Hannah S. Cail & Wesley J. Furlong
Margery Hunter Brown Indian Law Clinic
Alexander Blewett III School of Law
University of Montana
32 Campus Drive
Missoula, MT 59812

National Park Service
Attn: Joe Watkins
Office of Tribal Relations and American Cultures
1201 Eye Street, NW
Washington, DC 20005

September 28, 2015

RE: National Park Service, RIN 1024-AD84, NPS-2015-0002-0071, Gathering of Certain Plants or Plan Parts by Federally Recognized Indian Tribes for Traditional Purposes

Dear National Park Service:

Please accept these comments regarding the National Park Service's ("NPS") proposed rule for *Gathering of Certain Plants and Plant Parts by Federally-Recognized Tribes for Traditional Purposes* ("Proposed Rule"). We are third year law students at the Alexander Blewett III School of Law at the University of Montana in the American Indian and Land Use and Environmental Law certificate programs, and clinical students in the Margery Hunter Brown Indian Law Clinic.

We commend the spirit and intentions of the Proposed Rule for the benefit of tribes to continue or reinitiate traditional tribal customs and traditions of gathering plants and plant parts within national park boundaries. The Proposed Rules recognize that Native Americans have been a part of the ecosystem of now parklands for time immemorial, and that allowing an exception to the taking of plant and plant parts for approved traditional uses enables tribal members to practice essential cultural traditions.

However, we have identified issues in the Proposed Rule that must be addressed. First, the Proposed Rule as written ignore the disadvantaged position where Native Americans lie in jurisprudence for proving land use claims.[1] Oral traditions of Indian tribes are often viewed with skepticism by the courts, and this predicament should not be overlooked when promulgating these Proposed Rule for gathering of plants. The Proposed Rule also place a substantial burden on tribes entering agreements with parks to prove traditional gathering on parklands by sharing sacred knowledge about traditional practices and uses of plants and the land. While a necessary

[1] Assiniboine Indian Tribe v. United States, 77 Ct. Cl. 347, 369 (1933); Coos Bay Indian Tribe v. United States, 87 Ct. Cl. 143 (1938); Pueblo De Zia v. United States, 165 Ct. Cl. 501 (1964).

step in justifying and analyzing the use of parklands, these rules also overlook a key issue in Indian religious freedom – sacred knowledge is no longer sacred when shared. Finally, the Proposed Rule lacks any discussion about how its implementation will potentially effect tribes' and tribal members' ability to exercise their treaty-reserved right to gather plants. This comment sets forth the scope of these rights and identifies a number of issues that must be addressed by the NPS. This comment further focuses on the issue of tribal oral traditions as evidence of use as well as the requisite for tribes to share sacred knowledge to enter into an agreement with the NPS.

I.

Indian tribes have undoubtedly been constrained in their traditional cultural practices and religion. From abrogated treaties to forced assimilation, federal Indian policy, guided by western ideas of civility and Judeo-Christian religion, attempted to strip American Indians of their identity. A shift in federal Indian policy over the last fifty years better recognizes Indian Civil Rights, tribal sovereignty, and the need for better government-to-government relationship with federally recognized tribes. This shift illustrates the resilience of American Indians in maintaining and reinvigorating their tribal customs and traditions. The Proposed Rule continues that positive swing in policy. Although, a discouraging legacy of legal precedent regarding traditional cultural practices and American Indian religion adversely affect American Indians' ability to present evidence of traditional practices, and therefore the ability to provide sufficient evidence of traditional use for entering agreements under the NPS's proposed rules.

A.

Native Americans have experienced few successes protecting sacred sites and recognizing religious freedom claims in federally courts.[2] Scholars attribute this struggle to the oral traditions and oral basis for Native American religions and culture.[3] "What may be the biggest challenge of all for Indian litigants—that of dealing with a system in which the written word carries much more authority than the spoken work."[4] The challenge for Native Americans arises from the preference "in Judeo-Christian theologies, [that] there is a disproportionate emphasis and significance give to the written word. . . . The jurisprudence reflects a certain entrenched cultural predisposition to trust only that which is documented."[5] There is a general concern in the courts, and therefore in making an agency's decision, with the reliability of Native oral history.[6] In *Confederated Tribes of the Warm Springs Reservation v. United States*[7], the Court of Claims summarized its view of tribal oral traditions:

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[2] Glen Stohr, *The Repercussions of Orality in Federal Indian Law*, 31 ARIZ. ST. L.J. 679, 680 (1999).

[3] *Id*.

[4] Richard S. Michaelsen, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 L.J. & RELIGION 47, 58 (1985).

[5] Verna C. Sanchez, *All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence*, 8 HASTINGS WOMEN'S L.J. 31, 59-60 (1997).

[6] Stohr, *supra* note 2, at 686.

> Oral testimony of Indians who were descendants of members of the tribe who had actual knowledge of the extent of the use and occupancy of the land claimed by the tribe, which knowledge had been passed on by word of mouth, is entitled to some weight, and is not to be deemed worthless, particularly when it is corroborated by documents and the testimony of others. The importance of corroboration and cross-checking cannot be undervalued since informants can mislead researchers by describing some period... besides the aboriginal, pre-treaty period.[8]

The court's commentary exposes the discomfort with which courts weigh Native American oral history in the legal system by requiring corroboration with other sources, including documentation.[9]

The NPS has fostered strong relationships with American Indians tribes, but the reality of jurisprudence raises the bar for the NPS to promulgate rules that will allow tribal members to present evidence which a reviewing court will weigh with validity, reliability, and consistency.[10] Amending the Proposed Rule to define the standard of proof similar to the Native American Graves Protection and Repatriation Act's ("NAGPRA") requirements may provide more stability for proving traditional use in parklands.[11] Evidence of cultural affiliation is based on a totality of the circumstances evaluation of the evidence connecting claimants and the material being claimed.[12] NAGPRA specifically states cultural affiliation "should not be precluded solely because of some gaps in the record."[13] The standard of proof only requires claimants establish cultural affiliation by a preponderance of the evidence, which is not with scientific certainty.[14] Evidence used to establish cultural affiliation includes: geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.[15] Although, this statutory language is not without controversy regarding the use of oral traditions as evidence.[16]

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[7] Confederated Tribes of the Warm Springe Reservation v. United States, No. 2-64, 1966 WL 8893, at *1 (Ct. Cl. Oct. 14, 1966).

[8] *Id*., at *12.

[9] Stohr, *supra* note 2, at 694.

[10] *Id*. at 695.

[11] 25 U.S.C. § 3005 (2014) ("Where cultural affiliation of Native American[s] … has not been established …[they then must] show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.").

[12] 43 C.F.R. § 10.14(d) (2014).

[13] *Id*.

[14] *Id*.

[15] 25 U.S.C. § 3005(a)(4); see also 43 C.F.R. § 10.14.

[16] Bonnichsen v. United States, 367 F. 3d 864, 869 (9th Cir. 2004). In *Bonnichsen*, the Ninth Circuit Court of Appeals reviewed the Secretary of the Interior's decision to repatriate human remains, known as Kennewick Man, under the APA's Scope of Review, rather than apply the standard of proof set forth in NAGRPA. 5 U.S.C. § 706(2)(A). The court sought out "substantial evidence" to support the Agency's decision: "[s]ubstantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

B.

The Proposed Rule requires the Superintendent to document the determination to development an administrative record. In recognition of statutory requirements to comply with the National Environmental Policy Act and other applicable laws, the Proposed Rule as written may place tribes in untenable positions whereby they must divulge secret information about sacred sites for plant gathering and sacred uses for plant parts in order to access them. As tribal legal counsel stated in the *Havasupai Tribe v. United States*, "[d]etailed identification of the religious, cultural and ceremonial significance of the site would be considered sacrilege by the Tribe." [17] The judge concluded "[t]he Havasupai continuously claim that they are the only ones that know about their religion, yet the record clearly shows that they were not forthcoming on the subject during the scoping process … nor would they identify sites of religious significance." [18] The sanctity of knowledge is another obstacle to the protection of sacred sites for American Indians, closely related to the impediments of oral traditions in courts.

The NPS should recognize that entering agreements that necessitate the divulgence of sacred knowledge, the process must provide a way to protect this sacred knowledge. Other comments suggest an oral presentation, however this may not satisfy the need for developing an administrative record. The NPS should construct the Proposed Rule with an understanding of the interplay between the First Amendment right of access and the requesting tribes' desire and need protect sacred knowledge.[19] The Proposed Rule should illuminate the compelling interest the NPS and the Department of the Interior have in sealing the administrative record of sacred sites and knowledge to protect Native American religions as required by the Religious Freedom Restoration Act.[20] The NPS can propose tribes' gathering site descriptions be more generalized, as with evidence in NAGPRA, and not burden the tribes exercise of religion.[21]

Finally, the Proposed Rule places the Superintendent in a position of significant power, and the rule should be altered to formally include consultation with the NPS's cultural resources staff in reviewing requests from tribes to entering into agreements for gathering plants and plant parts. The cultural resources staff generally have better developed relationships with the tribes through the management of other cultural resources within the park boundaries.

II.

Richardson v. Perales, 402 U.S. 389, 401 (1971). Two decades later, new evidence, including DNA analysis of Kennewick Man, substantiates the Colville Confederated Tribes' cultural affiliation with the human remains.

[17] Havespai Tribe v. United States, 752 F. Supp. 1471, 1499-1500 (D. Ariz. 1990), *aff'd sub nom.*, Havesupai Tribe v. Robertson, 943 F. 2d 32 (9th Cir. 1991).

[18] *Id*. at 1500.

[19] *See* Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide*, Federal Judicial Center (2010), http://www2.fjc.gov/sites/default/files/2012/Sealing_Guide.pdf.

[20] United States v. Wilgus, 638 F. 3d 1274 (10th Cir. 2011).

[21] *See Id*. (recognized the compelling government interest in preserving the culture and religion of Native American Tribes).

Treaties are the supreme law of the land.[22] The federal government, and the NPS, owes a fiduciary duty to tribes to ensure that treaty-reserved rights are not abrogated or impinged, and to maintain treaty-reserved resources.[23] For a time in the late Nineteenth Century, the United States government entered into a series of treaties with tribes in which the tribe ceded their aboriginal homeland to the federal government in exchange for a reserved territory (the reservation system) and certain retained rights.[24] These reserved rights often included the right to hunt, fish, and gather on and off the new reservations at usual and accustomed grounds.[25] These reserved rights to hunt, fish, and gather are best described as the consideration the tribes received for ceding their aboriginal lands.[26] Indeed, the importance of hunting, fishing, and gathering to tribes is exemplified by these reservations of rights. Often included separately in their own articles in treaties, these reserved rights signify the cultural and practical importance the tribes places on the ability to freely hunt, gather, and fish in traditional places.

It is important to understand that this bundle of rights is not characterized as a "grant of rights to the Indians, but a grant of rights from them."[27] These rights were not given to tribes by the United States government, but retained by tribes and tribal members. Paramount to understanding the significance of these rights is that courts view the treaty-reserved rights to hunt, fish, and gather as property rights.[28] The property interest in theses rights are held, not only by the tribes, but also by each individual tribal member.[29]

In the seminal case delineating the scope of these reserved rights, the Supreme Court of the United States characterized these rights as "imposing a servitude on every piece of land as though described therein."[30] Most often described as interests akin to easements, the exercise of these rights do not require tribes and tribal member to hold title to the land on which they hunt, fish, or gather.[31] Access to usual and accustomed grounds cannot be withheld or obstructed by governmental or private actors.[32] Indeed, the property interests in these rights falls within the ambit of the Fifth Amendment, and cannot be taken without compensation.[33]

Furthermore, treaty language reserving the right to hunt, fish, and gather must be construed pursuant to the Indian law canons of construction. These canons of construction are based on the language barriers that existed at the time of treaty-making, the power imbalance

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[22] U.S. Const. art. VI, cl. 2.

[23] Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1286 (9th Cir. 2002).

[24] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 18.02, 1156 (Neil Jessup Newton, ed., 2012).

[25] *Id.* at § 18.04, 1163-84.

[26] *See* O. Yale Lewis, III, Comment, *Treaty Fishing Rights: A Habitat Right as Part of the Trinity of Rights Implied by the Fishing Clause of the Stevens Treaties*, 27 AM. INDIAN L. REV. 281 (2003) ("This was the consideration for which they ceded essentially all of their aboriginal territory to non-Indians." *Id*. at 307).

[27] United States v. Winans, 198 U.S. 371, 381 (1905).

[28] COHEN'S HANDBOOK, *supra* note 24, at § 18.02, 1156.

[29] *Id*. at § 18.04[1], 1164.

[30] *Winans*, 198 U.S. at 381.

[31] COHEN'S HANDBOOK, *supra* note 24, at § 18.02, 1157.

[32] *Id.* at § 18.04[4][f], 1174 (citing *Winans*, 198 U.S. at 381-82).

[33] *Id.* at § 18.04, 1156.

between the federal government and tribes, as well as the fact that tribe often were unaware of the legal ramifications of the treaties they entered into. The canons of construction require that treaty language be interpreted in a manner consistent with how tribes would have understood the treaties at the time they were signed.[34] It is within the context of these rights that the comment is submitted, finding that the Proposed Rule is wanting in its lack of discussion of its potential impacts on treaty rights.

A.

The Proposed Rule envisions a scheme by which tribes and parks will establish agreements that govern how, when, and where tribes will gather plants from within national parks. The Proposed Rule envisions that at a minimum the agreements will require tribes to identify specific individuals who will be allowed to gather plants within the parks. This aspect of the Proposed Rule is of particular concern.

The implementation of the Proposed Rule may represent an impermissible abrogation of treaty rights. By delineating who can enter the parks to gather plants, the NPS may be infringing on the ability of tribal members not designated to exercise their treaty-reserved rights. Each member of a tribe signatory to a treaty reserving the right to gather possesses a property interest in that right. The effect of the Proposed Rule is that most members of tribes still fall under the prohibition of plant gathering within national parks. By restricting the ability of some tribal members to access traditional gathering grounds and take traditional plants, while allowing other to do exactly that, the Proposed Rule seems to acknowledge the rights of tribes and tribal members while restricting a significant group of tribal members from exercising those rights.

By limiting who can exercise their right to take plants within the parks, it is possible that the implementation of the Proposed Rule would constitute a taking under the Fifth Amendment. Since there is no discussion of compensation, the Proposed Rule's effect of abrogating certain tribal members' rights to gather plants may be unconstitutional. Because the NPS and the federal government owe a fiduciary duty to protect treaty-reserved rights and resources, this possible effect is particularly disturbing.

Opening up the parks to certain tribal members to exercise these rights and not to others, poses other serious issues. In implementing a blanket ban on the gathering of plants, all tribal members and tribes are dispossessed of the ability to exercise their treaty-reserved rights. By opening the parks to gathering to a handful of tribal members, the NPS will be creating separate classes of tribal members, allowing a small group the ability to exercise treaty rights while denying a far larger group that same ability.

Additionally, while the application of equal protection jurisprudence is particularly difficulty in the context of Native Americans and Indian tribes,[35] the Indian Reorganization Act ("IRA") provides a level of equal protection amongst tribes that might apply to the Proposed Rule.

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[34] *Winans*, 198 U.S. at 380.

[35] *See generally* Morton v. Mancari, 417 U.S. 535 (1974) ("Indian" is a political classification and *de jure* and *de facto* discriminatory laws based on Indian status are subject to only rational basis review).

> Any regulation or administrative decision of determination of a department of agency of the United States . . . that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force of effect.[36]

No agency within the federal government my promulgate regulations that treat a tribe differently than any other tribe. While on its face, 25 U.S.C. § 467(g) applies to governmental regulations applicable to tribes, it may be fairly read that this provision applies to the enhancement and diminishment of privileges and immunities available to tribal members by virtue of their status as a member of an Indian tribe. By creating separate classes of tribal members—those allowed to exercise treaty rights versus those not allowed to—the NPS and the Proposed Rule might be in violation of the IRA. It is hard to contemplate how the Proposed Rule, as written, does not create separate classes of Indians and Indian tribes. Indeed, the Propose Rule contemplates that Tribes eligible for entering into gathering agreements must have a cultural and historical connection with the parklands, and must be located near the specific park. Even if §476(g) cannot be read to apply to enhances and diminished privileges of individual Indians, it certain can be applied in a situation were tribes are treated differently—allowed and not allowed to enter into agreements—based on their proximity to specific national parks.

B.

It is acknowledged that the NPS may be able to point to exceptions allowing it to operate parks in a manner that would otherwise impinge treaty-reserved rights. However, this does not supersede the NPS's duty to act in a fiduciary manner concerning treaty rights. Tribes retain their right to hunt, fish, and gather unless and until those rights are specifically abrogated by an act of Congress.[37] In promulgating the Proposed Rule, the NPS has implicitly acknowledged that no such an abrogation has occurred. Existing regulations barring the removal of plants generally from national parks contemplates that the regulation's prohibition is subject to superseding statutes and treaties. The NPS's prior recognition of the existing treaty rights that potentially supersede regulations barring the removal of plans from nation parks imposes an onus on the NPS to take into consideration how the implementation of the Proposed Rule would effect those rights. This prior recognition, in conjunction with the NPS's fiduciary duty to protect treaty rights, requires a heightened evaluation of possible effects the Proposed Rule might have on treaty rights.

The Proposed Rule's lack of discussion on its effects on treaty-reserved gathering rights is disturbing. The Proposed Rule mentions treaties in passing a handful of times, but spends no time discussion how treaty rights will play into the implementation of the Proposed Rule and the agreements made under it, and how the Proposed Rule and these agreements will effect tribal members' and tribes' ability to exercise their treaty-reserved rights. This lack of discussion is particular troublesome in light of the federal government's fiduciary duty to protect treaty-reserved rights and resources.

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[36] 25 U.S.C. § 476(g) (2012).

[37] COHEN'S HANDBOOK, *supra* note 24, at § 18.01, 1155.

It should not be construed from this letter that the Proposed Rule or the NPS will actually violate the treaty rights of Native Americans. Merely, this letter should serve as a notice to the NPS that it has failed to take into any meaningful consideration the effects the Proposed Rule might have on the exercise of treaty-reserved rights to gather plans in usual and accustomed places. The NPS must consider and discuss in detail how the implementation of the Proposed Rule will comport with and effect treaty rights. Without a meaningful discussion in the implications the Proposed Rule will have on treaty rights and the NPS's fiduciary duty to protect those rights, the adoption of the Proposed Rule would be arbitrary and capricious.

Respectfully submitted this 28th day of September, 2015.

/s/ Hannah S. Cail

Hannah S. Cail
J.D. Candidate, 2016
Margery Hunter Brown Indian Law Clinic
Alexander Blewett III School of Law
University of Montana

/s/ Wesley J. Furlong

Wesley J. Furlong
J.D. Candidate, 2016
Margery Hunter Brown Indian Law Clinic
Alexander Blewett III School of Law
University of Montana

/ / / **Appendix Attached Below** / / /

8 Hastings Women's L.J. 31

Hastings Women's Law Journal
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ALL ROADS ARE GOOD: BEYOND THE LEXICON OF CHRISTIANITY IN FREE EXERCISE JURISPRUDENCE

Verna C. Sánchez [a]

I studied under Grandpa Fools Crow, a Lakota holy man. He said never bad-mouth anybody, never be envious or jealous of anybody; if you are; you won't be on the right road yourself, ‘cause all roads are good.

--Abe Conklin [1]

Thou shalt have no other gods before me . . . for I the Lord thy God am a jealous God . . . .

--Exodus [2]

I am the way, the truth, and the life: no man cometh unto the Father, but by me.

--St. John [3]

INTRODUCTION

The journey of religious freedom in this country has been a linear one. ***32** Its point of departure was, on one hand, tolerance for religious beliefs and protection from state mandated religion, but on the other, an unspoken consensus that religion was, if not exclusively Protestantism, then certainly Christianity. This course was set by the Founding Fathers and the first courts to interpret the Free Exercise Clause, and there has been virtually no deviation since. While there have been stops along the way which have broadened slightly the highway traveled, there has been no change in direction, reevaluation of the itinerary, or toleration of alternate routes.

In this Article, I argue that in the jurisprudence of the Free Exercise Clause, religion has always been defined in a linear, hegemonic way. This monochromatic approach to the spiritual and sacred has worked as a roadblock, almost always preventing those who believe in and practice animist, earth-based, non-monotheistic traditions from ever being permitted the same level of religious freedom accorded others.

This Article examines the fundamental premises of monotheism and absolutism founded in Judeo-Christian traditions and explores how they have permeated Free Exercise jurisprudence and effectively blockaded the road to equal constitutional protection to those walking other paths. The narrowness of the jurisprudence is not merely a quaint historical fact. It continues to shut out all but fairly narrow views of religion, religious beliefs, traditions, and ideas about the sacred and spiritual. This remains true, despite the slight expansion of the definition of religion applied in more recent Free Exercise cases. The demand

for absolutes in religion--one God, one way, an "ultimate and comprehensive 'truth'" [4] --is matched by courts' aversion to "ad hoc justice" [5] in the realm of Free Exercise. They are two sides of the same coin, and they work together to deprive those who practice and believe in earth-based religions, [6] of true legal protection for their rituals and beliefs.

The jurisprudence of the Free Exercise Clause has arrived at a crossroads. If courts persist in applying the narrow, Judeo-Christian view of religion, then the linear journey will proceed, leaving many behind. If, however, courts choose to broaden their perspective, a more inclusive, panoramic view of religion will emerge. This shift will require a systematic and fundamental transformation of the underlying premises, biases, and craving for absolute predictability manifested in current jurisprudence. It calls for a commitment to recasting the analytical framework of the Free Exercise Clause, and reevaluating and reworking ideas about what constitutes religion and religious belief.

***33** From the earliest days of the drafting, planning, and writing of the United States Constitution and the Bill of Rights, two seemingly contradictory positions were in play. First, Americans would have a freedom of religion greater than that experienced under British rule. But second, this freedom was viewed from a perspective which assumed that those protected were both believers in one God and Christians of one sort or another. This assumption ran through the earliest jurisprudence of First Amendment Free Exercise claims and continues, in varying degrees, to this day. Indeed, the underlying assumption of Christianity has and continues to pervade American life.

This Article will consider the lexicon of Christianity in the jurisprudence of the Free Exercise Clause, from its early roots to the present day. While historically the idea of constitutionally ensuring the free exercise of religion went hand in hand with the idea of opposing the establishment of religion by the government, these ideas meant slightly different things for each of the Founding Fathers. As Jesse Choper has noted, the framers were "animated by several separate and sometimes opposing goals." [7] However, those differences had a common foundation in Christian beliefs and practices. The narrowly constructed, monotheistic, Christian perspective, which colored the struggle for religious freedom in the early days of this country, excluded non-Christians (and some Christians) [8] from the ideas, rights and protections ***34** of religious freedom. This legacy, to varying degrees, continues today. Although the language of the religion clause is neutral, [9] the cultural context and climate in which it arose was overwhelmingly Christian. [10] That perspective informed and shaped the early jurisprudence of First Amendment claims.

Part I of this Article will examine the early jurisprudence of the Free Exercise Clause. Because of the Christian lexicon, the framework for Free Exercise analysis has been, and continues to be, religion-specific, at great cost to those religions that do not derive from, or have any connection to, a monotheistic, Judeo-Christian tradition. Courts' legal analysis of free exercise claims arising from beliefs or practices that stand outside this framework, such as polytheistic or animistic and/or non-hierarchical and non-institutionalized religions, result almost inevitably in less protection and fewer rights than those afforded Judeo-Christian religions. The overwhelming, pervasive Judeo-Christian framework generally hampers the equal and fair treatment of Free Exercise claims falling outside this model.

