against government agencies, private actors, and their regulatory counterparts.\textsuperscript{212}

Courts should construe the right to access and take actual fish as equivalent to a tribe’s full, fair portion of the harvest taken from historic fishing grounds prior to project construction.\textsuperscript{213} As the Umatilla, Muckleshoot, and Sea Farms decisions indicate, the fact that a project allows a tribe to take some of the available salmon or to access some of the fishing stations does not satisfy the treaty right; rather, injunctive relief is proper for any limitation on the right.\textsuperscript{214} Courts also have enjoined projects that require more money and time for a tribe to catch even “the same number of fish,”\textsuperscript{215} or projects such as the private pipeline in No Oilport! that affect the “size or quality of the run.”\textsuperscript{216} Most notably, the Muckleshoot court considered the Tribe’s estimated financial loss should the private project proceed.\textsuperscript{217} Even though the opposing parties had different dollar estimates,\textsuperscript{218} the fact that the court considered the Tribe’s monetary losses indicates that courts consider a tribe’s right to the pre-project fair harvest of fish.\textsuperscript{219}

\begin{itemize}
\item See Umatilla, 440 F. Supp. at 555. Courts would likely consider only the loss attributed to the proposed project. See Muckleshoot, 698 F. Supp. at 1506 (citing dollar estimates of the potential loss of harvestable fish). This is consistent with the steps to bring “fish damage claims” outlined in a United States Department of the Interior memorandum. Memorandum from the Associate Solicitor, Indian Affairs, to Solicitor 1 (May 25, 1982). The memo outlined potential claims that the Department considered bringing on behalf of tribes against hydroelectric dam operators, elements of which included: (a) reasonably specific proof of the fishery prior to construction of the dam; (b) proof that the dam caused the loss of fish; and (c) a determination of the loss suffered. Id. The United States declined to pursue any such claims. Id. at 1, 30.
\item See Sea Farms, 931 F. Supp. at 1522; Muckleshoot, 698 F. Supp. at 1515; Umatilla, 440 F. Supp. at 555–56; see also United States v. Washington, 157 F.3d 630, 650 (9th Cir. 1998) (reversing trial court decision where the lower court had improperly limited the treaty scope in determining the remedy).
\item Muckleshoot, 698 F. Supp. at 1515 (emphasis added).
\item No Oilport!, 520 F. Supp. at 372 (quoting United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980), aff’d in part, rev’d in part, 694 F.2d 1374 (9th Cir. 1982)). To be sure, the No Oilport! court relied in part on the portion of the opinion in United States v. Washington later vacated by the Ninth Circuit; however, the No Oilport! court first cited Fishing Vessel to support the conclusion that a project threatening a tribe’s moderate standard of living must be adjudicated to ensure that a tribe’s fishing right is not limited by a unilateral private action. Id.
\item Muckleshoot, 698 F. Supp. at 1506.
\item Id.
\item See Confederated Tribes of the Colville Reservation v. United States, 43 Indian Cl. Comm’n
\end{itemize}
B. Monetary Relief Is Required to Make the Tribe Whole when Any Party Interferes with the Right to Take Actual Fish

Given that both government and private parties are subject to treaties, courts that impose monetary penalties against one defendant actor and not the other unlawfully limit the scope of the treaty right. Despite U.S. Supreme Court precedent in Menominee and the Indian Claims Commission’s decision in Colville, which construe the treaty fishing right as compensable property, the court in Nez Perce distinguished the elimination of tribal harvest by the federal government from that by a private party’s project and denied damages. Rather than discussing the extent of the legal right harmed, the Nez Perce court expressed concern over imposing a remedy that threatened to return Idaho to nineteenth-century conditions. The tribe, however, did not claim a right to catch pre-industrialization levels of fish, but rather prayed for monetary relief for the decline in fish runs, which was proximately caused by construction and operation of the dam since 1955. Not only did the Nez Perce court mischaracterize the claim, it also restricted the treaty right in prescribing the appropriate remedy. Courts can, at best, adjust the magnitude of the award as justice requires, but they are not at liberty to limit the scope of the right itself. To do otherwise is reversible error because Congress alone has the authority to alter treaty terms. Said another way, if treaty rights are exempted

505, 541 (1978). Note that the number of fish prior to project implementation is merely a characterization of the right, not necessarily the scope of the harm caused by a defendant project. Assuredly, the tribe would still have to prove that the project proximately caused the fish decline. See Memorandum from the Associate Solicitor, Indian Affairs, to Solicitor 1 (May 25, 1982).

220. See supra Part I.C.

221. See Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); Colville, 43 Indian Cl. Comm’n at 541.

222. Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 811–12 (D. Idaho 1994); see also Sanders, supra note 42, at 162–63 (arguing that the Nez Perce fishing right, as a property interest, is enforceable against all parties).


224. Id. at 794.

225. See id. at 811–12 (discussing the scope of the right under the heading, “Award of Monetary Damages”).

226. See United States v. Washington, 157 F.3d 630, 650 (9th Cir. 1998); Cree v. Waterbury, 78 F.3d 1400, 1405 (9th Cir. 1996).