This Judeo-Christian-centered model and the dilemma it creates for genuine religious freedom is best evidenced in the treatment of Native American [11] religious claims by United States courts, throughout American jurisprudential history and continuing through the present day. While paternalism or racism accounts for many of the wrongs committed against Native Americans in this country, at least as to Indian Free Exercise claims, there is more to the story. There is little or no acknowledgment by judges that they are judging from within a purely Judeo-Christian framework of thinking about, defining or "measuring" religious beliefs and practices, which skews their perspective when looking at other religions. This may be based on one or more circumstances: a judge's own religious beliefs, traditions and experiences which consciously or unconsciously color his or her view of the claim before the court; judicial precedent which, from its earliest days has been developed from an

explicitly Christian perspective; or the dominance of Judeo-Christian values which permeates American culture. While there are exceptions, it is a general truth that "other" belief systems do not, and cannot, "measure up" to Judeo-Christian indicia of what constitutes a religious ***35** belief or practice worthy of constitutional protection.[12] Even the American Indian Religious Freedom Act,[13] has done virtually nothing to protect Indian religious rights, in part because no private cause of action exists.[14] This is almost equally true of the Religious Freedom Restoration Act of 1993,[15] which merely restored the pre-Smith compelling interest test,[16] which itself had done little to protect minority religions.[17] Even this limited relief is illusory, ***36** as one federal district court declared the Act unconstitutional.[18] Although that decision was reversed by the Fifth Circuit,[19] the district court decision may be a sign of things to come.[20] Constitutional history clearly establishes the Christian roots of both the establishment of the United States and the religion clauses of the First Amendment.[21] That assumption of Christian belief continues to dominate the jurisprudence of the Free Exercise Clause. Earth-based spritual traditions and practices, which tend to be non-institutionalized, non-hierarchical, and nature-centered, stand in almost direct opposition to Christian structures and beliefs. As such, they present a direct challenge to the current jurisprudential structure.

The majority of earth-based religious claims have been brought by Native Americans. Part II of this Article will examine a number of cases where Native Americans sought protection for particular religious traditions, beliefs and practices,[22] and how those claims fared in the courts in light of the lexicon of Christianity. As will be shown, the belief in "one way," as defined by Judeo-Christian traditions, continues to operate as a roadblock to protections for non-Judeo-Christian beliefs.

Finally, Part III of this Article will look at current definitions of religion relied upon by many courts. Some courts, as well as scholars, are looking at how religion has been explicitly or implicitly defined, how those definitions have excluded non-Christian religions, and to what effect. While well- ***37** intentioned, there are inherent problems in attempting to lock onto a single definition, even a broad one. I argue that the need for a fixed definition derives from a traditional Judeo-Christian perspective and will continue to exclude those standing outside such a focus. Part III will consider these new definitions and establish why these new approaches will fail to truly protect religious freedoms. The rejection of both definitions of religion and the interest in formulating them is a necessary and vital step in beginning to offer true constitutional protections to non-Judeo-Christian religious claims.

PART I: FREEDOM TO BELIEVE--IN THE ONE GOD WE TRUST

The Founding Fathers held differing positions regarding religion generally and Christianity in particular. These differences are consistent with the general state of the political and religious culture of this country during the eighteenth century. Although it is true that "most of the founding fathers had not put much emotional stock in religion, even when they were regular churchgoers,"[23] this was not necessarily reflected in the controlling view. Rather, religion, specifically Protestant Christianity, was quickly and thoroughly implanted in American life. However, while there was no question that religion would play a critical role in the formation of the American nation, the beginning days of the nation were, as historian Gordon Wood has made clear, a time of upheaval and change.[24] "Paternal authority" was being questioned. "Even the authority of the supreme father of all, God himself, was not immune to challenge."[25] Gordon Wood suggests that a subtle movement occurred, from a Puritan view based on the Old Testament, to a Christ-centered New Testament focus.[26]

Many of the theological struggles of late eighteenth century America were cast in the same terms as the debates over parental child-raising. Did people need coercion and the terror of eternal damnation by an absolute God to make them righteous? Was it only fear for their future existence that could make people bow to a sovereign God? Or could people be brought to humility and salvation better through Christ's love and compassion?[27]

This shift in focus is evident in the various "camps" that formed around the creation of the religion clause. These various stances naturally colored the goals sought in framing the Bill of Rights and the perspectives behind ***38** them. While generalizations cannot accurately capture and reflect the true dynamics of the time, they will be relied upon here simply as a means of furthering the discussion. The Founding Fathers are often divided into several general categories for the purpose of discussing the religion clauses of the First Amendment. Adams and Emmerich labeled these categories: 1) the Enlightened Separationists; 2) the Political Centrists; and 3) the Pietistic Separationists.[28]

The Enlightened Separationists (Witte's enlightenment thinkers), including such men as Thomas Jefferson and James Madison, believed strongly in the idea of a clear separation of church and state.[29] As Witte has noted:
The primary purpose of Enlightenment writers was political, not theological. They sought not only to free religion and the church from the interference of politics and the state, as did the evangelicals, but, more importantly, to free politics and the state from the intrusion of religion and the church. . . . To allow them to combine would be to their mutual disadvantage--to produce, in Thomas Paine's words, "a sort of mule-animal, capable only of destroying, and not of breeding up."[30]

It was the Enlightened Separationists who probably best represented the challenge to paternal authority that Wood has identified. Jefferson advocated a clear separation of church and state in order to protect the integrity of the government.[31] Madison shared this view, but also believed that religion benefitted from such a separation.[32] This divergence of underlying intentions perhaps derived from the religious beliefs of each of these men at the time they were engaged in the debates and discussions leading to the drafting of the religion clause. Michael McConnell has noted that it is unclear what Madison's adult religious beliefs were, but that as a young man, he attended a Presbyterian college (Princeton), rather than "the more natural course of study at the Anglican college, William and Mary."[33] Jefferson, like Paine, was a deist who repudiated Christian doctrine while accepting the moral code of Christ.[34] Both Jefferson and Benjamin Franklin, "went so far ***39** as to believe that the only thing worth keeping of the Christian faith was the Sermon on the Mount."[35] Unlike Madison, Jefferson refused to issue religious proclamations when President.[36] His stance derived from a strong belief in the personal, and therefore private nature of religion.[37] Madison believed that religious freedom was an innate, God-given right, which was beyond the purview of the government.[38] However, he also believed that religious diversity, in and of itself, safeguarded religious liberty.[39]

Madison ultimately defined religion as a duty, determined by human beings.
The obligations it entailed were to be interpreted by mankind and rested on individuals rather than on society, much less the state . . . 'Spiritual tyranny,' built 'on the ruins of the civil authority,' emerged when its supporters mistakenly erected 'ecclesiastical establishments' that manipulated the authority of the state to coerce both religious and secular opinion. Throughout, Madison assumed the plurality of religion . . . .[40]

The Pietistic Separationists fall somewhere in between Adams and Emmerich's other two categories. Generally this group believes that the government's role in this area was to encourage a climate which would be favorable to voluntary religious devotion,[41] a view generally advanced by persons belonging to dissenting religious groups. "This theologically grounded stance affirmed that God has appointed two kinds of government . . . which are distinct in their nature and ought never to be confounded together."[42] One of the leading proponents of this position was Isaac Backus.[43]

The view which perhaps most influenced the religion clause[44] was that of the political centrists (Witte's "civic republicans"), exemplified by such men as John Adams and George Washington.[45] These men all believed that religion was necessary for and vital to a democratic government.[46] Despite ***40** the defiance of the paternalistic structure that Wood has cited as a hallmark of American life in the Eighteenth Century, concurrently there was a recognition that American society was fragmented, and needed the cohesiveness that religion could provide.[47] In the area of religion, the colonial challenge to "paternalist authority" concentrated on the established, monarchically related Church of England, not on organized religion itself (although many enlightenment thinkers repudiated much of institutionalized Christianity),[48] and most certainly not on Christianity. While the tendency of Protestantism to fragment was evident during this time,[49] the new, unique experiment that was revolutionary America was one that nonetheless operated within fairly defined, clear parameters. Alexis De Tocqueville observed that "all of the sects of the United States are comprised within the great unity of Christianity, and Christian morality is everywhere the same."[50] A white, Christian, land-and-slaveowning patriarchy set the absolute boundaries for the American revolution. Christianity generally and Protestantism specifically, was a unifying factor, "for religion was the way most common people still made meaningful the world around them."[51] This religious landscape has dominated the society and culture ever since. Gordon Wood has noted that with the democratization of the nation, came evangelization.[52]

"From the time of the Puritans to the present, the country has been viewed in missionary terms. . . . What Protestantism did was synthesize, from diverse sources, a view of man that it endowed with a religious mission."[53] Despite their assertion of a "generic" religious/civil society, proponents of "multiple establishments," clearly advocated an explicitly Christian ***41** version of America.[54] "Christianity, not just 'religion,' propelled mankind to better governments and just societies."[55]

George Washington, while not particularly religious, nonetheless, believed in the benefits of religion for promoting order.[56] John Adams, a political centrist, issued presidential religious proclamations which "urg[ed] dependence on God as essential for the 'promotion of that morality and piety without which social happiness can not exist nor the blessings of a free government be enjoyed.'"[57] The centrist position was the dominant one in the ideology of the Founding Fathers.[58] From the beginning of the jurisprudence of the Free Exercise Clause, it is this position that came to dominate the ideology and thinking of the courts.[59] A slightly different view of the origins and purpose of the Free Exercise Clause has been articulated by Vine DeLoria, Jr., who noted: "'Religion' in the original sense of the Constitution means the various Christian denominations, whose members and clergy had been active in religious persecution in Europe and who might, given some authority, repeat their tyranny in America. The First Amendment was designed to keep Christians from killing each other."[60] One hundred years earlier, De Tocqueville expressed a somewhat similar sentiment:

> In the United States, the influence of religion is not confined to the manners, but it extends to the intelligence of the people. Among the Anglo-Americans some profess the doctrines of Christianity from a sincere belief in them, and others who do the same because they are ***42** afraid to be suspected of unbelief. Christianity, therefore, reigns to be without any obstacle, by universal consent; the consequence is, as I have before observed, that every principle of the moral world is fixed and determinate . . . .[61]

The influence of the centrists continues to dominate today and is manifested in innumerable ways. What are often noted as typically American characteristics--strong individualism and the idea of free enterprise--it has been argued, are "nothing more than secular extensions of the Christian precepts of a personal relationship with Christ, man's dominion over the earth, and the bringing of Good News to all peoples."[62] The dominance wielded by Christian ideology, specifically in Free Exercise

jurisprudence, can be best understood by briefly examining the underlying canons of Christianity especially influential in the early history of this country.

Go out into the highways and hedges, and compel them to come in.

--St. Luke [63]

Christianity, like many other religions before and since, has often fostered the belief that it is the one "true" religion. However, that idea, coupled with two other important characteristics, have created a whole greater than its parts. The first of these two traits is the monotheistic nature of Christian religions. The second is the inherent evangelical component of Christianity. [64] When joined together these three components set the stage for the development and nurturing of a political and social culture of conversion (voluntary or coerced), conformity, and, in many instances, intolerance, despite the language of the First Amendment. Grounded in a monotheistic creed, the dogmatic belief in a one truth/one way, can and does result in a rejection of the possibility that an "other" religion or belief is at least as viable or acceptable as Christianity. [65]

Monotheism begins with the notion that no other gods exist. [66] This canon leads almost inevitably to rejection of other religions, which is not found in most other religious systems. The Baha'is, for example, stress ***43** ideas of brotherhood and generally accept the validity of all faiths, and Buddhists generally do not see conflicts between most of their teachings and other religions. [67] For Africans and Native Americans in early America, the Christian God that was presented to them was simply one deity, as feasible as any other. However, the reverse did not apply, especially because of the exclusionary nature of monotheism. Red Jacket, a Seneca chief, once asked a Christian missionary, "If there is but one religion, why do you white people differ so much about it?" [68] Furthermore, when the missionary aspect of Christianity is considered, [69] the inevitable result is religious imperialism. The enslaved Africans brought to this continent, as well as the indigenous peoples already living here, learned this lesson better than anyone. [70]

From the earliest exploration of the "New World," a religious component accompanied the economic incentives of "discovery" and conquest. [71] The charters that King James granted to the Virginia companies in 1606 explicitly required "propagating the Christian religion," [72] and the charter for the Massachusetts Bay Company contained a comparable mandate to teach and convert the Indians. [73] Five other charters also contained missionary components. [74] Significantly, the motivation and compulsion to convert, and thereby "uplift non-believers," could be traced as easily to those who professed to do it out of love and compassion, as to those who feared and disdained Indians and Africans. [75]

***44** Thus, from the earliest days of this nation, an unassailable presumption of the absolute rightness, and therefore supremacy, of Christianity over other religions has existed. It is within this historical and cultural context that the jurisprudence of the Free Exercise Clause developed.

Part II: THE ROADS NOT TAKEN

Although time and experience have helped American jurisprudence inch forward somewhat, to a slightly more inclusive perspective, compulsory unification of opinion only achieves the unanimity of the graveyard. [76] However, the framework of viewing religion has traditionally been and remains, albeit to a somewhat lesser degree, inexorably enmeshed in a Judeo-Christian weltanschauung that inherently disadvantages those religions and religious beliefs outside that view. According to the Supreme Court,

[n]ational unity is the basis for national security. . . . The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. [77]

There has been some progression away from the explicit, "this is a Christian nation" [78] view articulated by Justice Brewer, but the march away from such a proclamation has been carried out with deliberate sluggishness. The destination, a more vibrant, meaningful, and inclusive view of religion that protects equally the free exercise rights of all, has yet to be reached.

A. In the Beginning

In the early cases, the issue of religion arose less in the area of free exercise than in areas such as bequests, oaths, and disposition of property. [79] ***45** Nonetheless, the stark and virtually unassailable notions of a monotheistic, distinct, Christian [80] perspective run rampant. A number of assumptions underlie any discussions of these cases. The starting point in almost any case where religion was an issue was that, of course, everyone was religious, followed closely by the assumption that the religion practiced was of Christian origin. [81] While some of the language, in some of the discussions, acknowledged the existence of religions other than Christianity, the overall effect equaled little more than lip service. Even in those cases with a "liberal" result, i.e., upholding some semblance of religious freedom, the underlying attitude was one of exclusion and noblesse oblige. A review of some of these early cases amply demonstrates these points.

In People v. Ruggles, [82] a New York court upheld a conviction of blasphemy, rejecting the defendant's argument that the crime was not punishable in that jurisdiction. The defendant had admitted that his words [83] were punishable under English common law, but not under state law, because New York had not made Christianity part of its common law. [84] The court rejected all of the defendant's arguments for several different, although interconnected, reasons. The words of the defendant, which had, according to the court, "scandalized" the "author of" Christianity, constituted a "gross violation of decency and good order," [85] in addition to being impious. [86] This interplay between Christian religion and morality, the pervasive and eternal marriage of concepts in American life, was explicitly acknowledged by the court when it noted, "Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane." [87] The court went on to note that the defendant's ***46** words also clearly went against the religion and religious beliefs of "almost the whole community," [88] and were, therefore, an abuse of the right to a "free, equal and undisturbed enjoyment of religious opinion." [89] The opinion was an absolute rejection of two principles typically thought to be held dear in American jurisprudence and American life: the right to free speech and the right to freely exercise one's religious beliefs. But the right to believe, under the Ruggles analysis, is permissible only as long as the "non-believer" says or does nothing that offends the majority, a hollow right indeed. [90] This interpretation is not an exaggeration of the reasoning, as the court went on to make clear, that non-Christian religions were not equally protected.

> Nor are we bound, by any expressions in the constitution, as some have strangely supposed, either not to punish at all, or to punish indiscriminately the like attacks upon the religion of Mahomet or of the Grand Lama; and for this plain reason, that the case assumes that we are a christian people, and the morality of the country is deeply ingrafted upon Christianity, and not upon doctrines or worship of those impostors. Besides, the offense is crimen malitioe, and the imputation of malice could not be inferred from any invectives upon superstitions equally false and unknown. [91]

It was only the elevated moral sense of Christians, then, that would be protected,[92] at least under the New York court's analysis.

Finally, the court held that although the Constitution was religion-free, it did not automatically follow that common law "barriers against licentious, wanton and impious attacks upon christianity"[93] had been abandoned. In doing so, it also found that certain Christian values had clearly been incorporated into the law, citing a statute against immorality which recognized the sanctity of the sabbath day, clearly a principle founded in Christian doctrine.[94] Thus, the court upheld the blasphemy charge as going against the morality, religious beliefs, and common law of the community, essentially asserting that the three were one and the same. This last point is perhaps the most telling for what it reveals. Despite a state, or indeed, a federal constitution that had sound historical reasons for both attempting to protect religious ***47** liberty, and preventing the establishment of any one religion over another, courts often act on what they assert constitutes the common thread of "the community": its mores, standards and beliefs. However, the community, more often than not, is defined by those very same courts, and typically means "others like me." This reasoning, which is implicitly if not explicitly reflected in the case law, is circular. Although a court generally states that its reasoning and opinion is simply reflecting a communal "agreement" as to morality and beliefs, it is instead defining and limiting that community. It does so by selecting those values, morals, and beliefs that it has decided are the ones that represent the totality of the community. In doing so, it inherently ignores, and therefore excludes, all others. Consciously or not, the world reflected, discussed and upheld is a narrow one not genuinely reflective of the larger society. This was as true in 1811 New York as it is today.

In 1844, the United States Supreme Court, in the case of Vidal v. Girard's Executors,[95] had one of its first opportunities to consider the question of religion, albeit not on a specific First Amendment issue. Vidal concerned a bequest to the City of Philadelphia that sought to establish a college for orphans.[96] A critical issue in the bequest, however, was the following language:

> Secondly, I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.[97]

One of the arguments made in the challenge to the will was that such a request was "antichristian."[98] As such, it was argued, the will violated Pennsylvania law.[99] However, the Court upheld the will, including the "antichristian" aspect of the bequest.[100] The Court first noted that Girard's clear intention in making his bequest was to help "the orphan poor of all sects, Jews as well as Christians, and those who had no religion at all."[101] However, the Court's comfort with that broad-based intent seemed to restless ***48** on an open-armed embrace of "all," than on an underlying assumption that the Court appeared to superimpose onto Girard's bequest. First, the Court acknowledged the difficulty of furthering the goals espoused in the deceased's will, in particular the fostering of morality, if the college were to specifically establish or require only one religious perspective.[102] But then, in an approach which seems to mimic that of the Ruggles court, the Vidal court held that "morality" could have only one possible definition and origin. The Court, in discussing this question, said:

> The purest principles of morality are to be taught. Where are they found? Whoever searches for them must go to the source from which a Christian man derives his faith--the Bible. It is therefore affirmatively recommended, and in such a way as to preserve the sacred rights of conscience. No one can say that Girard was a deist.[103]

The Court's comfort with Girard's bequest derived from the absolute certainty that "morality" was virtually interchangeable with Christian doctrine, not from an acceptance of a potentially "antichristian" bequest. This perspective is equally reflected in Holy Trinity Church v. United States.[104] Holy Trinity is, of course, where the Supreme Court declared, "We are a Christian people."[105] There, the Court would not concede that a statute which prohibited the importation of labor could, in any way, have been meant to apply to a clergyman. While the Court first discussed religion in ***49** general terms, ("this is a religious people"),[106] the bulk of the case makes clear that, for the Court (presumably speaking for "the people" generally),[107] religion and Christianity are one and the same.[108]

The presumption of unanimity of belief is also reflected in Church of Latter Day Saints v. United States,[109] one of several early cases involving the Mormon Church. In Latter Day Saints, the question was the validity of Congress's revocation of the charter of the Mormon Church, as well as the forfeiture of church property. The Court upheld the revocation as being within the powers of Congress.[110] In the context of discussing the disposition of Church property, the Court examined the corporation which held title. It noted that the purposes of the corporation focused on spreading the doctrines of the Mormon Church, including. The Court's discussion of this practice is filled with scorn and revulsion. It called polygamy "abhorrent to the sentiments and feelings of the civilized world . . ." and a "barbarous practice" which was "a blot on our civilization."[111] So although Mormonism is Christian in origin, in the early days of its existence it was sufficiently "distinctive" from other Christian religions (in the view of the Court) to justify numerous rulings against the Church as an institution, as well as against early religious practices, specifically polygamy.[112]

While the "anti-Mormon" cases would appear, on their face, to contradict the thesis of this Article, i.e., that courts generally support Christian religious claims and go against non-Christian belief systems or ways of life, in fact the opposite is true. Courts' early biases against the Mormons were centered upon an absolute rejection of the practice of polygamy: "a return to barbarism," as the Court described it in Church of Latter Day Saints.[113] ***50** The Court there added: "It is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world."[114] Kurt Lash has noted that the impetus behind a bill to punish and prevent the practice of polygamy emanated from the idea that "it was a direct affront to the religious beliefs of the majority."[115] This is consistent with a literalist view of monotheism which, as discussed above, requires a rejection of the "other." That does not, as these cases demonstrate, simply mean a rejection of other gods, but other beliefs, ideas and practices different from or inconsistent with a very clearly delineated view of Christianity. That view, already on display in the Mormon cases, takes on an equally narrow, and even greater exclusionary bent in Native American and other animist, earth-based contexts.

B. On the Other Side of the Street

If the courts were specifically setting out the inherent Christian character of the United States, they were also implicitly, when not explicitly, sanctioning the dismantling of various non-Christian religions. This is best evidenced by examining the treatment of the two groups of peoples most profoundly affected by the Christianization that took place in early. America: the Africans brought to the United States in the slave trade and Native Americans.

1. The Africans

The religious status of Africans brought to the United States in the earliest days of this country was complicated by "that peculiar institution." The Puritans thought, for example, that slavery was "a means of bringing the heathen to Christ."[116] Slavery was originally justified in part by a bias against "heathens" and unbelievers.[117] Although eventually that general bias transformed

into a specific bias against race, which made it easier to justify the practice, for a long while the institution of slavery posed a dilemma for Christian slaveowners.[118] How could one reconcile one's own Christian beliefs, and the mandate to bring the opportunity of salvation through conversion to the heathens, while maintaining the institution of slavery? In the early days of colonialism and slavery, conversion of slaves was discouraged, in part on economic grounds.[119] There was an inherent contradiction in both ***51** baptizing and admitting Africans into white churches, while simultaneously enslaving them.[120] Slaveowners feared that Christian concepts of equality would plant dangerous ideas in slaves' minds. They also feared that since only heathens could be enslaved, conversion would eliminate a critical justification for slavery.[121] That incongruity was most often dealt with by ensuring legislatively that baptism did not confer manumission.[122] For example, six colonies passed such laws in the late seventeenth century through the beginning of the eighteenth century.[123]

In New England, there was less resistance to the idea of converting slaves than in the South, in part due to efforts by the British "to spread the Protestant faith by competing with the Catholics in the conversion of Indians and Negroes."[124] Cotton Mather became an ardent advocate of Christianizing slaves, reconciling their conversion with the maintenance of the system of slavery by noting: "What law is it, that sets the baptized slave at liberty? Not the law of Christianity."[125] The Quakers, many of whom owned slaves until 1773, when they forbade members from doing so, also favored Christianization of slaves.[126] These motivations and ideas took on even greater momentum with the coming of the first Great Awakening, which spread a religious fervor throughout the colonies.[127]

What ultimately occurred then, as historian Jon Butler has noted, was a parallel growth in both Christianity and slavery in the colonies after 1680.[128] That expansion of Christianity and slavery in the colonies led to what Butler classifies as "the single most important religious transformation to occur in the American colonies before 1776: an African spiritual holocaust that forever destroyed traditional African religious systems as systems in North America and that left slaves remarkably bereft of traditional collective religious ***52** practice before 1760."[129] This was fueled in part by the overwhelming success of Protestant Christianity in converting slaves, as opposed to numbers of Africans converted to Catholicism in the colonies.[130] This was important because, as has been shown in studies of slave experiences in Brazil and the Caribbean, Spanish-enforced Catholic conversions did not eradicate African religious traditions and beliefs in the same way that Protestant conversions did.[131] The North American, predominantly Protestant, evangelization of slaves had a devastating effect on African spiritual traditions.[132] This was furthered by an insidious strategy devised by slave owners as a means of slave control. Slave owners created and spread stories of the supernatural that drew on, and were extrapolated from certain African beliefs. They played on fears of conjuring and witchcraft for one purpose: "to discourage the unauthorized movement of Blacks, especially at night.[133] It was used during slavery to prevent insurrections by discouraging the assembly of Blacks . . . ."[134]

The spiritual holocaust against Africans gave rise to a somewhat peculiar relationship between Christianity and slavery. That is, Christian tenets and Biblical mandates were used both as support for and opposition to slavery.[135] However, it should be noted that by the early nineteenth century, fear ***53** of slave uprisings came to outweigh any sense of obligation regarding Christian instruction.[136] Such instruction was seen as fomenting "self-assertive tendencies."[137] Nonetheless, conversion had already taken hold almost systematically throughout the African population, with its effects lasting through the present day. This may explain why, generally speaking, free exercise claims of non-Judeo-Christian religions arise largely, but not exclusively, in the context of Native American religious beliefs rather than in the context of African religious traditions.[138]

The indelible transformation of the spiritual traditions and beliefs of the African populations in early America did not occur in the same way, nor to the same effect in the indigenous populations. Christianity came later in time to many Native Americans

and lasted longer (the missionizing and government prohibitions against Indian religious practices continued through the latter part of the nineteenth century).[139] Unlike the slave populations, Indians were much more geographically dispersed across this continent. As such, different measures were required for the forced conversions of Native Americans.[140]

*54 2. Native Americans

The motivation for the Christianization of Native Americans rested, in part, on the general view that Indians, like African slaves, were "heathens" and Christian dogma required evangelization.[141] However, the overriding American demand and passion for the ownership and exclusive control of land had as much or more to do with efforts to Christianize Native Americans than did purely ethnocentric notions of superiority.[142] This demand grew greater by the beginning of the nineteenth century and led to the "Removal Era." Within that era, the movement to convert and "uplift" the Indians took on greater momentum.

The assimiliationist movement grew in tandem with the policy of removal. Thomas Jefferson was one of the major supporters of the view that with adequate resources and coaxing Indians could be "civilized" and live in harmony with their white neighbors. . . . Indians were seen as being "historically anterior and morally inferior" to Protestant Christian settlers, and with expectations of their demise as a people, there was pressure to civilize and Christianize them before it was too late.[143]

Thus, the government created the Civilization Fund, whereby Congress established an annual appropriation, the sole purpose of which was to fund missionary efforts for Christianizing the Indians.[144] Government support for and American policy regarding the Christianization of Indians, however, began before the Civilization Fund of 1819. For example, George Washington, in his Third Annual Message in 1791, articulates the necessary elements of an Indian policy, stating that a "system corresponding with the mild principles of religion and philanthropy toward an unenlightened race of men, whose happiness materially depends on the conduct of the United States, would be as honorable to the national character as conformable to the dictates of sound policy."[145] These notions of bringing "enlightenment" to the ***55** non-Christians continued through the nineteenth century, as Indian Commissioner Hiram Price's Annual Report of 1882 indicates:

> One very important auxiliary in transforming men from savage to civilized life is the influence brought to bear upon them through the labors of Christian men and women as educators and missionaries. This, I think, has been forcibly illustrated and clearly demonstrated among the different Indian tribes by the missionary labors of the various religious societies in the last few years. Civilization is a plant of exceedingly slow growth, unless supplemented by Christian teaching and influences. . . . If we expect to stop sun dances, snake worship, and other debasing forms of superstition and idolatry among Indians, we must teach them some better way.[146]

As in earlier times, the belief that Christianization was the only means of civilization[147] and progress was shared and propagated by both anti-Indian officials, such as Andrew Jackson, and reformers. Some of these reformers met annually between 1883 and 1916, and were influential in the creation of federal policy towards Indians. In a report from their 1884 meeting, the reformers noted how critical education (which for Indians generally meant mission schools) was to this process:

> Resolved, That education is essential to civilization . . . . [The Indian] must have a Christian education to enable him to perform the duties of the family, the State, and the Church. Such an education can be best acquired apart from his reservation and amid the influences of Christian and civilized society . . . The Christian people of the country should exert through the Indian schools a strong and moral and religious influence.[148]

These ideas and policies continued well into the twentieth century. In the 1920s, for example, the United States government continued to ban any Indian dances or feasts, and Indian children were forcibly removed from their families and sent to boarding schools, where church service was mandatory.[149] The official right to religious "freedom" did not come until 1978.[150]

***56** What this cursory review of American policy towards Africans and Indians makes clear is that there was a persistent ideological assumption that Christianity, both as a religion and a culture, was superior to all other various and disparate religions, and was the only acceptable foundation for a uniform, American culture. It followed, therefore, that there should be one, homogenous American culture ("the melting pot"), to the virtual exclusion of all else, especially to that which did not have European, Judeo-Christian origins.

C. We Are All Related[151]

Christians believe that God is separate from humanity and does as he wishes without the creative assistance of any of his creatures, while the non-Christian tribal person assumes a place in creation that is dynamic, creative, and responsive. Further, tribal people allow all animals, vegetables, and minerals . . . the same or even greater privileges than humans. The Indian participates in destiny on all levels, including that of creation. . . . [E]ven the All Spirit. . . has limited power as well as a sense of proportion and respect for the powers of the creatures. Contrast this spirit with the Judeo-Christian God, who makes everything and tells everything how it may and may not function if it is to gain his respect and blessing . . . .[152]

A meaningful discussion of Native American and other earth-based religions[153] and practices is immediately complicated not merely by semantics, but by a view of life[154] that encompasses not one's place in the universe, but ***57** one's place with and as a part of the universe.[155] That is a markedly different perspective than a religious ideology that places people above nature. "That which we refer to in current usage as 'religion' cannot be conceived as being separable from any of the multiple aspects of any American Indian culture."[156] This is a fundamental divergence from religious beliefs which compartmentalize people, animals and nature as separate entities within a specified hierarchical order.

How you live life is both an art and a religion, as is how you treat and respect the environment--including animals, plants and fellow humans--all life forms, even our Mother Earth. We see no need to create concepts to separate or fragment our daily lives. You need not have to go to church and pray when your home and environment are your church, your place of prayers. Try to live a clean, beautiful, good, and balanced life. Be generous and caring. That's what our elders tell us.

--Conrad House[157]

The persistent use and application of traditionally Judeo-Christian theological[158] terms to such beliefs and concepts perpetuates a system that will not comprehend "the other" and therefore results in the denial of religious freedom for entire ways of being. As Joseph Epes Brown has explained, when viewed from within a monotheistic religious perspective, there are only two, mutually exclusive variations; religions are either monotheistic or they are polytheistic.[159] This is inherently wrong, he argues, because "primitive religions" (Brown's term), such as Indian religious traditions, do not fall into this explicit duality. He asserts that instead, such religions actually fall into a general category of theism that draws on both.[160] This dualistic ***58** view is a far cry from a cultural view that, more often than not, tends to see things as an either/or proposition.

One must resist the tendency to think of non-Christian religions as simply faiths in which people worship other deities or apotheosize different messengers. The theologies and eschatologies of Native American, African, and Eastern religions are so fundamentally different from the Judeo-Christian belief system that the word "religion" often seems inadequate to identify them . . . how poorly the word "religion" describes the beliefs of other peoples when we try to understand them according to the monotheistic model. . . . .[161]

Rather, one must move away from a linear perspective to a circular one, in order to better understand how both earth based religious perspectives differ, and how they inform every aspect of one's life. The circle is "cyclical and reciprocal."[162] In order to draw a representational figure of a hierarchical relationship, one must use straight lines. But it is not possible to draw a hierarchy by using a circle. Herein lies a critical difference in the perspectives I am discussing, and this conflict is reflected in the realm of free exercise law.

There are three essential points of conflict between Judeo-Christian theological perspectives and earth-based ones. It is critical to identify and describe them in order to recognize how they impact a court's examination of a free exercise claim arising from a religion outside of the Judeo-Christian model. Any one of these differences plays a role in the skewed jurisprudence of the Free Exercise Clause. However, when they are synthesized, as they tend to be, the legal analysis that follows is inherently slanted in an exclusionary way.

The first tension arises from the significance and value given to the written word in Judeo-Christian religions, as opposed to those religions that rely on oral traditions.[163] The second point of departure is the view and role of ***59** women in the central tenets or beliefs of the religion. The third critical divergence arises out of the view and role of land and nature. The cases where "other" beliefs, practices and spiritual views have been brought before the courts cannot be fully and completely comprehended without understanding how these three characteristics have functioned as the unidentified, unacknowledged puppeteers which have manipulated and obscured the thinking and reasoning of the decisionmakers.

1. The Voice or the Book

Write the vision and make it plain upon tables, that he may run that readeth it.[164]

Behind naming, beneath words, is something else. An existence named unnamed and unnameable. . . . We say the inarticulate have no souls. . . . Yet for our own lives we grieve all that cannot be spoken, that there is no name for, repeating for ourselves the names of things which surround what cannot be named.[165]

In Judeo-Christian theologies, there is a disproportionate emphasis and significance given to the written word.[166] However, in numerous other spiritual traditions, typically earth-based ones, beliefs, ceremonies, rituals and understandings are generally passed down orally.[167] Written text, in fact, is often forbidden because of the specific knowledge being shared or transmitted.[168] "Sacred knowledge can be a kind of intellectual property. ***60** Disclosure can destroy its sacramentality."[169] Additionally, as the court in the Foster case acknowledged, not everyone is permitted to have access to all information.[170] This becomes even more complicated when the law is turned to for protection, because, as Barsh has pointed out, "[g]overnment action or private litigation to protect a religious site or practice unavoidably entails public documentation, which can destroy what is to be saved."[171] This concept stands in complete opposition to Judeo-Christian beliefs, which most often elevate that

which is written over that which is not.[172] It also reflects a general cultural perspective regarding knowledge. That which is written is tangible, and, therefore, knowable. While there is nothing problematic with that perspective, in and of itself, where it requires an absolute a rejection of other possible ways of knowledge, one is left with the rejection of any evidence, for example, derived from oral traditions.[173]

This myopic approach does not work in the area of religious freedom. The jurisprudence reflects a certain entrenched cultural predisposition to trust only that which is documented or documentable ("scientific") and to distrust that which is not ("intuitive," "irrational").[174] It is ironic that this ***61** partiality has been extended to religion, given that religion, generally, turns on, and indeed requires, faith in that which is not provable. But certain religious beliefs have become ensconced in the culture, and deference to written texts is one of them. Because monotheistic precepts require a rejection of the other, those others, especially those others that are based on oral traditions, are labeled "supernatural," or "uncivilized" and are therefore easily dismissed.[175] The recent uproar arising from the revelation in Bob Woodward's book, The Chosen, that Hillary Rodham Clinton had "visualized" a conversation with Eleanor Roosevelt, is only another example of this. Even in those articles "defending" the First Lady (including those relying on spokespersons for the Clintons), the sneering tones with which they discussed the topic reflects a general disdain for what may in fact be the genuine religious beliefs of others.[176] Indeed, there is an arrogance in mocking even the idea that one may communicate with spirits, (or rocks or trees, for that matter), while not finding it at all odd to believe in angels, a burning bush, or a resurrection from the dead, all concepts set forth in the Bible. However, that which cannot, or should not, be labeled or named is outside of one's control, and thus is less palatable in an ordered, hierarchical universe.[177]

***62** The sin Adam and Eve committed in the Garden of Eden was attempting to become knowledgeable. Their attempt opened the further possibility that, with knowledge, they might become immortal. This apparently was not acceptable, not because knowledge and immortality were sinful but because possession of them by human beings would reorder the hierarchical principles on which the Judeo-Christian universe is posited.[178]

Judeo-Christian religions are inherently hierarchical. Thus, those spiritual belief systems which rely on oral traditions, and which are typically non-hierarchical and non-institutionalized, are rarely given the same recognition as a religion qua religion that a "knowable" religion is.

2. Women, Men and God(s)

This is now bone of my bones, and flesh of my flesh; she shall be called Woman, because she was taken out of Man.[179]

There is a spirit that pervades everything, that is capable of powerful song and radiant movement. . . . Corn Woman is one aspect of her, and Earth Woman is another, and what they together have made is called Creation, Earth, creatures, plants, and light. At the center of all is Woman, and nothing is sacred. . . without her blessing, her thinking.[180]

The role of women in Judeo-Christian theologies, versus the role or roles in earth-based, animistic religions, is another clear point of divergence. In Judeo-Christian theologies, women are subordinate to men, as Paul's message to the Corinthians ("the head of woman is her husband")[181] . . . Genesis states that God (the Father) made man in his image, and "male and female he created them."[182] But in numerous earth-based traditions, woman is recognized as being a creator or co-creator, a fundamentally different idea indeed.[183] The religious and cultural roles of and views about women vary accordingly.

In Judeo-Christian theological schemes, a woman is most often seen as the evil temptress responsible for the downfall of man: "The woman whom thou gavest to be with me, she gave me of the tree, and I did eat."[184] Those ideas, coupled with the notion of woman coming from the rib of Adam, when translated into a broader culture, create a perspective of woman as "the ***63** weaker sex" whose role must, by definition, always be subordinate to that of man.[185] Excluding the Virgin Mary, Christianity has no woman approaching goddess status.

However, where you have a religious system where woman is creator or co-creator,[186] you will have a society that reflects entirely different views about women in its communities.[187] In Santería, for example, the goddess Yemayá (the moon goddess who also controls the water) gave forth, on her death, to fourteen of the gods of the Yoruba people. The city where she died, Ile Ifé, became known as the holy city.[188] In various Indian religions, there are numerous women creators or co-creators, such as Spider Woman, Hard Beings Woman, Sky Woman, Thought Woman, and White Buffalo Woman.[189] Of course, numerous pre-Christian religions also had women deities.[190] When women are either absent from a theology, or portrayed negatively, over time a culture that relies on that theology also reflects the view of women as subordinate. This makes it that much more difficult to comprehend a religion that not only rejects that idea, but affirmatively sets out women as deities. This aggravates the existing problem of misunderstanding a religious claim that arises outside historically monotheistic religions.

3. Nature

And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth and over every creeping thing that creepeth upon the earth.[191]

***64** Nature is sacred because it reveals . . . the Great Mystery.[192]

I do not know much about gods; but I think that the river is a strong brown god . . . .[193]

Religious views regarding written versus oral traditions, or the role of women, take on greater significance as differences between theological perspectives, when the last critical divergence between Judeo-Christian and earth-based religions is examined. Divergent cultural and religious views about nature--who or what it is, why it is, and humanity's relationship to and with it--are perhaps the single biggest impediment to just resolution of free exercise cases involving earth-based religions. A Judeo-Christian theological view which separates, and makes man and woman "apart" from and above nature, is entirely different from animistic religions.

In English, one can divide the universe into two parts: the natural and the supernatural. Humanity has no real part in either, being neither animal nor spirit--that is, the supernatural is discussed as though it were apart from people, and the natural as though people were apart from it. This necessarily forces English-speaking people into a position of alienation from the world they live in. Such isolation is entirely foreign to American Indian thought. At base, every story, every song, every ceremony tells the Indian that each creature is part of a living whole and that all parts of that whole are related to one another by virtue of their participation in the whole of being.[194]

The belief that the relationship between a person and nature is non-hierarchical runs counter to the very foundations of Judeo-Christian theologies, which have set nature out to be an inanimate object to be dominated by the "higher being"--man. This is a very different view indeed, than one which sees humans as simply one of many in the universe. As every form has some of

the intelligent spirit of the Creator, we cannot but reverence all parts of the creation." [195] All parts of nature are living beings. Further, if deities are present in all of nature, and nature itself is a deity (i.e. the Earth as Mother, literally, not as metaphor), then one does not need an intermediary (such as a priest or minister) in order to simply communicate with one's deities. Nor is there any need for a theological, institutionalized hierarchy based on gender.

Here lies the answer to why it is so essential to culture that the image of divinity be male. . . . And here is why the idea that earlier cultures might have worshipped a Great Goddess remains to some minds shaped by this ***65** culture absurd and unthinkable. For the proposition that woman, who is nature, could be sacred is not a possible concept in a culture which is by definition above nature. [196]

A theology that rests in part on an established hierarchy within humanity, and without, will take a markedly different view of nature than one that, for example, sees little spiritually significant distinction between a human and animal. In fact, in many such religious views, animals have special significance as manifestations of a deity, and because, according to some creation myths, they may have been created before humans. Animals may be seen as intermediaries between humans and deities. [197] All living things come from one creation, and therefore all are related. [198] Relationships extend outwards, from familial blood lines, to plants, and the elements. [199] For instance, the Ifá tradition, a West African religious system which is also a basis for Santería and Lucumí, is based on the study of nature. [200] Various aspects of nature are not merely symbols in a theology, they are the essence of what is often called God.

D. The Path of Least Resistance

Consider an essential belief and knowledge that says the earth is alive, she is the mother and she is sacred, that a particular set of mountains are not only one of four sacred mountains marking the boundaries of your homeland, but are in fact a living deity. Or consider an essential belief and knowledge that says your gods live in these same mountains, that they create the rain and snow that allow you to grow, in dry desert soil, the corn that you eat; and that the herbs, plants and animals you rely on in your prayers and rituals are all located in these same mountains. Or consider the belief and knowledge that your people first met with the Creator at a certain butte, where your people learned their sacred ceremonies, and where you still go to worship, pray and communicate with your deity. Or consider the belief and knowledge that a certain tract of land has always been used by your people for religious rituals, and it is an indispensable part of your religious life (which is inseparable from your life overall). Now imagine that you have been told by a court that the need for more ski slopes, parking lots and a new ski lodge outweigh your interests in trying to protect your "church," the San Francisco Peaks. These were the facts of Wilson v. Block, [201] where the court held that "the plaintiffs have not shown an impermissible burden on ***66** religion." [202] This holding was reached in the face of testimony that stated:

> It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. . . the basis of our existence as a society will become a mere fairy tale to our people. . . The destruction of these practices will also destroy our present way of life and culture. [203]

The court's language and approach as evidenced by their holding "notwithstanding the plaintiffs' concerns. . ." [204] reflects an absolute inability and unwillingness to extend beyond a particular view of god and nature. The court held that a plaintiff trying to restrict the government's use of its land would have to show that "the government's proposed land use would impair a religious practice that could not be performed at any other site." [205] The court also noted that the established evidence presented in the case that all of the San Francisco Peaks are sacred "does not establish the indispensability of the permit area." [206]

This compartmentalized view of the problem is a clear indication that the court does not have slightest comprehension of what the plaintiffs were arguing. This statement is akin to telling a Muslim pilgrim, for example, that a government's proposed transformation of Mecca into a resort city will not impinge on any fundamental religious belief, as the Muslim can simply go and pray elsewhere. Or telling a devout Catholic that she can no longer take communion, but she can still believe in transubstantiation if she so chooses, or a Jew that the Wailing Wall will now become a fast food restaurant, but one stone wall at which to pray is as good as any other.

What seems to be the bottom line for the court, in this case and others, is the absolute supremacy of the historical, monotheistic view of god first, then humans, then nature, in a strict hierarchical relationship. What is also reflected in these cases is one culture's sanctity and reverence for the ownership of land, and from that, a fundamental, virtually unrestricted right to the use of one's land, be it governmental or private property. This implicit thread, running through a line of cases regarding sacred sites, became explicit in Fools Crow v. Gullet.[207] There, Fools Crow and others, on behalf of the Lakota nation, and Bill Red Hat and others, on behalf of the Tsistsistas nation,[208] sued the State Park Manager of Bear Butte State Park. The ***67** plaintiffs' witnesses testified as to the absolute centrality and sacredness of Bear Butte for the Lakota and Tsistsistas peoples. As in the Wilson case, the government was the owner of the land and managed a park there. The lawsuit arose from proposed further encroachments, although part of the suit challenged the existing desecration of the area.[209] Tourists were allowed to camp, roads and parking lots were cut through the site, and the proposed additions included the construction of an access road and parking lot adjacent to an area used for religious ceremonies.[210] "Worshipers/campers" could obtain permits that allowed ten day "camping" permits, as opposed to the five day maximum at "non-religious" sites.[211] In discussing the fact that the plaintiffs allegedly had no objections to the park providing outdoor bathrooms, free firewood and garbage disposals, and that permits had never been denied for worship or ceremonial purposes,[212] the court noted one exception: when construction on the parking lot and road "at the traditional ceremonial ground" precluded overnight camping.[213]

In denying the plaintiffs' claim, the court in Fools Crow focused on several key points following a natural progression in reasoning derived from the earlier cases of Sequoyah v. Tennessee Valley Authority[214] and Badoni v. Higginson[215] cases. First, the court found that the plaintiffs had no property interest in the land,[216] i.e., they did not own the land.[217] Second, it reasoned ***68** that the religious practices were not absolutely prohibited.[218] However, worshiper's offerings were taken by campers, photographs were taken of ceremonies, and campers and hikers frequently disrupted songs and prayers.[219] Nevertheless, the Fools Crow court concluded that the infringements on religious exercise at Bear Butte were not as bad, by comparison, as those in Badoni[220] The Badoni court held that none of these facts constituted a violation of the Free Exercise Clause or Sequoyah[221] and therefore, were permissible.[222] The court found that the plaintiffs had failed to show that the defendants had impermissibly burdened their religion.[223]

It is difficult, if not impossible, to imagine a court holding likewise, had another set of plaintiffs presented evidence that the government had taken over ownership of Holy Trinity Church, had decided to put hiking trails, parking lots and camping sites throughout the cemetery on the lands behind the church, and had opened up the church for tours to be conducted during church services and prayers. To complete the analogy, one would have to extend this scenario to include a requirement that parishioners register before entering the church, obtain permits from the government stating when they can pray, and limiting their visits to the church for praying and participation in services to times the government had pre-determined. I do not believe that there is a court anywhere in this country that would not immediately condemn such a practice and find, without hesitation, an absolute violation of the First Amendment. Yet federal courts, including the Supreme Court, have upheld such practices time and again, as applied to Indian religions.