227. See Washington, 157 F.3d at 650; Cree, 78 F.3d at 1405.

228. See supra Part I.C.
from traditional common law remedies, Congress has yet to say so.\textsuperscript{229} Indeed, Congress has affirmatively opened federal courthouse doors to tribes asserting claims arising under treaty.\textsuperscript{230}

The emphasis on the extent of the legal right harmed rather than the identity of the defendant actor is consistent with the federal judiciary’s across-the-board grant of monetary relief for interference with other treaty rights.\textsuperscript{231} For treaty-guaranteed land, federal courts have sustained federal question jurisdiction and applied federal common law causes of action to compensate tribes for interference with tribal possessory rights at the hands of both private and government parties.\textsuperscript{232} Damages are the appropriate remedy either as one-time compensation for Congress’s full abrogation of the treaty right,\textsuperscript{233} or for harm proximately caused by a private defendant, as with blasting activities in \textit{Pueblo of Isleta},\textsuperscript{234} or for a county’s unlawful possession, as in \textit{Oneida}.\textsuperscript{235} Awarding damages to tribes for private party interference with fishing rights, as the Court did in \textit{Menominee} for federal party interference, is consistent with the rights-focused rationale in the treaty land context.\textsuperscript{236} In addition, given the essential role of fishing rights to treaty negotiations,\textsuperscript{237} courts should consider fish claims arising under treaty as analogous to land claims, which arise under the very same legal instrument.\textsuperscript{238} Even if, as in \textit{Nez Perce}, a court fails to construe the fishing right as property, courts

\textsuperscript{229} Courts have long sustained common law causes of action for treaty interference. See supra notes 144–154 and accompanying text. Congress has yet to expressly legislate to limit such causes of action.

\textsuperscript{230} 28 U.S.C. § 1362 (2000); see also Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 472 (1976) (stating the act was intended “to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason, were not so brought”).

\textsuperscript{231} See supra Part II.B.

\textsuperscript{232} See supra Part II.C.


\textsuperscript{234} \textit{Pueblo of Isleta v. Universal Constructors, Inc.}, 570 F.2d 300, 302 (10th Cir. 1978).


\textsuperscript{236} See supra Part II.B (discussing cases awarding monetary relief against both government and private parties).

\textsuperscript{237} See supra Part I.A.

\textsuperscript{238} See \textit{Mille Lacs Band of Chippewa Indians v. Minnesota}, 853 F. Supp. 1118, 1124–25 (D. Minn. 1994) (borrowing the rationale used in the \textit{Oneida} land title case as relevant in the fishing rights context) (citing \textit{Oneida}, 470 U.S. at 240), aff’d, 124 F.3d 904 (8th Cir. 1997), and aff’d, 526 U.S. 172 (1999).
should compensate tribal fishers’ like other non-Indian fishers.\textsuperscript{239} Indeed, under a common law claim by fishers, it is not necessary that tribes even “own” fish to assert a right upon which relief may be granted.\textsuperscript{240} The \textit{St. Helens} court based remedies to fishers solely on the right of vocation, regardless of ownership over the resource.\textsuperscript{241} Additionally, as in \textit{St. Helens}, remedies may attach to the fishers’ asserted rights not only for “a current supply of salmon,” but also for the “future supply of salmon” diminished by the private action.\textsuperscript{242} Remedies available to tribes should be, at the very least, equivalent to those available to commercial fishers,\textsuperscript{243} particularly given that tribes’ fishing rights are secured in enforceable, written legal instruments and contain rights broader than those tied to vocation.\textsuperscript{244} Thus, for example, even if the citizen suit provisions available under the Clean Water Act and Endangered Species Act preempt a \textit{St. Helens} cause of action,\textsuperscript{245} federal treaties remain the supreme law of the land unless expressly altered by Congress.\textsuperscript{246}

V. CONCLUSION

In \textit{Winans}, the U.S. Supreme Court warned that nothing less than the word of the nation stands behind a tribe’s reserved treaty right to fish.\textsuperscript{247} Tribes ceded millions of acres of land, contingent upon continued access to \textit{actual} fish as necessary to support a livelihood, common sustenance, and ceremonial values.\textsuperscript{248} It is not enough, then, that private projects

\begin{itemize}
\item \textsuperscript{239} Columbia River Fishermen v. City of St. Helens, 87 P.2d 195, 196 (Or. 1939); Sanders, \textit{supra} note 42, at 164.
\item \textsuperscript{240} \textit{See St. Helens}, 87 P.2d at 196; Sanders, \textit{supra} note 42, at 164; \textit{see also} Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 677 (1974) (rejecting the argument that the Tribes must base their claim of possession on actual title); Pueblo of Isleta v. Universal Constructors, Inc., 570 F.2d 300, 302 (10th Cir. 1978) (rejecting defendant’s arguments based on Anglo-American private property constructs).
\item \textsuperscript{241} \textit{St. Helens}, 87 P.2d at 196.
\item \textsuperscript{242} \textit{Id.} at 196, 199 (noting the past harm to fishing rights as well as the thousands of dollars that would be lost in the future).
\item \textsuperscript{243} \textit{See Sanders, supra} note 42, at 164 (arguing that the \textit{Nez Perce} court’s reasoning not only makes the Tribe’s rights inferior to commercial fishers, but would preclude even common law claims).
\item \textsuperscript{244} \textit{See supra} Part I.A.
\item \textsuperscript{245} \textit{See supra} note 113 (discussing preemption by treaty).
\item \textsuperscript{246} \textit{See supra} notes 101, 114–122 and accompanying text.
\item \textsuperscript{247} United States v. Winans, 198 U.S. 371, 380 (1905).
\item \textsuperscript{248} Fishing Vessel, 443 U.S. 658, 676 (1979).
\end{itemize}
operate under a compendium of state and federal regulations. Without express congressional authorization, treaties that long-precede such permitting schemes require a private party’s compliance. Given that federal courts have enforced the treaty fishing right against private and government parties alike, courts should award damages against private actors just as they grant monetary relief for claims of past harms by government parties.

249. Winans, 198 U.S. at 382.