These issues came to a head in Lyng v. Northwest Indian Cemetery Protective Association.[224] There, the United States Forest Service wanted to build a paved road through federal lands. The road was to pass through the Chimney Rock portion of Six Rivers National Forest in California.[225] That portion of land had traditionally been used by Yurok, Karok, and Tolowa Indians for religious rituals and practices; privacy, silence and the natural state of the surroundings are integral parts of the religions.[226] The required ***69** environmental impact statement found that the building of a road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems. . . ."[227] The final recommendation was that the road project be abandoned, a finding ultimately rejected by the Forest Service.[228] The District Court granted a permanent injunction, based in part on a finding that the road, and a timber harvesting plan also proposed, would violate the Free Exercise Clause. The Ninth Circuit affirmed in part, including the portion that rested on the finding of a constitutional violation.[229] In an opinion by Justice O'Connor, the Supreme Court reversed. Finding the issue in Lyng to be indistinguishable from Bowen v. Roy,[230] where applicants for benefits opposed the requirement of a Social Security number for their daughter for fear it would rob her spirit,[231] the Court noted that:

> The challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.[232]

Even in the face of expert testimony regarding the devastation the road construction would cause, the Court refused to yield on its stance. It stated that even were it to adopt the Ninth Circuit's prediction that the road would "virtually destroy the . . . Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding respondent's legal claims."[233] The truly determinative factor was once again the question of land ownership. In reviewing the religious rituals and ceremonies related to the land in question, the Court explicitly noted: "No disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of ***70** public property."[234] The language and tone of the statement makes clear the very idea is ridiculous without ever explaining why. The sentiment underlying this statement--that there is of course, an understanding "by all" as to why "we" would never want such a result--is distressingly consistent with the jurisprudence in this area of the law. As Justice Brennan noted in his dissent, "the Court embraces the Government's contention that its prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices."[235] The virtual inviolability of land ownership, even when the owner is the government acting as representative of the people, supersedes the claims of different groups to continue their spiritual beliefs, traditions, cultures and histories, all of which are interconnected.

What is difficult to discern in the line of cases discussed above is a just basis for why it was acceptable for the Court, in one instance, to permit the actual or virtual destruction of a people's way of life ("today's ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents. . . ."[236]) under the guise of refusing preferential treatment,[237] while in the other, where the Amish community was involved, the Court readily struck down a state law which would "ultimately result in the destruction of the Old Order Amish church community as it exists in the United States today."[238] There Chief Justice Burger went to great lengths to expound on the virtues of the Amish[239] and upheld the right of the Amish to live their lives relatively free of governmental interference.

Ironically, although some of the Amish cultural and/or religious characteristics identified in that case were similar to the beliefs and traditions of Native Americans, as set out in Badoni, Sequoyah, Fools Crow and Lyng, yet characteristics met with opposite legal results. One such characteristic was the relationship of the people to and with nature. Compare the Amish devotion to "a life in harmony with nature and the soil . . ." [240] with the Navajo and Hopi, for whom the San Francisco Peaks are a living deity and a source of healing plants and herbs and place of prayer and ceremonies. [241] ***71** Or consider that in both Yoder and several of the sacred site cases, there was expert testimony that the governmental action in question would have devastating consequences for the community involved. [242]

In fact, as Justice Brennan made clear, there was no substantive difference between Yoder and Lyng. [243] Actually, Brennan's dissent went a step further, proclaiming that indeed, the threat to the plaintiffs in Lyng, was "both more direct and more substantial." [244] Justice Brennan identified explicitly what implicitly drove the majority's reasoning--an overriding concern for the Government's rights as owner and manager of land, and a fear of numerous future Native American land use cases, seeking ever broader prohibitions on land use. [245] Indeed, it is the dissent in Lyng which brings to a head the general conflict between Judeo-Christian values and perspectives and those integral to earth-based religions. As Justice Brennan noted, Lyng represented "yet another stress point in the longstanding conflict between two disparate cultures--the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred." [246]

Further, as the dissent made clear, the Lyng decision would produce a profound impact that the majority refused to even acknowledge. "Given today's ruling, that freedom [to maintain religious beliefs] amounts to nothing more than the right to believe that their religion will be destroyed." [247] Given case precedent, with an almost consistent lack of constitutional protections being afforded earth-based religions, the Court's decision in Smith [248] two years after Lyng should not have surprised anyone. [249] The monodirectional ***72** journey of free exercise jurisprudence continues.

PART III: ALL ROADS ARE GOOD

Throughout this Article, I have argued that Judeo-Christian thought, values and cultural characteristics dominate the jurisprudence of the Free Exercise Clause. Even if one accepts that there may once have been a valid historical basis for this (a relatively religiously homogenous population), that basis no longer exists, and has not existed for a long while. The state of American jurisprudence in the area of free exercise derives from, and is dominated by, a monomaniacal demand for absolute certainty that is consistent with monotheistic religious thought. This is reflected both by the requirement that religion have a definition, and by the formulation of a definition which dictates that religion be concerned with absolutes. That is, the existing definition requires that the belief system focus on answers, certainty, and "naming" the mystery, rather than simply acknowledging "that which cannot be known."

Long ago, courts established a hegemonic definition of what constitutes religion. In the last few decades, only slight changes to that definition have appeared. Overall the path traveled in the realm of the Free Exercise Clause has been straight and narrow. It has often been presumed that the problems which exist in free exercise interpretation and application derive from the specific definition of religion being used, [250] rather than with the idea of any definition at all. [251] I believe that it is not simply the definition that is the problem. Rather, we must step back and question why we strive for a definition at all. A definition inherently contains within it the power to exclude ***73** all that falls outside of its boundaries. Thus, if we mean to broaden the jurisprudence in this area at all, in order to go beyond the boundaries of the Judeo-Christian construct now being applied, then a "better" definition is not the answer. Instead, we must look past the desire for absolute predictability and certainty, and

embrace rather than shirk from "ad hoc" justice.[252] The implicit fear of ad hoc justice on one hand, and the longing for a workable definition of religion on the other, are rooted in the same Judeo-Christian principles that I discussed earlier in this Article--fear of the unknown and the desire to name and predict and thus to control (e.g., written over oral traditions, man over nature, woman subordinate to man). For these reasons, free exercise jurisprudence cannot genuinely protect a broader class of religious claims unless it abandons its absolute definitional analysis.

A. Naming

But in a moment that which is behind naming makes itself known. . . . And all this knowledge is in the souls of everything, behind naming, before speaking, beneath words.[253]

The focus on a better, more inclusive definition of religion is misplaced, if the intention is to improve (i.e. make more fair) the application of the Free Exercise Clause to non-Judeo-Christian religions. It seems that what is behind the craving for some level of exactitude, which a definition would arguably provide, is fear of the unknown and unnamed. This apprehension includes a fear of the "other,"--that which is different.[254] Under these circumstances a clearer, more meaningful definition of religion cannot expand or enrich the jurisprudence in this area. This need for certainty and answers is a part of Judeo-Christian tradition and thought.[255] A monotheistic religious tradition that emphasizes answers more than questions, when translated into legal doctrine, lends itself quite easily to a predisposition against the "other." If then, such a tradition gets manifested expressly, or otherwise, in the jurisprudence of free exercise, as I have argued it does, it is that much easier to understand the disconcerting results and specious reasoning obtained in so many free exercise cases. Consider the definitions of religion ***74** that have emerged over the decades in First Amendment cases.[256]

"Religion has reference to one's views of his [sic] relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[257] This theistic idea of religion held sway well into this century. A move away from this narrow view began not in constitutional cases, but in cases interpreting draft laws and exemptions. In both United States v. Seeger[258] and Welsh v. United States,[259] the Court went beyond a theistic perspective (which was reflected in the military's conscientious objector exemption) to what was considered a more progressive approach. Beliefs that were "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent"[260] were deemed to be sufficient for purposes of conscientious objector status. This followed what the Court had earlier done in Torcaso v. Watkins.[261] While the Court in Yoder,[262] pulled back somewhat from this broad reading, this expanded idea of what constitutes religion (i.e., theism is no longer the determinative factor) still carries great weight with courts.[263] However, contained within this clearly Judeo-Christian framework are tenets I have already described--preference for written over oral traditions, a subordinate view of women, and nature as subordinate to people.[264] Thus, a religious belief that "all a person knows is placed in the ground when that person is buried. . . ." and therefore flooding or moving those bodies destroys not only the knowledge and beliefs of the buried person, but those particular teachings as well,[265] clearly stands outside of courts' general views and understandings about religion, and is ill served by even a non-theistic definition.[266]

***75** The definition now used by the courts, on its face and as it has been interpreted and applied, generally favors only those systems of belief that are based on and advance very particular principles. First, the belief system must turn on an egocentric view of the world; "above all else, religions are characterized by their adherence to and promotion of certain 'underlying theories of man's nature or his place in the Universe.'"[267] Second, this definition is predisposed towards those religions that establish a hierarchical view of the world, within the religion and without. "Religion, as comprehended by the first amendment now

includes mere affirmation of belief in a supreme being. . . ." [268] Thus, the move away from a rigid definitional requirement of a belief in "God" to one that also allows for a broader monotheistic non-theistic perspective, while something of a progression, does not yet ensure constitutional protections for earth-based religions. One impediment to real progress is the fact that new definitions of religion are wedded to a Judeo-Christian model of hierarchy.

When faced with less familiar religions, courts apply a "definition by analogy." [269] "The modern approach thus looks to the familiar religions as models in order to ascertain, by comparison, whether the new set of ideas or beliefs is confronting the same concerns, or serving the same purposes, as unquestioned and accepted 'religions.'" [270] The three general criteria for what constitutes religion that are currently being applied in cases are:
First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs. [271] ***76** Because of the inherent problems with a definition generally, and the definitions currently in use, in particular, this "new" approach offers no greater protections to "other" religions than did earlier analyses. As to the first criteria, the use of the word "ultimate"--in the ordinary sense of the word, final--is not a concept that generally has application in earth-based religions. On its face the word does not appear problematic. However, the interpretation makes clear it is a value-laden term. [272] In United States v. Kauten, for example, ultimate concern was understood to mean that a believer would "accept martyrdom" and "disregard elementary self-interest" rather than violate his or her religious beliefs. [273] In Africa, the term "ultimate concerns" was applied to the detriment of MOVE, which was held not to be a religion because there was no recognition of "a Supreme Being or transcendental or all-controlling force." [274] Thus the first indicium currently determinative of what constitutes a religion seems to require a showing that one must be willing to martyr himself or herself, or at least subscribe to a hierarchical ordering of the universe.

Additionally, what is meant by "ultimate" concerns or ideas is generally understood to be teachings or answers to questions regarding issues such as one's role in the universe and matters of right and wrong. "A science course may touch on many ultimate concerns, but it is unlikely to proffer a systematic series of answers to them that might begin to resemble a religion." [275] Moreover, it is not sufficient that a religion pose the question and provide the answer. It must do so in a comprehensive and wide ranging way. Therefore, ***77** as the court in Malnak noted, "certain isolated answers to ultimate questions, however, are not necessarily 'religious' answers, because they lack the comprehensiveness, the second of the three indicia." [276] Thus, a religion must "lay claim to an ultimate and comprehensive 'truth.'" [277] But this definition is nothing if not an almost exact likeness of the monotheistic, Judeo-Christian perspective. It harks back to Biblical teachings of "I am the way, the truth . . . ." [278] This definition requires absolutes, that is, the emphasis is on the destination, not the journey. [279] Thus, despite declarations to the contrary, a non-hierarchical belief system that prefers and embraces the mystery to the solution, and the idea of god as adjective or verb and not as noun, is not and will not be truly acknowledged as a religion, for the purposes of receiving the same types of protection afforded "mainstream" religions.

B. Fear of Flying

The desire for a definition of religion is tied to an absolute reluctance to treat religious freedom cases on an "ad hoc" basis. While this reluctance is one generally present in the law overall, it is also true that the law does recognize and accept the need for ad hoc determinations, the "best interests of the child" in custody determinations being, perhaps, the most obvious example. [280] Although a court may acknowledge the need for "flexibility and careful consideration," [281] there is a marked preference for avoiding ad hoc justice. I believe that the free exercise of religion is best served by no definition, and by a case-

by-case determination. Less, not more dogma, is required here. If courts genuinely recognized the predispositions inherent in existing free exercise jurisprudence, and undertook to consciously and explicitly ignore them, they could then, without any need for a definition of religion, truly hear and analyze each claim of free exercise on its own merits. Indeed, by explicitly rejecting both the existing definition of religion and any grail-like quest for a valid definition, courts would be able to come much closer to something resembling a genuine model of religious freedom. Under this scenario, one would no longer find a court reflexively applying a belief ***78** /conduct dichotomy to a religious claim where the religion itself adheres to no such distinction.[282] Nor would a court automatically assume that recreational use of public lands has greater value than the need to keep sacred the place of a people's teachings, rituals and deities.

An authentically just free exercise jurisprudence cannot exist if the underlying approach is one that remains grounded in a strict, monotheistic, hierarchical religious perspective. Such a view requires absolutes, and thus dogmas, and thus an inherent rejection of the "other." I urge, instead, an approach that embraces uncertainty, which contains within it an openness to "other" possibilities; other views; other roads.

CONCLUSION

The Free Exercise Clause has been, since the early days of the Constitution, predisposed towards Judeo-Christian religions and against earth-based religions. Judeo-Christian traditions have permeated how courts think about and treat what is and isn't deemed religion, for the purposes of extending constitutional protections. Not only have certain traditional Judeo-Christian characteristics colored any definition of religion and analysis of religious claims, they have also shaped the very approach typically applied in free exercise cases. The reaching out for a definition, not simply the definition itself, and the avoidance of "ad hoc" justice derive from particular religious traditions that do not readily apply, and often stand in complete opposition to, earth-based religions. Until such time as courts are truly committed to abandoning both the definition and the reluctance to treat each religious claim on its own terms, it is not possible for earth-based religions to achieve equal and fair treatment under the First Amendment Free Exercise Clause.

Footnotes

a Associate Professor of Law, Roger Williams University School of Law, B.A. Clark University, 1977, J.D. Northeastern University School of Law, 1981. I wish to thank both Hans W. Leo and Professor Linda Fitts Mischler for their thoughtful and insightful readings, comments, criticisms and suggestions, as well as their encouragement and support, throughout the writing of this Article. I also want to thank my Research Assistant, Andrea Hromi for all of her work on this Article. Finally, many thanks to Stephanie Edwards and Nan Kelly of the Roger Williams Law Library for all of their quick and diligent work.

1 All Roads Are Good: Native Voices on Life and Culture 7 (Terence Winch ed., 1994) [hereinafter All Roads are Good].

2 Exodus 1:20. "For the Lord thy God is a jealous God." Deuteronomy 15:6.

3 John 9:14.

4 Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring).

5 Id. at 210.

6 I will not attempt to define earth-based religions, for all the reasons set forth in this Article. However, examples of earth-based religions, as I use the term here, include many Native American spiritual beliefs and practices that recognize that all of nature is alive and is sacred. Santería is another such example of this type of spiritual tradition. A common focal point of earth-based religions is the individual's relationship to nature.

7 Jesse H. Choper, Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses 3 (1995).
Thomas Jefferson, for example, believed that "an established church constituted one of the gravest threats to freedom of the mind because it provided the 'orthodox' doctrine which civil authorities were to promote through coercive legal means." Arlin Adams & Charles Emmerich, A Nation Dedicated to Religious Liberty: The Constitutional Heritage of The Religion Clauses 25 (1990). James Madison, later in life, reached the conclusion that presidential religious proclamations (which he had issued), violated the Establishment Clause of the First Amendment, as did the chaplain system. John A. Semonche, Religion and Constitutional Government in the United States: A Historical Overview With Sources 29 (1986). And although Madison had issued proclamations asking people to pray, he also vetoed an act for the District of Columbia, which sought to establish an Episcopal church. Id. Roger Williams, perhaps not surprisingly, was an advocate of the "Evangelical theory of separation," that is, church and state separation was necessary to protect the sanctity of the church. Choper, supra at 3. Williams, of course, had been banished from Massachusetts by the Puritans because of his religious beliefs. Semonche, supra, at 6.

8 "Basically, then, the regimes of almost all the colonies enthroned strictly defined Protestant orthodoxies and called upon everyone for material and overt respect for the religious establishments.... The disfavored minorities included deviant Protestants as well as the more heretical Roman Catholics and Jews ... ." Marvin E. Frankel, Faith and Freedom: Religious Liberty in America 24 (1994). Massachusetts Bay's immigration policies are also instructive--restrictions affected "Quakers, Catholics, Jews, 'Familists, Antinomians, and other Enthusiasts.'" John Witte, The Essential Rights and Liberties of Religion in the American Constitutional Experiment, 71 Notre Dame L. Rev. 371, 380 (1996) (citation omitted). This kind of limited welcome was not confined to Massachusetts, but was true throughout New England. Id.

9 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

10 Michael McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990). In Carolina, for example, atheists were banned from the colony, and all persons in the colony were required to be members of a church. Id. at 1429. "'Any seven or more persons agreeing in any religion, shall constitute a church' ... and could worship without molestation, provided they adhered to three tenets: that there is a God, that God is to be publicly worshiped and that it is lawful and the duty of every man to bear ... witness ...." Id. (citation omitted).

11 Throughout this Article, I use the terms Native Americans and Indians interchangeably.

12 State v. Big Sheep, 243 P. 1067 (Mont. 1926), although dated, exemplifies this principle. There, a court rejected a Crow's claim that possession of peyote was protected by the First Amendment. In its holding that the criminalization of peyote possession was consistent with maintaining the "peace, good order and morals of society," id. at 1073, the court relied heavily on the Bible in its decision. "We do not find peyote or any like herb mentioned by Isaiah, or by Saint Paul in his epistle to the Romans, nor does it seem from the language employed that Saint John the Divine had any such in mind." Id. Of course I am not saying here, or anywhere else in the Article, that religious freedoms are always denied when they turn on beliefs or religions deviant from, or outside a Judeo-Christian norm. Nor am I saying that religious claims based on Judeo-Christian religions always succeed. However, the scales generally tip in favor of Judeo-Christian beliefs, and against those outside that framework. See for example, some of the early Jehovah's Witness or Mormon cases. Overall, those outside the Judeo-Christian framework have less success and much greater difficulties obtaining meaningful protections under the law. Tushnet states "sometimes Christians win, but non-Christians never do." See Mark Tushnet, "Of Church and State and the Supreme Court: Kurland Revisited," 1989 Sup. Ct. Rev. 373, 381.

13 42 U.S.C. § 1996 (1988) (amended 1994).

14 Havasupai v. United States, 752 F. Supp. 1471 (D. Ariz. 1990). "AIRFA does not create a cause of action or any judicially enforceable rights." Id. at 1488 (citing Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (emphasis added)). See also Crow v. Gullet, 541 F. Supp. 785, 793 (D.S.D. 1982) (stating that the Act does not create a cause of action in federal courts for violation of rights of religious freedom); New Mexico Navajo Ranchers Ass'n v. ICC, 702 F.2d 227 (D.C. Cir. 1983). See generally Sarah B. Gordon, Note, Indian Religious Freedom And Governmental Development of Public Lands, 94 Yale L.J. 1447 (1985); Note, The American Indian Religious Freedom Act--An Answer to the Indians' Prayers?, 29 S.D. L. Rev. 131 (1983); Rebekah J. French, Free Exercise of Religion On the Public Lands, 11 Pub. Land L. Rev. 197 (1990).

15 42 U.S.C. § 2000bb (1994).

16 An incidental burden on the free exercise of religion must be justified by a compelling state interest "in the regulation of a subject within the State's constitutional power to regulate." Sherbert v. Verner, 374 U.S. 398, 403 (1963) (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

17 See Tushnet, supra note 12; Michael McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109 (1990) (noting that political branches more often respect prominent, "majority" faiths). See generally Ira C. Lupu, Where Rights Begin: The Problem of Burdens on The Free Exercise Of Religion, 102 Harv. L. Rev. 933, 947-60 (1989); Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 56 (1993) (stating that the "essential to" language deleted from the Act would have made a greater difference than simply restoring the pre-Smith compelling interest test). But see James E. Ryan, Note, Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1412 (1992) (pointing out that most free exercise claimants were losing even prior to Smith). For pro-Smith arguments, see Maria Elise Lasso, Notes and Comments, Employment Division v. Smith: The Supreme Court Improves the State of the Free Exercise Doctrine, 12 St. Louis U. Pub. L. Rev. 569 (1993); Elise West, The Case Against A Right To Religion Based Exemptions, 4 Notre Dame J.L. Ethics & Pub. Pol'y 596-98 (1990) (arguing that the compelling state interest test leads to unpredictable results), cited in Lasso, supra, at 584, n.117; William P. Marshall, The Inequality of Anti-Establishment, 1993 B.Y.U. L. Rev. 63.

18 Flores v. City of Boerne, Texas, 877 F. Supp. 355 (W.D. Tex. 1995), rev'd, 73 F.3d 1352 (5th Cir. 1996).

19 Flores v. City of Boerne, Texas, 73 F.3d 1352 (5th Cir. 1996).

20 The Supreme Court has recently granted certiorari and will hear the case this term. 1996 WL 375944, 65 U.S.L.W. 3017 (1996). For arguments about the constitutionality of the Act, see Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437 (1994); Eugene Gressman & Angela C. Carmella, The RFRA Revision of the Free Exercise Clause, 57 Ohio St. L.J. 65 (1996); Joanne C. Brant, Taking the Supreme Court At Its Word: The Implications for the RFRA and Separation of Powers, 56 Mont. L. Rev. 5 (1995); Daniel O. Conkle, The Religious Freedom Restoration Act: The Constitutional Significance Of An Unconstitutional Statute, 56 Mont. L. Rev. 39 (1995); Marci A. Hamilton, The Religious Freedom Restoration Act: Letting The Fox Into The Henhouse Under Cover Of Section 5 Of The 14th Amendment, 16 Cardozo L. Rev. 357 (1995).

21 "There are no religious establishments, no preference of one denomination of Christians above another." Witte, supra note 8, at 373 (citation omitted) (emphasis added); A Century Sermon on the Glorious Revolution, in Political Sermons of the American Founding Era, 1730-1805 969, 988-99 (Ellis Sandoz ed., 1991) (emphasis added). See also McConnell, supra note 10; Daniel O. Conkle, Different Religions, Different Polities: Evaluating the Role of Religious Traditions in American Politics And Law, 10 J.L. & Religion 1 (1994).

22 I use the terms religion and religious here for purposes of convenience, all the while recognizing that doing so is perhaps not the most meaningful or helpful way of discussing beliefs and practices outside Judeo-Christian, institutionalized religious doctrines. However, these are the terms the courts have typically used to measure the claims before them.

23 Gordon S. Wood, The Radicalism of the American Revolution 330 (1991) [hereinafter G. Wood].

24 See generally G. Wood, supra note 23, at 155-59.

25 Id. at 158. But see Adrienne Rich, Of Woman Born: Motherhood as Experience and Institution 51 (1976). ("It is not from God the Father that we derive the idea of paternal authority; it is out of the struggle for paternal control of the family that God the Father is created.").

26 G. Wood, supra note 23, at 158.

27 Id.

28 Adams & Emmerich, supra note 7, at 21-31. I have chosen to follow their categories. For another view, see Witte, supra note 7. Witte has articulated four perspectives: congregational Puritans, free church evangelicals (theological), enlightenment thinkers, and civic republicans (political). Id. at 377. And, as Witte notes, these categories are not in any way exhaustive of all the various influences, and frequently persons shifted from one category to another. Id. at 377-78.

29 Adams & Emmerich, supra note 7, at 22-26.

30 Witte, supra note 8, at 383-84 (citation omitted).

31 Adams & Emmerich, supra note 7, at 24; Choper, supra note 7, at 3. Nonetheless, Jefferson negotiated treaties which provided federal monies for the Christianization of American Indians. Semonche, supra note 7, at 29.

32 See Choper, supra note 7, at 3; Adams & Emmerich, supra note 7, at 25-26.

33 McConnell, supra note 10, at 26. But see Adams & Emmerich, supra note 7, at 25 ("Though distrustful of institutional religion he remained an Episcopalian throughout his life and maintained strong religious convictions.")

34 Adams & Emmerich, supra note 7, at 22.

35 G. Wood, supra note 23, at 158.

36 Semonche, supra note 7, at 29.

37 Adams & Emmerich, supra note 7, at 23. "It is important to remember that many believers in the separation of religion and government were primarily interested in protecting religion from the state rather than vice-versa." Semonche, supra note 7, at 12.

38 Adams & Emmerich, supra note 7, at 25.

39 Semonche, supra note 7, at 2.

40 Jon Butler, Awash in a Sea of Faith: Christianizing the American People 263 (1990) (citation omitted).

41 Adams & Emmerich, supra note 7, at 29.

42 Id. at 28 (citation omitted).

43 Id. at 29. Another proponent of this view was John Witherspoon, the only clergyman to sign the Declaration of Independence. Id. at 30.

44 Id. at 26.

45 Id.

46 Id.

47 The geographic distances, "surging population and changing economic relationships unsettled traditional hierarchies ...." G. Wood, supra note 23, at 144. Thus, there was a move away from the Church of England and a movement towards numerous other religious sects. "In these mid-century decades succeeding waves of enthusiastic New Light Presbyterians, Separate Baptists, and finally Methodists swept up new converts ...." Id.

48 "Jefferson hated orthodox clergymen, and he repeatedly denounced the 'priestcraft' for having converted Christianity into an 'engine for enslaving mankind' ...." Id. at 330. That Jefferson, a slaveholder, could somehow divorce the institution of slavery from the "enslaving" role of Christianity is but one of the many paradoxes of constitutional history. See supra note 7.

49 "To some observers, 'Pennsylvania in 1750 was simply a chaos of sects,' and in North Carolina an Anglican missionary complained about the 'great number of dissenters of all denominations ....' Religious proliferation was so extensive in Long Island, New York, that attempts to count denominations were meaningless because the number changed almost daily." Forrest Wood, The Arrogance of

Faith: Christianity and Race in America from the Colonial Era to the Twentieth Century 12-13 (1990) (citation omitted) [hereinafter F. Wood].

50 1 Alexis De Tocqueville, Democracy in America 314 (Phillips Bradley ed. & Henry Reeve trans., 1966).

51 G. Wood, supra note 23, at 330.

52 Id. at 331. "If the democratic revolution of the decades following the Declaration of Independence meant the rise of ordinary people, it meant as well the rise of popular evangelical Christianity." Id. at 330.

53 Semonche, supra note 7, at 2.

54 In 1778, William Tennet, a Presbyterian minister complained to the South Carolina legislature that current laws favored the Church of England to the detriment of other Christian religions and violated both principles of religious liberty and equality. However, when he was told that the legislature was "considering a multiple establishment that might include many 'orthodox' Christian groups, including his own, he found a new meaning for equality. [[[Then] he supported the multiple establishment bill, because 'it opens the door to the equal incorporation of all denominations' and to a new, more creative relationship in which 'Christianity itself is the established religion of the State.'" Butler, supra note 40, at 260 (emphasis added) (citation omitted).

55 Id. at 264. The debate on Virginia's "Bill Concerning Religion" was a touchstone for the various positions across the spectrum.

56 Id.

57 Adams & Emmerich, supra note 7, at 27 (citation omitted).

58 Id. at 26. See for example, the Carroll family (devout Roman Catholics--then a "minority" religion among the Founding Fathers but which fell within the rubric of Christianity, the dominant religious ideology). Charles Carroll was a signer of the Declaration of Independence and was on the drafting committee of the First Amendment, and Daniel Carroll signed the Constitution and advocated religious freedom. Id. at 27. John Carroll became the first American Roman Catholic Bishop and urged toleration towards other Christians. Id. at 27 (emphasis added).

59 Ironically, however, it has been noted that only about ten percent of "the generation which produced the Constitution" were church members (as contrasted with approximately two-thirds of today's population). Semonche, supra note 7, at 2.

60 Vine Deloria, Jr., Red Earth, White Lies: Native Americans and the Myth of Scientific Fact 27 (1995).

61 De Tocqueville, supra note 50, at 295.

62 F. Wood, supra note 49, at xviii. This idea of dominion over the earth will be discussed later in this Article, as this view of human versus nature runs directly counter to earth-based, animistic beliefs. Such a view gets reflected in the jurisprudence of free exercise claims, where all or part of the basis of the claim is to protect nature.

63 14 Luke 23:14.

64 "Go ye into all the world, and preach the gospel to every creature." Mark 15:16.

65 Of course, Christianity is not the only religion susceptible to bouts of intolerance. Rather the point is simply that one views the underlying tenets of Christianity as inherently exclusive and exclusionary.

66 F. Wood, supra note 49, at 17 (emphasis added). "Christian conviction, by definition, was based on an infallible authority; to challenge canons or dogmas with rational arguments could be construed by true believers as heresy." Id. at 6.

67 Id.

68 Id. at 13 (citing David T. Bailey, Shadow of the Church 65 (1985)).

69 The historian Forrest Wood cites Christ's mandate, found in Matthew 28:19 (“to teach all nations”) as one example that has been (and for some still remains) not only a justification, but in fact a requirement to evangelize others in the Christian religion. Id. at 10.

70 A thorough discussion of the extent of and damage to both peoples by conquest and evangelization is well beyond the scope of this paper. See Butler, supra note 40; F. Wood, supra note 49. The latter book focuses specifically on the effects of Christianity on Africans.

71 See Steven T. Newcomb, The Evidence of Christian Nationalism In Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh and Plenary Power, 20 N.Y.U. Rev. L. & Soc. Change 303 (1993).

72 F. Wood, supra note 49, at 18.

73 “Reviewing the charter ... King Charles considered the conversion of the heathen natives to Christianity to be ‘the principall Ende of this plantacion.”’ Id.

74 The charters were for Maryland, Maine, Carolina, Rhode Island and Pennsylvania. “[O]nly those for Connecticut (1662) and New York (1664 and 1674) were silent on the question of missions to the heathens.” Id. at 19. However, Forrest Wood notes that the mandate in these charters to convert the Indians was often ignored or supplanted by the tendency simply to conquer and dominate, which he asserts derived from a need to feel safe in the new surroundings. Id. at 19-20. A more likely interpretation, perhaps, was the expediency of conquest versus conversion.

75 Quaker critics of slavery, such as Anthony Benezet, demonstrate this point. Benezet viewed Christianity as the means by which the Africans could overcome “the corruption of the human heart...,” it being “the only hope for oppressed black people everywhere.” Id. at 21. John Eliot and Cotton Mather both urged slaveholders to allow the conversion of their slaves, Eliot arguing that it was the owners' Christian duty to do so. Lorenzo Johnston Greene, Negroes in Colonial New England 257, 263, 265 (1969) (discussing Mather's assertions that the Christian mandate to love one's neighbor extended to slaves). See also Kurt T. Lash, The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment, 88 Nw. U. L. Rev. 1106, 1132 (1994).

76 West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943). Three years after Gobitis, on virtually the same issue, the Court reversed itself, by a vote of 6-3. In the three years between the cases, Jehovah's Witnesses had been attacked by mobs all over the country. “The Court handed down its decision [in Gobitis] on June 3, 1940. Between June 12 and June 20, hundreds of physical attacks upon Witnesses were reported to the United States Department of Justice. Barbara Grizutti Harrison, Visions of Glory: A History and a Memory of Jehovah's Witnesses 190 (1978).

77 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940) (upholding the expulsion of two Jehovah's Witness children from public school and the subsequent arrest of their father for the children's failure to salute the flag).

78 Rector of Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892).

79 A review of the earliest religion cases before the U.S. Supreme Court shows that the Court was almost exclusively dealing with property issues. See Carl H. Esbeck, Table of United States Supreme Court Decisions Relating to Religious Liberty 1789-1994, 10 J.L. & Religion 573 (1994).

80 I use the word distinct here, because, to paraphrase Orwell, some Christian religions were more equal than others. Michael McConnell has identified several different approaches to the church-state relationship in colonial times. For example, one such attitude was developed by the Puritans, who rejected the idea of religious pluralism (toleration made the world anti-Christian). McConnell, supra note 10, at 1422. A second approach was that of the Anglicans. Such congregations were established by the Crown and were both financed and controlled by it. Id. at 1423. When non-Anglicans eventually ventured into these communities, they were met with opposition. Id.

81 Of course, the opposite assumption was made as to “the others”-- Indians and Africans. For the courts, it was axiomatic that both groups were not religious, that they did not believe in a Christian god, which was, for the courts, the same thing.

82 People v. Ruggles, 8 Johns. 290 (1811).

83 The charge against the defendant was that he had "wickedly, maliciously and blasphemously" said, "in the presence and hearing of divers good and christian people," several highly derogatory remarks about Christ and his mother. Id.

84 Id. at 293-94.

85 Id. at 293.

86 Id.

87 Id.

88 Id. at 294.

89 Id.

90 This is, of course, an anathema to the principles articulated by people such as Jefferson, Franklin and Paine. See generally Adams & Emmerich, supra note 7, at 21-31.

91 Ruggles, 8 Johns. at 293.

92 "It is sufficient that the common law checks upon words and actions, dangerous to the public welfare, ... are suited to the conditions of this and every other people whose manners are refined, and whose morals have been elevated and inspired with a more enlarged benevolence, by means of the Christian religion." Id. at 293.

93 Id.

94 Id. at 297.

95 Vidal v. Girard's Executors, 43 U.S. 127 (1844). There were a number of other cases heard by the Court, but the religious "question" was not as central to the case, and will therefore not be discussed here. See e.g., Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815) (state prohibited from expropriating property of Episcopal Church); Permoli v. First Municipality, 44 U.S. (3 How.) 589 (1845) (Bill of Rights not a protection for state citizens); Goesele v. Bimeler, 55 U.S. (14 How.) 589 (1852) (heirs' recovery of property from Society of Separatists). Esbeck, supra note 79, at 1.

96 Vidal v. Girard's Executors, 43 U.S. 127 (1844).

97 Id. at 132.

98 Id. at 143. There were other grounds for challenging the will not relevant to this discussion.

99 Id.

100 Id. at 153.

101 Id.

102 Id. "Girard did what was in conformity with law, and often done practically. He had to abandon his scheme or prevent discord by adopting the plan which he followed." Id.

103 Id. at 153-54 (emphasis added). There is an obvious irony in reading the almost palpable scorn with which the Court used the term deist, forgetting, of course, that Thomas Jefferson, for example, a man vital to the life of the Constitution, was one. This change in attitude, a dogmatism regarding religion, contributed to the despair experienced by men such as John Adams, Alexander Hamilton, and Thomas Jefferson, at the end of their lives. John Adams, like Thomas Jefferson, bemoaned the religious revivals which the country was experiencing in the very late 1700s and early 1800s. "Superstition and bigotry, with which Jefferson identified organized religion, were reviving, released by the democratic revolution he had led." G. Wood, supra note 23, at 367. John Adams asked: "Where is now, the progress of the human Mind? ... When? Where? and How? is the present Chaos to be arranged into Order?"

Id. at 366-67. Alexander Hamilton noted, "[t]his American world was not made for me." Id. at 367. Vidal, in its assumptions about the unquestioned "rightness" of Christianity and Christian morality, exemplified the change in American life that took place in less than a hundred years.

104 Holy Trinity v. United States, 143 U.S. 457 (1892).

105 Id. at 471. The case arose from a challenge to an anti-immigrant statute, which prohibited the importation of foreign labor. Id. at 463. Holy Trinity, in New York City, had contracted with an English clergyman to come and serve as its pastor. Id. at 458. The government sought to exclude the minister under the statute, and the Supreme Court reversed the lower court's upholding of the exclusion. The Court's opinion generally reflects a xenophobia and anti-laborer stance which is also supported in the legislative history of the Act. See id. at 464-66.

106 Id. at 465.

107 After reviewing numerous state constitutions, the Court declared: "There is no dissonance in these declaration.... These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people." Id. at 470 (emphasis added).

108 In hypothesizing about an Act that would have specifically excluded a church from contracting with a clergyman to come to this country, the Court does include a synagogue and rabbi in its speculative fact pattern. Id. at 472. Overall, however, the Court generally exhibits a decidedly Christian bent throughout the case.

109 Church of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

110 Id. at 62, 65.

111 Id. at 48-49. In the opinion, the Court almost visibly recoils at the term polygamy. Whatever one thinks about the practice of polygamy, it hardly seems equal to the response it elicited from the Court in this case, or in others, or from the government, generally. It is one thing to hold a certain practice illegal, or even simply unprotected by the law; it is another to treat it as if it is a manifestation of all that is evil and wrong in the world.

112 See, e.g., Reynolds v. United States, 98 U.S. 145 (1878) (upholding conviction of polygamy where a requested jury instruction regarding polygamy as protected religious belief was rejected); Davis v. Beeson, 133 U.S. 333 (1889) (affirming guilty verdict for man who, as member of Mormon Church, violated voter registration oath which required rejection of bigamy or polygamy).

113 Church of Latter Day Saints, 136 U.S. at 49.

114 Id. (emphasis added).

115 Lash, supra note 75, at 1124.

116 Greene, supra note 75, at 257.

117 Butler, supra note 40, at 129.

118 Id. at 129.

119 Greene, supra note 75, at 257-58. "Many owners feared conversion might lessen the value of their chattels as laborers. Not only would valuable time be lost in instructing them, but, once converted, the Negroes would be compelled to attend church on Sunday. Prohibition of Sunday work by the slaves would increase maintenance costs, for in the plantation colonies, especially, the slaves raised part of their food on that day." Id. at 258 (citation omitted).

120 George Eaton Simpson, Black Religions in the New World 213 (1978). It was also true, however, that white slaveowners had a tremendous fear of the Africans congregating in their own churches, in a group setting not absolutely controlled by the slaveowner. Id. at 214. This led to numerous acts being passed which forbid owners from allowing "any Negro or Negroes to build on their ...

lands ... any house under pretense of a meetinghouse upon account of worship....” Id. (citation omitted). See also Gladys-Marie Fry, Night Riders in Black Folk History 38-58 (1991).

121 Greene, supra note 75, at 259.

122 Simpson, supra note 120, at 213.

123 Greene, supra note 75, at 260. Those colonies were Maryland, Virginia, New York, New Jersey, North and South Carolina. Id.

124 Id. at 262-63.

125 Id. at 264 (emphasis added).

126 Id. at 275.

127 Greene, supra note 75, at 276. See also Adams & Emmerich, supra note 7 (citation omitted).

128 Butler, supra note 40, at 149-50. He notes that while slavery existed in the colonies existed prior to 1680, it was not until that time that slavery became a viable economic force. Id. at 130.

129 Butler, supra note 40, at 129-30.

130 See generally Greene, supra note 75, at 268.

131 Joseph M. Murphy, Santería: An African Religion in America 27-33 (1988). The reasons for more of a “survival” of African spiritual beliefs and practices under Spanish conversions had to do, in part, with the easily drawn analogies between Catholic saints and their mythologies, for example, and various African deities who appeared to have comparable characteristics. See F. Wood, supra note 49, at 7-8 (citation omitted); Migene Gonzalez-Wippler, Santería: African Magic in Latin America 3 (1981).

132 This is not to suggest, however, that African beliefs and traditions did not, and have not survived. See generally Africanisms in American Culture (Joseph E. Holloway ed., 1991). But a greater or more extensive preservation of African religious traditions and practices occurred under Spanish Catholic rule than under Anglo-American Protestant rule.

133 One of the more devious manifestations of this strategy was the designation of the Indian as a “devil figure.” Fry, supra note 120, at 50. As Fry notes, this had particular significance in the Eastern colonies, “... arising mainly from the problem of troublesome communities of runaway slaves who had settled in uninhabited areas of Southern states and the fear of possible conspiracies between Indians and Blacks against whites. To forestall such cooperative efforts between these two groups, the whites adopted a policy of divide and conquer, in which Indians and Blacks were played off against each other....” Id.

134 Id. at 45. She notes that this method of control survived post-emancipation and was used to keep Blacks from fleeing the rural South for the cities in the North. Id.

135 F. Wood, supra note 49, at 39-83. “Religion, therefore, was largely employed as a device for making the slave content and submissive by his bondage.... This interpretation was first inculcated by Cotton Mather ... Mather's precepts set a precedent for using the religious indoctrination of the slaves as a subtle device for slave control....” Greene, supra note 75, at 286. It should not have come as much of a surprise, then, when Alabama State Senator Charles Davidson distributed a written copy of a speech recently, which cited Biblical support for slavery. Indeed, not only did his speech cite several specific Biblical references, Davidson went on to assert that a benefit of slavery was that Blacks got converted to Christianity. “‘I'm sure that those converted black Southerners are most grateful today,’ he wrote.” Atlanta J. & Const., May 10, 1996, at C11.

136 In 1800, there was the Gabriel conspiracy, in 1822, Denmark Vesey's aborted attempt at an uprising; and in 1831, the Nat Turner rebellion. Fry, supra note 120, at 39-40. Ironically, all three men, especially Nat Turner, were devout Christians. “Vesey was also a devoted student of the Bible and frequently quoted passages from it to support his argument that slavery was contrary to the laws of God....” Id. at 42.

137 Id. at 43.

138 Of course, Church of Lukumi Babalú-Ayé, Inc. v. City of Hialeah, 508 U.S. 520 (1993) is one of several exceptions, as is Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994), where inmates, practitioners of Santería were prohibited from wearing Orisa beads. Their beads had been confiscated by prison officials and they sought a return of the beads and the right to wear them. The court granted the plaintiffs' injunction on free exercise grounds. Campos, 854 F. Supp. at 197. See also Francis v. Keane, 888 F. Supp. 568 (S.D.N.Y. 1995), where Rastafarian correctional officers sought protection from regulations which would have required them to cut their dreadlocks. They argued that both the Religious Freedom Restoration Act and state and federal free exercise claims guaranteed them the right to refrain from cutting their hair. The federal district court denied the defendants' motions for summary judgment. Id. at 580.

139 See Russell Barsh, The Illusion of Religious Freedom for Indigenous Americans, 65 Or. L. Rev. 363, 369-74 (1986). Barsh notes that in 1882, dances and feasts were suppressed. Id. at 370. In 1884, violations of that policy resulted in imprisonment. Id. at 370 n.44 (citing U.S. Dep't. of Interior, Dep't of Interior Regulations of the Indian Dep't 496-97 (1884), which also punished "holding oneself out as a 'medicine-man'").

140 Native Americans and Public Policy 19 (Fremont J. Lyden & Lyman H. Letgers eds., 1992). I wish to note here that this Article cannot, and does not pretend to do justice to the stories of either the Africans brought to this continent as slaves, or the Native American settler history and experiences, or American expansionism. I merely seek, here, to introduce some basic historical experiences as a necessary component to discussing, in context, the difficulties of applying a Judeo-Christian framework to non-monotheistic belief systems. That must, and does, include characteristics and values that emanate from those differing belief systems. Such values manifest in numerous ways including, as I argue throughout this Article, in the jurisprudence of the Free Exercise Clause.

141 For a discussion of the idea of evangelization as an inherent component of Christian tenets, see supra notes 52-54, 64 and accompanying text.

142 The desire and demand for more and more land generally superseded all other interests vís a vís the Indians. The numerous Indian Removal Acts best exemplify this lust. See, e.g., Message of President Monroe on Indian Removal (1825); reprinted in Francis Paul Prucha, Documents of United States Indian Policy 39 (2d ed. 1990). See also Secretary of War Eaton On Cherokee Removal (1829), reprinted in Prucha, supra at 44; President Jackson on Indian Removal 47 (1829), reprinted in Prucha, supra at 47; The Indian Removal Act of 1830, reprinted in Prucha, supra at 52.

143 Prucha, supra note 142, at 20.

144 Id. "Be it enacted ..., [t]hat for the purpose of providing against the further decline and final extinction of the Indian tribes, ... and for introducing among them the habits and arts of civilization ...." Civilization Fund Act (1819), reprinted in Prucha, supra note 142, at 33.

145 President Washington's Third Annual Message, reprinted in Prucha, supra note 142, at 15.

146 Annual Report of the Commissioner of Indian Affairs (1992), reprinted in Prucha, supra note 142, at 157-59. Prucha notes that Indian Commissioner Price was a noted Methodist layman. Id. at 157.

147 The writings and discussions regarding "civilizing the heathen" (African or Indian) remind me of graffiti I saw long ago, painted on the side of a building in New York City. It read: "Q: Mr. Gandhi, what do you think of Western civilization?" Gandhi: "I think it would be a good idea."

148 Program of the Lake Mohonk Conference (1884), reprinted in Prucha, supra note 142, at 163-64.

149 Barsh, supra note 139, at 371.

150 42 U.S.C. § 1996 (1978).

151 "'We are all related' is a statement of profound implications made by each Lakota after he or she has smoked a sacred pipe in common and in communion." Joseph E. Brown, The Spiritual Legacy of the American Indian 13 (1982).

152 Paula Gunn Allen, The Sacred Hoop: Recovering the Feminine in American Indian Traditions 56-57 (1986).

153 I recognize that I am engaging in generalizations here and in other sections of this Article about an "Indian" or "earth-based" religion, as if there were one. Indeed, it is precisely the inherent individual co-relationship between a person and all other living beings (who are defined very broadly) that lies at the root of such religious beliefs. However, in order to discuss the thread of bias in the jurisprudence of the Free Exercise Clause, I feel compelled to use this "shorthand" terminology. But I should not be understood to suggest that there is one such religion. Many people who practice Santería, for example, are also practicing Catholics. The pervasiveness of Christian missionizing among Indians has had an effect on Indians and Indian religions as well. Many Indians, for example, may pray with a sacred pipe and be practicing Christians. There is nothing inherently problematic with that. Black Elk, the great Lakota holy man, was a Christian. Thomas E. Mails, Fools Crow 45 (1979). It is the flexibility of these earth based religions ("all roads are good") that allows for this, while monotheism generally rejects it.

154 "American Indian thought makes no such dualistic division, nor does it draw a hard and fast line between what is material and what is spiritual, for it regards the two as different expressions of the same reality." Allen, supra note 152, at 60.

155 This is also true of other "earth-based," "polytheistic," "animistic" "belief systems," such as Candomble or Santería, for example. I use quotation marks around these words, because this terminology, I believe, does not do justice to the beliefs and knowledge these religions encompass. Rather, they are terms that are derived from a language which emanates from Judeo-Christian perspectives. Perhaps it is in the recognition of such limitations that a seed of change is planted.

156 Brown, supra note 151, at 2.

157 All Roads Are Good, supra note 1, at 91.

158 My language here is somewhat awkward, but words and ideas grounded in theology do not work well when taken outside of their Judeo-Christian context. Of course, that is exactly what has almost always occurred in the jurisprudence of the Free Exercise Clause, and is the point of this Article. Words reflect concepts, and therefore the choice of words carries tremendous weight and influence. Furthermore, he/she who gets to choose the words gets to define and control both the discussion and the results.

159 Brown, supra note 151, at 69-70. Brown has also noted that monotheism is the one generally recognized as a sign of progress and civilization. Id.

160 Id. at 70. For example, he cites the Lakota and Dakota of the Plains, for whom "Wakan-Tanka, Great Mysterious, is an all-inclusive concept that refers both to a Supreme Being and to the totality of all gods or spirits or powers of creation." Id. (emphasis added).

161 F. Wood, supra note 49, at xxi.

162 Brown, supra note 151, at 4. As Brown notes, this circular perspective pervades every aspect of life for Indians. In Santería, there are comparable concepts. "The Ifá Creation myth teaches that all form (ire) was placed in the universe at the beginning of time. The primal Spirit that sustains form as an element of Creation is Olodumare .... Olodumare is similar to the Western theological concept known as pantheism; the belief that everything in the physical universe is an expression of Deity." Awo Falokun Fatunmbi, Iwa-Pele, Ifa Quest: The Search for the Source of Santería and Lucumí 82 (1991).

163 This is not to suggest that Judeo-Christian religions have no oral traditions, or that earth-based belief systems have no written traditions. However, generally speaking, those religions which fall within or derive from Judeo-Christian origins tend to rely on and center on the written word, as manifested in the Bible, Talmud, or Koran, for example. "The Bible and the Bible only is the religion of Protestants." The Oxford Dictionary of Quotations 199 (Angela Partington ed., 4th ed. 1992) (citing William Chillingworth, The Religion of Protestants.) Many, if not most earth-based belief systems tend to continue as they began--in an oral tradition passed on through each generation.

164 2 Habakkuk 2 (emphasis added).

165 Susan Griffin Brown, Woman and Nature 190 (1978).

166 The Bible is replete with references which support this premise. In the Islamic religion, which has the Koran as its sacred written text, Jesus is considered "the Word which God placed into Mary." Anne Marie Schimmel, Islam: An Introduction 73 (1992). The Koran is considered "not the word of a prophet but the unadulterated word of God...." Id. at 29. Similarly, the Torah is considered to be "the Law as the will of Yahweh revealed through the priests." Encyclopedia of Religion 3546 (Paul Kevin Meagher et al. eds., 1979). The Vedas, in Hinduism, while not exactly analogous to the Bible, for example, are also written sacred texts. ("The Vedas ... and other writings comprising the sacred canon of Brahmanic Hinduism, recognized as authoritative in all orthodox Hinduism"). Id. at 3647.

167 "This history of the sacred pipe of the Sioux was handed down orally by the former Keeper of The Sacred Pipe, Elk Head (Hehaka Pa) ...." The Sacred Pipe: Black Elk's Account of the Seven Rites of the Oglala Sioux xii (Joseph E. Brown ed., 1984). See also L. Ernesto Pichardo, Oduduwa Obatala 1-2 (1984) (stating that Santería was an oral tradition until this century; the first writings were done in secret); Acaoohkiwina and Acimowina: Traditional Narratives of the Rock Cree Indians (Robert A. Brightman ed., 1989) (including accounts of sacred rites and rituals traditionally passed down orally now being written down for fear they will be lost forever).

168 Russel Barsh's article is instructive in noting the Australian case of Foster v. Mountford, 29 F.L.R. 233 (N. Terr. Sup. Ct. 1976). Barsh, supra note 139, at 391. That case arose when members of the Pitjantjara Council (an Aboriginal group) sought to block the publication of a book by the defendant/author Dr. Mountford. Thirty-five years earlier, the Pitjantjara people had taken Dr. Mountford "into their confidence, they showed him and explained to him sacred sites and objects, paintings and rock engravings, and he recorded their myths and totemic geography by aboriginal drawings, the camera and the notebook." Foster, 29 F.L.R. at 236. The author had even acknowledged, in his foreword, that his book "should be used only after consultation with local male religious leaders...." Id. The plaintiffs argued that the revelation of this information was a breach of confidence, and that the book revealed secrets that, the court found, if revealed to "women, children and uninitiated men may undermine the social and religious stability of their hard-pressed community." Id.

169 Barsh, supra note 139, at 391 (emphasis added).

170 Foster, 29 F.L.R. at 236.

171 Barsh, supra note 139, at 392.

172 "Blessed Lord, who hast caused all holy Scriptures to be written for our learning; Grant that we may in such wise hear them, read, mark, learn...." Book Of Common Prayer, reprinted in The Oxford Dictionary of Quotations 120 (1992) (emphasis added). The subtext here, of course, reinforces the ideas that the "one truth," "one idea," "one word," inherent in monotheism, are captured in the "one" Book ("the Word," "the Good Book"). See supra notes 63-66 and accompanying text.

173 This approach dominates law and science. Generally, evidence labeled anecdotal, as opposed to empirical, is dismissed or discounted. It is this view that is reflected in the weight courts give not only to certain types of evidence, but certain witnesses. For example, in Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), the plaintiffs, Navajos and Hopis, filed suit seeking to stop the expansion of ski slopes in the San Francisco Peaks, sacred to both tribes. The plaintiffs' affidavits asserted that the Peaks (including the permit area) were indispensable to their religious practices. The district court, however, rejected the position that the permit area was central to their religions. Id. at 745 n.7. The appellate court upheld the decision, noting that the evidence that all of the Peaks are sacred, including the ski area that was to be expanded, "does not establish the indispensability of the permit area." Id. This finding seemed to mirror the testimony of two government witnesses who were experts on the Navajo and Hopi religions. Id. at 744. It would appear, therefore, that the experts on religious beliefs and practices carried more weight in court than did the practitioners themselves, who argued otherwise.

174 There is clearly a connection here between the negative societal views towards women and what are traditionally described as feminine characteristics, i.e., emotion vs. intellect or intuition vs. reason.

175 The definition for supernatural is telling: "of or caused by power above the forces of nature." Oxford American Dictionary 923 (Eugene Ehrlich et al. eds., 1980) (emphasis added). But in fact, others would argue that those things typically labelled "supernatural" (spirits, for example) are not "above" nature, but simply a part of nature.

176 "Washington was titillated when Sunday's Washington Post ran ... excerpts from 'The Choice' ... that says the president's wife found encouragement by talking with Jean Houston, co-director of the Foundation for Mind Research, which studies psychic experience." First Lady Defended on Ties to New Age Author, L.A. Times, June 24, 1996, at A11. Even Dr. Houston herself stated: "I'm not a psychic! I don't believe in spirits and spooks!" Paula Span, Spirits Lifted, Not Summoned: Philosopher Jean Houston Denies Role as First Lady's Spiritual Guide, N.Y. Times, June 25, 1996, at C1. She went on to note: "Mrs. Clinton is a very committed Christian, a serious Methodist. The president is a prayerful man." Id. Deborah Tannen, a linguistics professor who wrote a New York Times Op-Ed piece on this issue, zeroed in on the sexism underlying the attacks on Dr. Houston and Hillary Rodham Clinton, by comparing how differently, i.e., matter of factly, the media report on male athletes and businesses who rely on visualization and other such techniques to be successful. Deborah Tannen, The Guru Gap, N.Y. Times, at A19. But what has gone unnoticed is why one set of beliefs (psychics, channeling, seánces) is inherently ridiculous, while another (God speaking to Moses, archangels, Lot's wife turning to a pillar of salt) is not. It is impossible to imagine a newspaper in this country discussing these latter beliefs in any way other than respectfully, if not reverentially. I am simply suggesting here that the media reaction is not very different from the implicit reactions and views of many judges.

177 See Griffin Brown, supra note 165, at 51-52, 190-91. Griffin quotes Carolus Linnaeus: "The first step of science is to know one thing from another... but in order that it may be fixed and permanent distinct names must be given to different things and those names must be recorded and remembered." Id. at 146 (citation omitted). This seems to be equally applicable to Judeo-Christian religions.

178 Allen, supra note 152, at 58.

179 2 Genesis 23.

180 Allen, supra note 152, at 13.

181 1 Corinthians 11.

182 1 Genesis 26, 27.

183 See generally The Book of the Goddess Past and Present (Carl Olsen ed., 1985); Allen, supra note 152, at 13-29; Gonzalez-Wippler, supra note 131, at 24-30. See also Barsh, supra note 139, at 364-65.

184 3 Genesis 12.

185 "The power of woman is her dependence, flowing from the consciousness of that weakness which God has given her for protection. But when she assumes the place and tone of man as public reformer ... she yields the power which God has given her for her protection, and her character becomes unnatural ...." Adrienne Rich, Of Woman Born 53 (1976) (quoting a pastoral letter from the Congregational Church sent to the Grimké sisters who had been speaking out publicly against slavery) (citation omitted).

186 This is not meant to refer to woman as mother. Rather, it refers to "She Who Thinks rather than She Who Bears ... [a] woman as creation thinker and female thought as origin of material and nonmaterial reality. In this epistemology, the perception of female power as confined to maternity is a limit on the power inherent in femininity." Allen, supra note 152, at 15.

187 For example, the Cherokee, in times of war, had a red government, which included among its officers "Beloved, Pretty or War Women." Rennard Strickland, Fire and the Spirits: Cherokee Law from Clan to Court 26 (1975). The Cherokee, like many other Indian nations, was matrilineal. Id. at 22. See also Allen, supra note 152, at 20-32.

188 Gonzalez-Wippler, supra note 131, at 26. Two of those gods propagated the human race. Id.

189 Allen, supra note 152, at 13-17.

190 See generally The Book of the Goddess Past and Present, supra note 183.

191 1 Genesis 26.

192 Barsh, supra note 139, at 365 (citing A. Hultkrantz, Belief and Worship in Native America 27 (1981)).

193 T.S. Eliot, The Dry Salvages, in Four Quartets 21, 21 (1943).

194 Allen, supra note 152, at 60.

195 Brown, supra note 151, at 70 (citation omitted).

196 Susan Griffin, Pornography and Silence: Culture's Revenge Against Nature 71 (1981).

197 Brown, supra note 151, at 38. Oftentimes, deities take the form of animals.

198 Barsh, supra note 139, at 366.

199 Brown, supra note 151, at 53.

200 Fatunmbi, supra note 162, at 20.

201 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).

202 Id. at 740. One hesitates to imagine what would be an impermissible burden.

203 Id. at 740 n.2 (quoting testimony of Abbott Sekaquaptewa, then-chairman of the Hopi tribe).

204 Id. at 741 (emphasis added).

205 Id. at 744 (emphasis added).

206 Id. at 745 n.7.

207 541 F. Supp. 785 (D.S.D. 1982), aff'd, 706 F.2d 956 (8th Cir. 1982), cert. denied, 464 U.S. 977 (1983).

208 The named individual plaintiffs included traditional chiefs and spiritual leaders. Id. at 787. Fools Crow was Ceremonial Chief of the Teton Sioux, and a renowned spiritual leader. See generally Mails, supra note 153. Arvol Looking Horse, another plaintiff in the case, is the keeper of the Sacred Calf Pipe. Id. at 55.

209 Fools Crow, 541 F. Supp. at 785.

210 Id. at 788-89. The court also said that the specific area was used by Indians for camping as well. But in reviewing the evidence cited in the opinion, the “camping” was not recreational, but for extended (i.e., more than one day) ceremonies.

211 Id. at 789. The court noted that the record showed no evidence that plaintiffs had ever been denied access for ceremony or worship. Id.

212 A critical point here, however, is that in fact permits had been denied. Barsh, supra note 139, at 405 n.286. Barsh cites the Joint Appendix in the case and states that there was uncontroverted testimony on this issue. Id. Barsh also states: “The court furthermore accepted the State administrator's contentions that ‘numerous people,’ whom he could not identify but ‘appeared to be American Indian people,’ had asked for road improvements, and that medicine man Fools Crow had been ‘pleased’ with the road, over hearsay objections and Fools Crow's vigorous denial under oath.” Id.

213 Fools Crow, 541 F. Supp. at 789 (emphasis added).

214 620 F.2d 1159 (6th Cir. 1980).

215 638 F.2d 172 (10th Cir. 1980).

216 Fools Crow, 541 F. Supp. at 791. In Badoni, the Tenth Circuit had rejected the district court's finding that the plaintiffs had no property interest in the land as dispositive. Id. Rather, it held that “the government must manage its property in a manner that does not offend

the Constitution." Id. at 176. In Sequoyah, the Sixth Circuit had a more qualified view of the matter. It stated that while a lack of property interest "is a fact to be considered, we feel it should not be conclusive in view of the history of the Cherokee expulsion from Southern Appalachia." Sequoyah, 620 F.2d at 1159, 1164 (emphasis added).

217 Fools Crow, 541 F. Supp. at 791. Private ownership of land is essentially antithetical to religious beliefs that view humans as caretakers and guardians of nature and the earth. Thus, while there was no "property" interest in the land, as owner, there clearly was (and is) an interest in Bear Butte, generally, and specifically as a ceremonial place.

218 Id.

219 Id. at 788.

220 Badoni, 638 F.2d 172. In Badoni, the government's impounding water to form Lake Powell drowned some of the Navajo plaintiffs' gods, the Navajos were denied access to a sacred prayer spot, and tourists were allowed to visit Rainbow Bridge, a previously isolated sacred site.

221 Although in Sequoyah the impoundment created by the Tellico dam would flood land the court acknowledged as a sacred homeland to the Cherokee people and destroy sacred sites, holy places and cemetaries, the court held it did not violate the Free Exercise Clause. Sequoyah, 620 F.2d 1159.

222 Fools Crow, 541 F. Supp. at 792.

223 Id. at 793.

224 485 U.S. 439 (1988).

225 Id. at 442.

226 Id.

227 Id. (citing a study of American Indian cultural and religious sites in the area commissioned by the Forest Service).

228 Id. at 442.

229 Id. at 444.

230 476 U.S. 693 (1986).

231 Id. at 696.

232 Lyng, 485 U.S. at 449 (emphasis added). Some of the Court's tortured reasoning in this case foreshadowed the disingenuous manueverings in the Smith case two years later. The Lyng Court rejected the argument that the burdens on religious exercise here were much greater than those in Bowen, stating that it could look to the underlying beliefs in either case. Therefore, it noted that it could not tell the difference between the two claims, and so the same result would obtain. In other words, the two claims seem to be the same, but we can't (or, rather, won't) look beyond the surface to see whether that is true and whether a different result warranted.

233 Id. at 451.

234 Id. at 453.

235 Id. at 465 (Brennan, J., dissenting).

236 Id. at 476 (Brennan, J., dissenting).

237 See id. at 452 ("The First Amendment must apply to all citizens alike ....").

238 Wisconsin v. Yoder, 406 U.S. 205, 212 (1972).

239 Id. at 222. See also id. at 212-13. "[T]he Amish community has been a highly successful social unit.... Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms ...." While all of the above information was apparently very meaningful to Justice Burger, I can find no legal relevance in it. One would hope he was not suggesting that religious liberty is or should somehow be tied to some sort of merit test.

240 Yoder, 406 U.S. at 210.

241 Wilson v. Block, 708 F.2d 735, 738 (1983).

242 "[C]ompulsory high school attendance could result in the destruction of the Old Order Amish church community as it exists in the United States today." Yoder, 406 U.S. at 212. "[C]onstructing a road ... 'would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of the Northwest California Indian peoples."' Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 442 (1988) (citation omitted). "The Hopis and Navajos believe that they owe a duty to the deities to maintain the San Francisco Peaks in their natural state. They believe that breach of that duty will lead to serious adverse consequences for their peoples." Wilson, 708 F. 2d at 740. "Plaintiffs believe that if humans alter the earth in the area of the Bridge, plaintiffs' prayers will not be heard by the gods and their ceremonies will be ineffective to prevent evil and disease." Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir 1980).

243 Lyng, 485 U.S. at 466 (Brennan, J., dissenting).

244 Id. at 467-68 (Brennan, J., dissenting).

245 Id. at 473 (Brennan, J., dissenting).

246 Id.

247 Id. at 477 (Brennan, J., dissenting).

248 Empl. Div., Dep't. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Where the Supreme Court rejected the compelling interest test. The Plaintiffs, Smiths' drug counselors, were denied unemployment compensation after losing their jobs because of their spiritual use of peyote.

249 James Ryan has argued that free exercise cases generally do not receive enough attention, which, he says, explains why the Smith decision provoked such a reaction. Ryan, supra, note 17, at 1407-08. Even the Babalú-Ayé decision, where plaintiffs actually won on their claim, does not represent a true victory in the jurisprudence of the Free Exercise Clause. Church of the Lukumi Babalú Ayé, Inc. v. City of Hialeah, 508 U.S. 520 (1993). There, where the City of Hialeah sought to prohibit animal sacrifice, a fundamental religious practice in the Santería religion, it did so by poorly drafting statutes that were both overly broad and narrowly drawn. See id. at 521-22. It was that fact, coupled with a legislative history that showed an absolute intention to reach only the Santería church, that led the Supreme Court to strike down the statutes. Id. at 534-42. It seems clear from both that opinion, id. at 538-39, and the legislative history of the RFRA, that a "properly" drawn statute prohibiting animal sacrifice could survive a constitutional free exercise challenge, despite the practice's centrality to the Santería religion. See, e.g., 139 Cong. Rec. § 14461-01, S114467 (daily ed. Oct. 27, 1993) (statement of Sen. Kennedy) ("It is certainly not the intent of Congress to stifle the enforcement of religious-neutral laws that protect animals.").

250 See, e.g., James M. Donovan, God Is As God Does: Law, Anthropology and the Definiton of "Religion," 6 Seton Hall Const. L.J. 23, 26-27 (1995).

251 But see George C. Freeman, III, The Misguided Search for the Constitutional Definition of "Religion," 71 Geo. L.J. 1519, 1519-20 (1983). I agree with Freeman's conclusion that there can not be a workable definition, but not necessarily for all of the same reasons. As I have argued throughout this Article, I believe that the very idea of and need for a definition, in and of itself, is, in some way, a specifically religious perspective, i.e., one derived from a Judeo-Christian, monotheistic approach to the world and life.

252 "[I]t is important to have some objective guidelines in order to avoid ad hoc justice." Malnak v. Yogi, 592 F.2d 197, 210 (3d Cir. 1979) (Adams, J. concurring) (emphasis added).

253 Griffin Brown, supra note 165, at 191.

254 "Monotheism posits a god whose essential attribute is that he [sic] is all-powerful.... But his power is most devastatingly that of an idea in people's minds, which leads them to obey him ... and to reject other deities ...." Rich, supra note 185, at 66.

255 Many other religions may have, to varying degrees, concerns about, and some need for explanations and answers. However, I argue here that it is inherent in a monotheistic religion. Where a dominant religion has pervaded the cultural values, traditions, and overall jurisprudence of a society, the problems in defining religion are obvious.

256 The Internal Revenue Service also grapples with determining what constitutes a religion. While it does not have a fixed definition, it tends to rely on guidelines to determine tax-exempt status. See Donna D. Adler, The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making, 28 Wake Forest L.Rev. 855, 877-79 (1993); Terry A. Slye, Rendering Unto Caesar: Defining "Religion" For Purposes of Administering Religion-Based Tax Exemptions, 6 Harv. J.L. & Pub. Pol'y 219 (1983).

257 Davis v. Beason, 133 U.S. 333, 342 (1890).

258 380 U.S. 163 (1965).

259 398 U.S. 333 (1970).

260 Seeger, 380 U.S. at 176 (emphasis added).

261 367 U.S. 488. The Court held that government cannot favor religions which were based on a belief in the existence of God over religions which were not. Id. at 495.

262 Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

263 "Under the modern view, 'religion' is not confined to the relationship of man with his Creator, either as a matter of law or as a matter of theology. Even theologians of traditionally recognized faiths have moved away from a strictly Theistic approach in explaining their own religions." Malnak v. Yogi, 592 F.2d 197, 207 (3d Cir. 1979) (Adams, J., concurring) (citations omitted).

264 See supra notes 164-77 and accompanying text.

265 Sequoyah, 620 F.2d at 1162.

266 This was demonstrated in the Sequoyah case, where demands for water superseded any right to protect religious beliefs and practices. While the court here, as in other sacred site cases, recognized the beliefs asserted as religious ("the Cherokees have a religion within the meaning of the Constitution"), id. at 1163, the recognition had no practical value. The beliefs and practices, because they stood outside of Judeo-Christian principles and perspectives and values, were therefore not appreciated and not protected in the same way that "mainstream" religious beliefs have been.

267 Africa v. Pennsylvania, 662 F.2d 1025, 1033 (3d Cir. 1981), cert. denied, 456 U.S. 908 (1982).

268 Malnak, 592 F.2d at 199 (emphasis added). See also United States v. Seeger, 380 U.S. 163, 176 (1965).

269 Id. at 207 (Adams, J., concurring).

270 Id. (emphasis added).

271 Africa, 662 F.2d at 1032, (citing Malnak, 592 F.2d at 207-10 (Adams, J., concurring)). See also Callahan v. Woods, 658 F.2d 679 (9th Cir. 1981) (adopting Malnak criteria). The Callahan opinion was written by Judge Adams, sitting by designation. I am not going to discuss this third indicium as I think that its meaning and interpretations are obvious. Judge Adams, in his concurrence in Malnak,

when discussing this third indicium, notes: "Of course, a religion may exist without any of these signs ...." Malnak, 592 F.2d at 209. However, his footnote immediately following that statement quotes Durkheim as stating: "In all history, we do not find a single religion without a Church [sic]." Id., at n.44 (citation omitted). In earth-based religions, where one's relationship with his or her dieties is very much a personal matter, and there is no real hierarchy imposed or required in order to worship or pray, neither is there any need for buildings or specific organizational structures.

272 Jesse Choper has noted several specific problems with the "ultimate concerns" test. Choper, supra note 7, at 70-74. He notes that it automatically excludes a number of religious traditions, id. at 71; that application of this concept to legal problems, when it was primarily aimed at theologians and laypersons (formulated by the theologian Paul Tillich) oversimplifies a complex theological argument; and finally, people may have ultimate concerns about a number of issues. This last point then, he argues, "is at odds with an important historical assumption that underlies the constitutional protection granted by the Religion Clauses: that religion comprehends matters with which the government ... is not competent to interfere." Id. at 72. George Freeman has also identified numerous problems with the ultimate concerns test. See Freeman, supra note 251, at 1534-41.

273 United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943). The idea of martyrdom and a disregard of "elementary self-interest" would seem, in and of itself, to reinforce ideas of hierarchy, and is a concept with historical links to Judeo-Christian traditions but not necessarily earth-based ones. Additionally, George Freeman has shown how unworkable this interpretation is. He notes that "self-interest might be an individual's ultimate concern." Freeman, supra note 251, at 1535 (emphasis added).

274 Africa, 662 F.2d at 1033. The Court described MOVE as having an ideology requiring its members to "live in harmony with what is natural, or untainted." Id. at 1027. It is also described as a "revolutionary organization." Id. at 1026.

275 Malnak, 592 F.2d at 209 (Adams, J., concurring) (emphasis added). See also Africa, 662 F.2d at 1033. Also, as Freeman notes, an "ultimate concern" test for free exercise has the end result of a standard "so narrow that only a few could expect to enjoy its protection." Freeman, supra note 251, at 1541.

276 Malnak, 592 F.2d at 208-09 (Adams, J., concurring) (emphasis added).

277 Id. at 209 (Adams, J., concurring) (emphasis added).

278 14 John 9 (emphasis added).

279 This is also seen in the emphasis in the idea of heaven and hell, i.e., the preoccupation with life after death. In many earth-based religions, by contrast, how one lives one's life is important not for what it may guarantee after death, but because it is precisely one's relationship with all other living beings during one's life that matters.

280 I am not prepared here to address the debates surrounding court custody determinations or the appropriateness of the best interest standard. I am simply asserting that courts, lawyers, academics and/or legislatures have sometimes arrived at the conclusion that fairness, in some instances, is best served by a case by case determination, with only the very broadest of guidelines established.

281 Malnak, 592 F.2d at 210 (Adams, J., concurring).

282 Indeed, as Justice O'Connor pointed out in Smith, the First Amendment does not make such a distinction. Empl. Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 893 (1990).

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§ 18.01 Aboriginal Hunting, Fishing, and Gathering Rights

When Europeans arrived on the North American continent, hunting, fishing, trapping, and gathering were vital to Indian life. Many tribes relied heavily, some exclusively, on these activities for their food, clothing, and shelter. As the United States Supreme Court stated in *United States v. Winans*,[1] these activities "were not much less necessary to the existence of the Indians than the atmosphere they breathed."[2] Aboriginal, or original Indian, title over land[3] includes the right to engage in hunting, fishing, and gathering activities. In *Mitchel v. United States*,[4] the Court stated:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.[5]

Aboriginal title, along with its component hunting, fishing, and gathering rights, remains in the tribe that originally possessed it unless it has been granted to the United States by treaty, abandoned, or extinguished by statute.[6] A claim based on aboriginal title is good against all but the United States. The power to extinguish aboriginal title or aboriginal use rights rests exclusively with the federal government.[7] If aboriginal title to land is extinguished, the hunting, fishing, and gathering rights on the land are extinguished as well, unless those rights are expressly or implicitly reserved by treaty, statute, or executive order.[8] Aboriginal rights will not be extinguished, however, absent "plain and unambiguous" congressional intent.[9] Some state courts have ignored this rule. In *Vermont v. Elliott*,[10] for example, the Vermont Supreme Court found the aboriginal title of the Missiquoi Abenaki Tribe to have been extinguished by a series of events preceding and following

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

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

3 *See* Ch. 15, § 15.04[2].

4 Mitchel v. United States, 34 U.S. 711 (1835).

5 Mitchel v. United States, 34 U.S. 711, 746 (1835); *see also, e.g.*, United States v. Michigan, 471 F. Supp. 192, 256 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981); State v. Coffee, 556 P.2d 1185, 1188 (Idaho 1976) ("hunting and fishing rights are part and parcel with aboriginal title"). For discussion of how aboriginal title is established, see Ch. 15, § 15.04[2]; Ch. 16, § 16.02.

6 *See* United States v. Santa Fe P. R. Co., 314 U.S. 339, 347 (1941); Sac & Fox Tribe of the Mississippi in Iowa v. Licklider, 576 F.2d 145 (8th Cir. 1978); *cf.* Native Vill. of Eyak v. Blank, 688 F.3d 619, 622 (9th Cir. 2012) (holding the Village had not satisfied burden of proof necessary to establish aboriginal title, but asserting that "[a]boriginal rights don't depend on a treaty or an act of Congress for their existence.").

7 *See, e.g.*, Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 667 (1974); United States v. Santa Fe P. R. Co., 314 U.S. 339, 347 (1941).

8 Confederated Tribes of the Chehalis Indian Reservation v. Washington, 96 F.3d 334, 341 (9th Cir. 1996); Western Shoshone Nat'l Council v. Molini, 951 F.2d 200, 202–203 (9th Cir. 1991). If hunting, fishing, and gathering rights have been recognized by treaty, however, proof of prior aboriginal title and use can be important in determining the extent of the rights reserved under the treaty. *See, e.g.*, United States v. Michigan, 471 F. Supp. 192, 216 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981) (treaty essentially reserved tribe's aboriginal rights to fish).

9 *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247–248 (1985) (quoting United States v. Santa Fe P. R. Co., 314 U.S. 339, 346, 354 (1941) (congressional intent to extinguish original title must be "plain and unambiguous," and "will not be lightly implied").

10 Vermont v. Elliott, 616 A.2d 210 (Vt. 1992).

the admission of Vermont to the Union. The Vermont Supreme Court ruled that aboriginal title had been extinguished by "the increasing weight of history."[11] Other courts have stated that the exercise of off-reservation aboriginal hunting, fishing, and gathering rights is subject to state game regulation when no treaty, statute, or agreement exists to protect the exercise of those rights free of regulation.[12]

When aboriginal rights are extinguished, the Supreme Court has held that the *just compensation clause of the federal Constitution* does not require Congress to compensate the tribes for a *fifth amendment* taking.[13] Instead, compensation for the extinguishment of aboriginal rights depends on congressional authorization.

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[11] Vermont v. Elliott, 616 A.2d 210, 218 (Vt. 1992). *But see* Commonwealth v. Maxim, 695 N.E.2d 212, 214 (Mass. App. Ct. 1998), *aff'd*, 708 N.E.2d 636 (Mass. 1999) (recognizing Wampanoag aboriginal rights to gather shellfish). For critiques of the *Elliott* ruling, see Gene Bergman, *Defying Precedent: Can Abenaki Aboriginal Title be Extinguished by the "Weight of History"?*, 18 Am. Indian L. Rev. 447 (1993); John P. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, 42 Buff. L. Rev. 77 (1994); Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481 (1994).

[12] *See* Organized Vill. of Kake v. Egan, 369 U.S. 60, 76 (1962) (Secretary of the Interior lacked authority to adopt regulations granting tribes exclusive fishing rights); *see also* State v. Newell, 24 A. 943, 943–944 (Me. 1892) (because the federal government never recognized the Passamaquoddy Tribe, state law applied to hunting and fishing outside tribal lands); State v. Posenjak, 111 P.3d 1206 (Wash. Ct. App. 2005) (holding member of tribe not recognized by the federal government and not a recognized successor of the signatory tribe to be subject to state hunting laws).

[13] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955). Extinguishment could still be an actionable breach of trust. *See* Ch. 15, §§ 15.09[1][d][i].

§ 18.02 Origin of Reserved Hunting, Fishing, and Gathering Rights

Consistent with the importance of their traditional practices,[1] Indian tribes often sought to retain the rights to hunt, fish, trap, and gather, collectively referred to as usufructuary rights, when they signed treaties and agreements ceding ownership of and sovereignty over their lands. Because of the impact of these continuing Indian rights, particularly outside reservations, frequent clashes have occurred with states over the extent of the rights and the degree of state regulatory authority over them. Most of these controversies have occurred in the Pacific Northwest and the western Great Lakes regions, where tribes reserved off-reservation rights.[2]

When a treaty reserves or grants lands to a tribe, tribal ownership necessarily includes full hunting, fishing, and gathering rights on those lands.[3] These treaty rights are property rights that cannot be taken by Congress or the courts without compensation.[4]

In addition, tribes frequently entered into treaties that expressly reserved hunting, fishing, and gathering rights on specified lands outside reservation borders.[5] Treaties reserving hunting, fishing, and gathering rights over previously owned tribal lands do not constitute a "grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[6] Treaty-reserved hunting, fishing, and gathering rights on off-reservation lands are akin to easements running with the burdened lands, and include easements to access hunting, fishing, and gathering sites.[7] Thus, reserved rights on off-reservation lands do not require the tribe to have title to the underlying land.[8] These treaty-reserved easements, like the treaty-reserved hunting, fishing, and gathering rights themselves, are property rights within the meaning of the *fifth amendment* and cannot be taken by Congress or the courts without compensation.[9]

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[1] *See* § 18.01.

[2] *See, e.g.*, Michael C. Blumm, Sacrificing the Salmon: A Legal and Policy History of the Decline of Columbia Basin Salmon (Book World Publ'ns 2002); Rick Whaley & Walt Bresette, Walleye Warriors: The Chippewa Treaty Rights Story (Tongues of Green Fire Press 1994).

[3] *See, e.g.*, Menominee Tribe v. United States, 391 U.S. 404, 406 (1968) (reservation of lands "to be held as Indian lands are held" necessarily included rights to hunt and fish on those lands).

[4] Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); Hynes v. Grimes Packing Co., 337 U.S. 86, 105 (1949).

[5] *See, e.g.*, Treaty with the Makah, 1855, art. 4, ***12 Stat. 939*** ("[t]he right of taking fish and whaling or sealing at usual and accustomed grounds and stations … together with the privilege of hunting and gathering roots and berries on open and unclaimed lands"); Treaty with the Chippewa, 1837, art. 5, ***7 Stat. 536*** ("[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded").

[6] United States v. Winans, 198 U.S. 371, 381 (1905).

[7] United States v. Winans, 198 U.S. 371, 381 (1905) ("[the treaties] imposed a servitude upon every piece of land as though described therein"); *see* 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 (1998); Restatement (Third) of Property (Servitudes) § 1.2, & cmt. e (2000).

[8] *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 201–202 (1999); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 700 F.2d 341, 352 (7th Cir. 1983); Kimball v. Callahan, 590 F.2d 768, 775 (9th Cir. 1979).

[9] ***Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510 (W.D. Wash. 1988)***; *see also* United States v. Welch, 217 U.S. 333, 338–339 (1910) (easements are property rights requiring just compensation if taken by federal government); Jon W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land § 10.13 (West, 2001-2011). For discussion of ***fifth amendment*** taking rights, see Ch. 15, § 15.09[1]; § 18.07[6].

Treaty language reserving hunting, fishing, and gathering rights is to be construed pursuant to the Indian law canons of construction.[10] These rules of construction are based on the communication difficulties between the tribes and the treaty negotiators, the imbalance of power between the tribes and the United States, and the fact that the tribes are unlikely to have understood the legal ramifications of the exact wording of their treaties.[11]

After an 1871 statute prohibited further treaties with Indian tribes,[12] the usual methods of dealing with Indian tribes and establishing reservations were statutes, executive orders, or agreements later approved by statute.[13] Indian tribes whose reservations are set aside by statute, executive order, or agreement generally have the same implied hunting, fishing, and gathering rights within their borders as tribes with treaty reservations.[14] In addition, agreements later ratified by statute operate as treaty substitutes, and may expressly reserve off-reservation hunting, fishing, and gathering rights as well.[15] Statutes and agreements ratified by Congress become, like treaties, the supreme law of the land, and preempt state laws to the contrary.[16] Moreover, the Indian law canons of construction that are used to interpret treaties are also employed to interpret executive orders, statutes, and agreements.[17]

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[10] *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 194 n.5, 196, 200 (1999) (treaties are to be interpreted liberally in favor of Indians; treaty ambiguities are to be resolved in Indians' favor, and treaties are to be interpreted as Indians would have understood them). *See* Ch. 2, § 2.02.

[11] *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 n.10 (1979). In a lower court opinion on the same issue the court described the negotiations prior to the signing of the treaties in the Puget Sound region, explaining that some aspects of the arrangements could not be accurately translated into the Chinook trade jargon and that the "vast majority of Indians at the treaty councils did not speak or understand English." *United States v. Washington*, 384 F. Supp. 312, 330 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). "Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ." *Id. See also* Ezra Meeker, Pioneer Reminiscenses of Puget Sound and the Tragedy of Leschi 208 (Lowman & Hanford 1905).

[12] 25 U.S.C. § 71.

[13] *See* Ch. 1, § 1.04.

[14] United States v. Dion, 476 U.S. 734, 745 n.8 (1986) ("Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty."); *see also* Parravano v. Masten, 70 F.3d 539, 547 (9th Cir. 1995) (emphasizing that hunting, fishing, and gathering rights of executive order lands "are entitled to the same protection against non-federal interests" as rights created by treaty).

[15] Antoine v. Washington, 420 U.S. 194, 196 (1975) (cession of land by an agreement ratified through statute reserved to the tribe "the right to hunt and fish" on the ceded lands); *cf.* Confederated Tribes of the Chehalis Indian Reservation v. Washington, 96 F.3d 334, 342–343 (9th Cir. 1996) (rejecting claim to implied off-reservation rights based on executive order). *See* United States v. Confederated Tribes of the Colville Reservation, 606 F.3d 698 (9th Cir. 2010) (despite later move to Colville Reservation, Wenatchi tribe members retained fishing rights at off-reservation site pursuant to 1894 agreement).

[16] Antoine v. Washington, 420 U.S. 194, 201, 204 (1975). In *Antoine*, the Supreme Court reversed the convictions of two Colville Indians for state game violations in an area the tribe had ceded to the government in an 1891 agreement that was later ratified by Congress. The Court noted the agreement specified that the hunting rights of the Indians in common with other persons would not be taken away or abridged.

[17] *See, e.g.*, Confederated Tribes of the Chehalis Indian Reservation v. Washington, 96 F.3d 334, 342 (9th Cir. 1996) ("[a]s with treaties, executive orders are interpreted as the Indians would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor"); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1259 n6 (9th Cir. 1983); Antoine v. Washington, 420 U.S. 194, 199 (1975). *See* Ch. 2, § 2.02.

§ 18.03 On-Reservation Indian Hunting, Fishing, and Gathering Rights

[1] Ownership and Allocation of the Rights

Indians enjoy exclusive hunting, fishing, and gathering rights on reservation lands. Although some treaties provide expressly that Indians have exclusive hunting, fishing, and gathering rights on their reservations,[1] it is not necessary that the rights be referred to as "exclusive" in the treaty, or even that they be expressly mentioned.[2] Exclusive on-reservation hunting, fishing, and gathering rights are implied from the establishment of a reservation for the exclusive use of a tribe, whether the reservation was set aside by executive order, statute, agreement, or treaty.[3] In some cases, evidence of historic harvesting practices may affect the determination of reservation borders. For example, the Washington Supreme Court interpreted the boundaries of the Swinomish Reservation established in a treaty and executive order to include the tidelands to the "extreme low water mark" because of the Indian custom of digging clams in the area.[4]

Although exclusive tribal hunting, fishing, and gathering rights continue on reservation lands held by or for Indians, the exclusive nature of the rights is lost on lands within reservation boundaries that have been alienated in fee to non-Indians.[5] The continuing exclusive nature of the on-reservation rights on tribally owned lands, however, is confirmed by a federal statute that makes it a crime for any person to take game from restricted Indian lands "without lawful authority or permission."[6]

If a reservation has been terminated,[7] reserved tribal harvesting rights will be retained in former reservation areas unless the termination act expressly extinguishes those property rights.[8] If a reservation has been disestablished or diminished,[9] reserved hunting, fishing, and gathering rights will be retained on the former reservation lands, unless those rights were exclusive within the reservation and tied to land ownership. Thus, if a tribe cedes reservation land on which it held exclusive hunting, fishing, and gathering rights that were tied to the reservation status of the land, the land cession

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1 *See, e.g.*, Treaty with the Yakima, 1855, art. 3, ***12 Stat. 951*** (reserving "exclusive right of taking fish in all the streams, where running through or bordering said reservation").

2 Menominee Tribe v. United States, 391 U.S. 404, 406 (1968) (treaty language setting aside reservation "to be held as Indian lands are held" implicitly included hunting, fishing, and gathering rights); United States v. Aanerud, 893 F.2d 956, 958 (8th Cir. 1990) (treaty silent as to hunting, fishing, and gathering rights nonetheless "reestablished the Minnesota Chippewas' aboriginal rights of hunting, fishing, and collecting rice").

3 *See* Menominee Tribe v. United States, 391 U.S. 404, 406–407 (1968); *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 326, 343–344 (1983) (exclusive tribal rights to regulate hunting, fishing, and gathering activities on reservation established by executive orders).

4 State v. Edwards, 62 P.2d 1094, 1095–1096 (Wash. 1936) (construing Treaty of Point Elliott, 1855, arts. 2 & 3, ***12 Stat. 927***); *see also* United States v. 4,450. 72 Acres of Land, 27 F. Supp. 167, 174 (D. Minn. 1939), *aff'd sub nom.* Minnesota v. United States, 125 F.2d 636 (8th Cir. 1942) (upholding use of eminent domain power to condemn state land to establish exclusive wild rice reserve).

5 *See* § 18.06; Montana v. United States, 450 U.S. 544, 560 (1981). Tribal regulatory authority over non-Indian hunting, fishing, and gathering may continue under some circumstances. *See* § 18.06[1].

6 *See* 18 U.S.C. § 1165.

7 *See* Ch. 3, § 3.04[3].

8 Menominee Tribe v. United States, 391 U.S. 404, 412–413 (1968).

9 *See* Ch. 3, § 3.04[3].

terminates the rights as well.[10] However, if a tribe cedes land on which it held nonexclusive hunting, fishing, and gathering rights, those rights survive cession of the land, unless the rights are clearly terminated.[11] Hunting, fishing, and gathering rights that survive on the former reservation lands will not be exclusive to tribal members, however, but are shared with nonmembers.[12]

[2] Regulation of Indian On-Reservation Rights

[a] Tribal Regulation

Tribes retain powers of self-government on their reservations when those powers have not been limited by treaties or acts of Congress.[13] By virtue of their retained powers of self-government, tribes holding on-reservation hunting, fishing, and gathering rights also retain the power to regulate their members in the exercise of those rights.[14]

[b] State Regulation

The states' ability to exercise concurrent regulatory authority over on-reservation hunting, fishing, and gathering activities by members of the governing tribe is severely restricted. States may regulate on-reservation hunting, fishing, and gathering by tribal members only in "exceptional circumstances."[15] The Supreme Court held that sufficient circumstances were present for state regulation in a case in which the on-reservation lands at issue no longer belonged to the tribe, the treaty accorded the tribe a right "in common with" non-Indians, and the state had an interest "in conserving a scarce, common resource."[16] Absent those circumstances, however, states may not regulate tribal members in the exercise of on-reservation hunting, fishing, and gathering rights.[17] Public Law 280 does not accord states any greater authority to regulate Indians, because it does not grant states regulatory power, only civil adjudication and criminal jurisdiction, and because it specifically exempts reserved hunting, fishing, and gathering rights from state authority.[18]

Nonetheless, several Public Law 280 states have relied on expansive applications of their on-reservation authority. Two have held that they may ban possession of firearms by, and thus limit treaty hunting rights of, Indians convicted of on-reservation felonies.[19] The Minnesota Court of Appeals reasoned there could be no treaty violation because the treaty

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[10] Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 776–78 (1985).

[11] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 201–202 (1999) (cession of nonreservation land on which tribe held nonexclusive hunting, fishing, and gathering rights that were not tied to land ownership did not terminate the rights); Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 174 n.13 (1977).

[12] Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 174 (1977) *(Puyallup III)*; United States v. Washington, 384 F. Supp, 312, 339 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

[13] The scope of tribal regulatory authority over non-Indians is discussed in Ch. 4, §§ 4.02–4.03.

[14] *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330 (1983); State v. McClure, 268 P.2d 629, 635 (Mont. 1954); Pioneer Packing Co. v. Winslow, 294 P. 557, 560 (Wash. 1930).

[15] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331–332 (1983).

[16] Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 174–177 (1977). State authority under this conservation-necessity standard is very limited; *see* § 18.04[3][b].

[17] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 n.15 (1983) (distinguishing Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 174–177 (1977)).

[18] *See* 18 U.S.C. § 1162(b) ("[N]othing in this section … shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."). For issues involving Public Law 280, *see* Ch. 6, § 6.04[3][b][vi].

[19] State v. Roy, 761 N.W.2d 883 (Minn. Ct. App. 2009; State v. Jacobs, 735 N.W.2d 535 (Wis. Ct. App. 2007).

right is tribal rather than individual.[20] This analysis contradicts Supreme Court precedents recognizing that treaty rights are reserved for the use of individual Indians.[21] In a third case, the Washington Supreme Court held that "when sentencing a tribal member for an off-reservation crime, the trial court may impose crime-related prohibitions to the extent they serve the purpose of sentencing and the crime related-prohibitions follow the individual during the prohibition's validity."[22] The court thus upheld a sentence precluding a tribal member from possessing a gill net on the Chehalis Reservation as a sanction for an off-reservation fishing offense.[23]

[c] Federal Regulation

Congress has the same authority to regulate Indian exercise of reserved hunting, fishing, and gathering rights that it has to regulate other tribally held rights.[24]

Even when tribal regulatory authority is exclusive of the states,[25] Congress may enact laws governing Indian on-reservation hunting, fishing, and gathering rights.[26] The Lacey Act[27] makes it a federal crime for "any person" to traffic in fish, wildlife, or plants taken in violation of federal, tribal, or state law.[28] The Lacey Act incorporates tribal law, but only in Indian country.[29] Because the Lacey Act applies to "any person," courts have found that it applies to tribal members as well as nonmembers in Indian country.[30] A tribal member in Indian country may be prosecuted under

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[20] State v. Roy, 761 N.W.2d 883, 886 (Minn. Ct. App. 2009). In *United States v. Winans*, 198 U.S. 371, 381 (1905), the Supreme Court described the relationship of individuals Indians to tribal treaty rights: "The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein." *See* United States v. Dion, 476 U.S. 734, 738 n. 4 (1986) (individual may assert tribal right as defense to prosecution); United States v. Fox, 573 F.3d 1050, 1054 (10th Cir. 2009) ("[W]hile acknowledging '[t]he right to hunt and fish on reservation land is a long-established tribal right,' we have long recognized that '[i]ndividual Indians … enjoy a right of user in the tribe's hunting and fishing rights.' ").

[21] United States v. Winans, 198 U.S. 371, 381 (1905) (describing the relationship of individual Indians to tribal treaty rights: "The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein."; *see also* United States v. Dion, 476 U.S. 734, 738 n. 4 (1986) (individual may assert tribal right as defense to prosecution); United States v. Fox, 573 F.3d 1050, 1054 (10th Cir. 2009). ("[W]hile acknowledging '[t]he right to hunt and fish on reservation land is a long-established tribal right,' we have long recognized that '[i]ndividual Indians … enjoy a right of user in the tribe's hunting and fishing rights.' ").

[22] State v. Cayenne, 195 P.3d 521, 524 (Wash. 2008).

[23] State v. Cayenne, 195 P.3d 521, 524 (Wash. 2008) (the trial court left open alternative means by which Cayenne could lawfully take fish on the reservation during his eight-month sentence). The court invoked *Nevada v. Hicks*, 533 U.S. 353 (2001), a Supreme Court case on a completely different topic—the limits of tribal court adjudicatory jurisdiction—to reach this flawed conclusion, which has yet to be adopted by any other court. For a discussion of *Hicks*, see Ch. 4, § 4.02[3](c)[ii]; Ch. 6, § 6.03.

[24] *See generally* Ch. 5, §§ 5.02–5.03. Congress's authority to abrogate or terminate hunting, fishing, and gathering rights, as well as its authority to regulate those rights under statutes of general applicability, are discussed in § 18.07.

[25] *See* § 18.03[2][a].

[26] *See* United States v. Sohappy, 770 F.2d 816, 819 n.3 (9th Cir. 1985).

[27] 16 U.S.C. §§ 3371–3378. The Lacey Act specifically disclaims any congressional intent to abrogate or modify tribal hunting, fishing, and gathering rights, or to affect the authority of either tribes or states to regulate in Indian country. 16 U.S.C. § 3378(c); *see* United States v. Brown, 777 F.3d 1025, 1033-1034 (8th Cir. 2015) (Lacey Act does not abrogate Indian treaty rights; therefor, United States may not prosecute tribe member for fishing on reservation in violation of tribal law).

[28] 16 U.S.C. § 3372(a).

[29] 16 U.S.C. § 3371(c).

[30] United States v. Sohappy, 770 F.2d 816, 822 (9th Cir. 1985).But see, United States v. Brown, 777 F.3d 1025, 1033-1034 (8th Cir. 2015) (Lacey Act does not authorize federal prosecution of tribe member for fishing in violation of tribal law). .

the Lacey Act for a violation of state law, however, only if the federal government proves that the state law is a valid conservation regulation applicable to tribal members in Indian country.[31]

The Department of the Interior may regulate on-reservation Indian hunting, fishing, and gathering rights if the regulation is supported by congressionally delegated powers, is warranted by the tribe's treaty, and is consistent with the department's trust responsibilities. Thus, the Tenth Circuit upheld interim game regulations imposed on the Wind River Reservation when the two governing tribes, the Shoshone and Northern Arapaho, were unable to reach agreement on a uniform code.[32] The court grounded the Secretary of the Interior's authority in congressional delegation of the power to manage Indian affairs[33] and to promulgate implementing regulations;[34] the applicable treaty, which the court found authorized the federal government to protect reservation resources; and the Shoshone Tribe's request that the Secretary intervene.[35] The Ninth Circuit relied on the same congressional delegation of authority to uphold the Secretary's regulations restricting tribal fishing on the Hoopa Valley Reservation to ceremonial and subsistence purposes.[36] The court found that the regulations were not arbitrary and capricious under the Administrative Procedure Act.[37] The court noted as well that the Secretary was acting as a trustee to allow tribal fishing consistent with preservation of a scarce resource.[38] On the other hand, a district court determined that regulations imposing royalties on fish caught and limiting sales to licensed buyers were beyond the Department's discretionary authority, because they were not warranted by the treaty that guaranteed the tribe exclusive on-reservation rights to fish.[39]

Congress also may remove regulatory barriers to the exercise of treaty rights. In 1988, Congress provided that no federal income and employment taxes would be imposed on tribal members engaged in "fishing rights-related activity" under a treaty, statute, or executive order.[40] A companion provision preempts state and local taxation of fishing activities to the same extent the activities are exempted from federal taxation.[41] The statutes are oddly limited to fishing income, and may not apply to income from other hunting and gathering activities such as wild ricing, although the limitation may be due to the fact that most commercial hunting, fishing, and gathering activity involves the fishing right.

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31 United States v. Sohappy, 770 F.2d 816, 823–824 (9th Cir. 1985); *see* §§ 18.03[2][b], 18.04[3][b].

32 N. Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987).

33 25 U.S.C. § 2.

34 25 U.S.C. § 9.

35 N. Arapahoe Tribe v. Hodel, 808 F.2d 741, 749–750 (10th Cir. 1987).

36 United States v. Eberhardt, 789 F.2d 1354, 1359–1360 (9th Cir. 1986). The California Supreme Court held that the comprehensive nature of the federal regulations preempted state conservation laws. Mattz v. Super. Ct., 758 P.2d 606, 613–614 (Cal. 1988).

37 ***5 U.S.C. § 706(2)(A)***.

38 United States v. Eberhardt, 789 F.2d 1354, 1362, 1359 (9th Cir. 1986).

39 Mason v. Sams, 5 F.2d 255, 259 (W.D. Wash. 1925).

40 26 U.S.C. § 7873; *see* Smith v. Comm'r, 101 T.C.M. (CCH) 1368 (T.C. 2011) (redetermination of income tax deficiencies arising from issues of how much of members' compensation from various tribal activities was "income" and whether members were entitled to deduct certain business expenses).

41 25 U.S.C. § 71.

§ 18.04 Off-Reservation Hunting, Fishing, and Gathering Rights

[1] Nature of Off-Reservation Rights

Many tribes, particularly in the Pacific Northwest and western Great Lakes regions, reserved hunting, fishing, and gathering rights on lands ceded to the federal government by treaty,[1] or by agreement subsequently ratified by statute.[2] Once such off-reservation hunting, fishing, and gathering rights are reserved by treaty or agreement, however, the rights survive subsequent tribal cession of the land, unless clearly and plainly extinguished.[3]

Tribal reserved off-reservation hunting, fishing, and gathering rights are rights held communally by the tribe.[4] Each tribal member has the right to exercise the reserved rights, subject to tribal regulation,[5] and to sue to enforce those rights.[6] Because the hunting, fishing, and gathering rights are communal, individual Indians are not entitled to compensation separate from that awarded to the tribe when tribal hunting and fishing rights are abrogated through congressional action.[7]

[2] Scope of Off-Reservation Rights

[a] Resources Covered by Off-Reservation Rights

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[1] *See, e.g.*, Treaty with the Crows, 1868, art. 4, ***15 Stat. 649*** (guaranteeing "the right to hunt on the unoccupied land of the United States so long as game may be found thereon, and as long as peace subsists among the whites and the Indians on the borders of the hunting districts"); Treaty with the Nez Perces, 1855, art 3, 12 Stat. 957 (guaranteeing, in addition to exclusive on-reservation fishing rights, "the right of taking fish [off the reservations] at all usual and accustomed places in common with the citizens of the Territory … together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land"); Treaty with the Chippewas, July 29, 1837, art. 5, ***7 Stat. 536*** (guaranteeing "the privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded … during the pleasure of the President of the United States").

[2] Antoine v. Washington, 420 U.S. 194, 196 (1975).

[3] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 201–202 (1999) (cession of tribal claims to nonreservation land on which tribe held nonexclusive hunting, fishing, and gathering rights did not terminate rights); *see* § 18.07[2]. Litigation in the Pacific Northwest has involved the rights of tribes not recognized at the time of the initial litigation and denied participation on the ground that they had not maintained an "organized tribal structure." United States v. Washington, 641 F.2d 1368, 1372 (9th Cir. 1981) (Washington II). In 2005, the court approved the Samish Tribe's motion to reopen the judgment based on the tribe's subsequent recognition as a tribe by the BIA. United States v. Washington, 394 F.3d 1152, 1159 (9th Cir. 2005). After remand, the panel decision was overturned by an en banc panel which reasoned that federal recognition was not sufficient to allow reopening of the prior decree, and also rejected the panel's statement that recognition of a tribe was a sufficient condition for the establishment of fishing rights. ***United States v. Washington, 593 F.3d 790 (9th Cir. 2010)*** (en banc); *see also* United States v. Confederated Tribes of the Colville Reservation, 606 F.3d 698 (9th Cir. 2010) (despite a later move to Colville Reservation, Wenatchi tribe members retained fishing rights pursuant to 1894 agreement).

[4] *See* United States v. Washington, 520 F.2d 676, 688 (9th Cir. 1975); United States v. Michigan, 471 F. Supp. 192, 271 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981).

[5] *See* United States v. Winans, 198 U.S. 371, 381 (1905); United States v. Felter, 546 F. Supp. 1002, 1022–1023 (D. Utah 1982), *aff'd*, 752 F.2d 1505 (10th Cir. 1985).

[6] *See* Sohappy v. Smith, 302 F. Supp. 899, 904 (D. Or. 1969), *aff'd & remanded*, 529 F.2d 570 (9th Cir. 1976).

[7] *See* Whitefoot v. United States, 293 F.2d 658, 663 (Ct. Cl. 1961).

Few treaties that reserved off-reservation hunting, fishing, and gathering rights specifically enumerated every possible right to hunt, fish, and gather. Nonetheless, in keeping with the Indian law canons of construction,[8] courts have interpreted treaty language reserving rights to hunt, fish, or gather as reserving to the tribe all hunting, fishing, and gathering rights, subject only to specific treaty limitations.[9] Treaties frequently reserved broad rights, such as "[t]he right of taking fish at usual and accustomed grounds and stations … together with the privilege of hunting and gathering roots and berries on open and unclaimed lands,"[10] or "[t]he privilege of hunting, fishing, and gathering the wild rice."[11] Treaty language that may appear more limited has been interpreted to include general hunting, fishing, and gathering rights.[12]

In addition, treaty-reserved hunting, fishing, and gathering rights extend to the harvest of all species currently existing in the tribes' reserved harvesting grounds,[13] subject only to specific treaty limitation.[14] Thus, for example, tribal rights to take fish include both natural and hatchery-bred fish.[15]

[b] Methods of Harvest

Indian tribes are generally not limited in their methods of exercising their hunting, fishing, and gathering rights. Courts have rejected expressly the contention that tribes should be limited to the methods of hunting, fishing, and gathering that

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[8] *See* Ch. 2, § 2.02.

[9] One limitation may be to those specific activities engaged in by the tribe at the time the treaty was concluded. A district court held that the Wisconsin Chippewas' off-reservation reserved rights to gather did not extend to commercial logging, because at the time of the treaty the tribe did not harvest trees for logs or boards, but rather used forest products in a way that did not destroy the trees. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 758 F. Supp. 1262, 1270–1271 (W.D. Wis. 1991). The court rejected the argument that logging was a modern harvesting technique, holding instead that it was a "wholly different" activity than those reserved by the treaty.

[10] Treaty of Point Elliott, 1855, art. 5, ***12 Stat. 927***.

[11] Treaty with the Chippewa, 1837, art. 5, 7 Stat. 1837.

[12] *See, e.g.*, Kimball v. Callahan, 493 F.2d 564, 566 (9th Cir. 1974) (treaty that specifically reserved only right to fish, included as well rights to hunt and trap, because Indians would not have understood they were relinquishing those important tribal rights); United States v. Michigan, 471 F. Supp. 192, 238 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981) (reservation of "the other usual privileges of occupancy" included rights to fish and engage in traditional gathering activities); State v. Tinno, 497 P.2d 1386, 1389–1390 (Idaho 1972) (treaty specifically reserving only right to hunt also included right to fish, because tribal language's verb "to take wild food" encompassed both hunting and fishing, and tribe would not have understood it was ceding fishing rights).

[13] *See, e.g.*, United States v. Michigan, 471 F. Supp. 192, 260 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981) (tribes' rights not species-limited); United States v. Washington, 384 F. Supp. 312, 332, 401 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) (same); *see also* United States v. Aanerud, 893 F.2d 956, 961 (8th Cir. 1990) (although trapping leeches was relatively recent activity of treaty users, it "fits firmly within the ambit" of treaty rights); ***United States v. Washington, 157 F.3d 630, 643 (9th Cir. 1998)*** (rejecting state's contention that tribe could make no claims to species of shellfish not actually harvested by tribe at time of treaty, because nothing in treaty limited right by species). In some cases, treaties specifically reserved rights to take particular species of special importance to the Indians, such as whales and seals. *See, e.g.*, Treaty with the Makah, 1855, art. 4, ***12 Stat. 939***.

[14] Treaty limitations on harvesting rights are rare and narrowly construed. For example, several Northwest treaties expressly disclaimed the rights of Indians to "take shellfish from any beds staked or cultivated by citizens." *See, e.g.*, Treaty of Medicine Creek, 1854, art. 3, ***10 Stat. 1132***. The Ninth Circuit construed this language to entitle Indians to gather shellfish at all natural beds within their accustomed fishing grounds and to a 50/50 allocation at the natural beds. ***United States v. Washington, 157 F.3d 630, 652 (9th Cir. 1998)***. Moreover, the court found that if shellfish growers had improved natural beds, the signatory tribes were entitled to a 50/50 allocation of the production of the improved beds, less the percentage yield increase that the growers had produced through their improvements to the natural beds. The only beds the tribes were not entitled to harvest were beds artificially created and tended by the shellfish growers. *Id.* at 653.

[15] United States v. Washington, 759 F.2d 1353, 1358–1359 (9th Cir. 1985) (en banc).

they employed at the time the right was reserved.[16] Instead, tribes may employ modern hunting and fishing aids such as nylon nets and steel hooks, powerboats, metal spears, modern lighting, firearms, and the like.[17]

[c] Commercial Use

Tribes may engage in commercial harvest of reserved resources. For example, because Indians in the Pacific Northwest and western Great Lakes areas always had fished commercially, their treaties are interpreted to entitle them to continue their commercial fishery.[18]

[d] Allocation of the Resources

Off-reservation hunting, fishing, and gathering rights generally are not exclusive rights, but, rather, shared with nonmembers.[19] Most treaties in the Pacific Northwest expressly state that the reserved right to fish at usual and accustomed fishing grounds is "in common with" nonmembers.[20] Although other treaties do not specify that off-reservation rights are "in common," courts have interpreted the off-reservation rights as nonexclusive.[21]

Treaty rights generally were established at a time when the resources to supply those rights seemed inexhaustible. Depletion of fish and game populations over time, however, has led to severe scarcity in some instances, creating intense disputes over allocation of the fish and game.[22] As a result, courts have apportioned resources subject to off-reservation hunting, fishing, and gathering rights between treaty and nontreaty users.[23]

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[16] Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Resources, 141 F.3d 635, 639 (6th Cir. 1998) ("treaties did not in any way, limit the means by which fish were to be taken from the lakes or restrict the treaty fishers to using technology that was in existence at the time of the treaty"); United States v. Michigan, 471 F. Supp. 192, 260 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981) ("[t]he right may be exercised utilizing improvements in fishing techniques, methods and gear"); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1430 (W.D. Wis. 1987); Peterson v. Christensen, 455 F. Supp. 1095, 1099 (E.D. Wis. 1978); United States v. Washington, 384 F. Supp. 312, 402 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *cf.* State v. Gurnoe, 192 N.W.2d 892, 902 (Wis. 1972) ("[s]uch fishing must also reasonably conform to those types and methods of gathering fish employed by the Chippewa at the time of the 1854 treaty or to such modern types and methods as are reasonably consistent with those used at the time of the treaty"). *Gurnoe*, however, has not been followed by subsequent cases addressing the scope of Chippewa rights to fish.

[17] *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 402, 407 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) ("[t]he treaty tribes may utilize improvements in traditional fishing techniques, methods and gear subject only to restrictions necessary to preserve and maintain the resource").

[18] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678–679 (1979); Grand Traverse Band of Ottawa & Chippewa Indians v. Michigan, 141 F.3d 635, 637 (6th Cir. 1998); *see also* Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973) *(Puyallup II)*; United States v. Michigan, 471 F. Supp. 192, 260 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981); *cf.* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 758 F. Supp. 1262, 1270–1271 (W.D. Wis. 1991) (tribe had not reserved right to engage in commercial logging, because it was a different activity than use of forest resources in which tribe engaged at treaty time).

[19] Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968) *(Puyallup I)*.

[20] *See, e.g.*, Treaty of Point Elliott, 1855, art. 5, ***12 Stat. 927***.

[21] *See, e.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400, 1416 (W.D. Wis. 1990).

[22] *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 669 (1979); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 686 F. Supp. 226, 230 (W.D. Wis. 1988) (even if tribes captured entire potential harvest in territory subject to off-reservation rights, harvest would be insufficient to provide tribes with moderate standard of living).

[23] *See* Midwater Trawlers Coop. v. Dep't of Commerce, 393 F.3d 994 (9th Cir. 2004) (upholding allocation of a portion of the U.S. harvest of Pacific coast whiting to the Makah Tribe under the Treaty of Neah Bay).

The resource allocation standard is grounded in the concept that both Indians and nontreaty users are entitled to a "fair share" of the harvest in the areas subject to nonexclusive hunting, fishing, and gathering rights.[24] The United States Supreme Court determined that the treaties secure to the tribes "so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living."[25] Indian tribes are entitled to take nonexclusive resources sufficient to ensure a moderate living, up to a maximum of 50% of the harvestable resources.[26] The 50% cap applies, even if tribal harvest of all the resources would not be sufficient to provide the Indians with a moderate living.[27] The Court further commented that in unusual circumstances, such as a drastic decline in tribal population or tribal abandonment of the resources, the tribal allocation could be modified downward.[28] The Ninth Circuit refused to entertain a tribal request to allocate a fishery between one treaty tribe and another "on the ground that the [Tribe} has not pleaded facts that would entitle it to application of the doctrine of equitable apportionment."[29] The court noted that the "point of the [original] lawsuit the United States filed was to protect Indian treaty rights from state infringement, not to sort out competing tribal claims."[30]

When a fishery is apportioned, the tribal share will include fish caught on- and off-reservation, as well as fish caught by tribal members for ceremonial and subsistence purposes.[31] Similarly, all nontreaty catches within the state's jurisdiction are included in the non-Indian share.[32] Both naturally bred and hatchery fish are included in the allocation.[33]

Resistance to the implementation of allocation plans often has been stiff.[34] States have argued that despite federal court orders, state game officials lack the authority under state law to carry out the types of allocation ordered by the courts

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[24] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684 (1979).

[25] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979). This standard was announced in the context of the Pacific Northwest treaty language that tribal fishing rights at traditional fishing places are held "in common with" non-Indians. Courts in the western Great Lakes, where treaties do not contain the "in common with" language, have also adopted the moderate living standard. *See* United States v. Bresette, 761 F. Supp. 658, 660 (D. Minn. 1991); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 686 F. Supp. 226, 230 (W.D. Wis. 1988).

[26] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979). A federal district judge in Washington, Judge Boldt, in a decision popularly known as the "Boldt decision," had ordered a 50/50 allocation between treaty and nontreaty users. United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) (awarding nontreaty users "up to 50%"). The Supreme Court, however, modified Judge Boldt's initial determination, and awarded treaty users a maximum of 50%, holding that the tribal share could be adjusted downward if 50% was not necessary to provide the tribe a livelihood. Courts in the Great Lakes region have adopted the maximum of 50% approach. *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400, 1418 (W.D. Wis. 1990).

[27] *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 686 F. Supp. 226, 227 (W.D. Wis. 1988).

[28] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686–687 (1979). *See* United States v. Washington, 873 F. Supp. 1422, 1445 (W.D. Wash. 1994), *aff'd*, ***157 F.3d 630 (9th Cir. 1998)*** (rejecting claim that tribes had achieved moderate standard of living and refusing to deviate from 50% allocation to tribes); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400, 1418 (W.D. Wis. 1990) (adopting same standard).

[29] United States v. Washington, 573 F.3d 701, 707 (9th Cir. 2009).

[30] United States v. Washington, 573 F.3d 701, 709 (9th Cir. 2009).

[31] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 687–688 (1979). The nontribal share includes the catch by tribes on executive order reservations when reservations were created *after* a treaty reserved rights. United States v. Washington, 235 F.3d 438 (9th Cir. 2000).

[32] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 688 (1979). In the Pacific Northwest, where anadromous fish spend their adult lives in the ocean, fish caught by non-Indians outside the state that are part of identifiable fish runs destined to pass a usual and accustomed tribal fishing place are also counted against the non-Indian share.

[33] United States v. Washington, 759 F.2d 1353, 1358–1359 (9th Cir. 1985) (en banc).

[34] *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 696 n.36 (1979) ("except for some desegregation cases, the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.") (quoting Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct., 573 F.2d 1123, 1126 (9th Cir. 1978)).

and, in addition, that to do so would violate the rights of the non-Indian citizenry to the equal protection of the laws.[35] The Supreme Court rejected equal protection challenges to percentage allocations between treaty and nontreaty users.[36]

[e] Location of Exercise of Off-Reservation Rights

[i] Introduction

Treaties reserving off-reservation hunting, fishing, and gathering rights often contain limitations on the location at which those rights may be exercised. Treaties with the Pacific Northwest tribes generally restrict off-reservation fishing to usual and accustomed fishing grounds, and confine hunting and gathering to open and unclaimed lands. Treaties with the tribes of the western Great Lakes generally reserve rights throughout the ceded territories, but have been interpreted to exclude certain private lands.[37] Geographic limitations are found also in other treaties.

[ii] Usual and Accustomed Fishing Grounds

The "Stevens treaties"[38] with the Pacific Northwest tribes all guarantee the signatory tribes the right to fish at their "usual and accustomed" fishing places and grounds.[39] To determine the particular sites involved, the courts have looked to the Indians' understanding of the phrase at the time the treaties were signed,[40] and have relied on anthropological and historical evidence to determine whether particular areas were fishing grounds of particular treaty tribes.[41]

As the leading decision explains, "usual and accustomed" applies to "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then-usual habitat

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[35] *See, e.g.*, Wash. State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373, 1378 (Wash. 1977), *vacated and remanded sub nom.* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). The Supreme Court stated: "State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution. It is also clear that Game and Fisheries, as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so." Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979). The Washington Supreme Court subsequently conceded that state officials must carry out the mandates of the federal district court. Puget Sound Gillnetters v. Moos, 603 P.2d 819, 826 (Wash. 1979).

[36] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 (1979). *See* Ch. 14, § 14.03[2][b].

[37] The Sixth Circuit denied intervention by a sportsman's group in litigation over off-reservation treaty rights, concluding that the group's interests were adequately represented by the state. On remand the district court will determine whether the tribes "have retained usufructuary rights on inland property which has passed out of federal control." United States v. Michigan, 424 F.3d 438, 445 (6th Cir. 2005).

[38] In 1854–1855, Governor Isaac Stevens of the Washington Territory negotiated several treaties with the tribes of the Pacific Northwest; all the treaties contain similar and often identical provisions. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 (1979).

[39] The exact language varies slightly. *See, e.g.*, Treaty with the Nez Perces, 1855, art. 3, 12 Stat. 957 ("all usual and accustomed places"); Treaty of Medicine Creek, 1854, art. 3, ***10 Stat. 1132*** ("all usual and accustomed grounds and stations"). A federal district court explained that " '[s]tation' indicates fixed locations such as the site of a fish weir or a fishing platform or some other narrowly limited area; 'grounds' indicates larger areas which may contain numerous stations and other unspecified locations which in the urgency of treaty negotiations could not then have been determined with specific precision and cannot now be so determined." United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). The district court's original determinations of usual and accustomed fishing grounds for Puget Sound Tribes has been subject to continued litigation over the precise location of such grounds. *See* ***Upper Skagit Tribe v. Washington, 590 F.3d 1020 (9th Cir. 2010)***.

[40] *See, e.g.*, United States v. Winans, 198 U.S. 371, 380 (1905).

[41] *See, e.g.*, United States *ex rel.* Charley v. McGowan, 62 F.2d 955, 957–958 (9th Cir. 1933), *aff'd*, ***290 U.S. 592 (1933)***; United States v. Washington, 384 F. Supp. 312, 350–353, 359–382 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); United States v. Brookfield Fisheries, Inc., 24 F. Supp. 712, 713–716 (D. Or. 1938).

of the tribe, and whether or not other tribes then also fished in the same waters."[42] Thus, a usual and accustomed fishing site need not be located in the territory ceded by the tribe,[43] although the burden of proving that a certain place is a usual and accustomed area falls on Indians claiming rights under the treaties.[44] Similarly, traditional fishing grounds do not have to be used exclusively by one tribe. Because tribes historically were accustomed to fish at numerous locations and often did not claim control of particular places to the exclusion of other tribes, the reserved treaty fishing sites may be in common with other tribes.[45] As explained by an Indian witness, quoted by the Supreme Court, the tribes "likened the river to a great table where all the Indians came to partake."[46] Nonetheless, some tribes may have primary rights in particular areas.[47]

In the years since the treaties were signed, the courses of some of the rivers and the location of some of the fish stocks have changed. Courts have held, however, that because Indians historically would have followed the fish, those changes do not negatively affect the treaty rights.[48]

[iii] Restrictions by Land Status

In a distinct treaty clause from the right to take fish at all usual and accustomed fishing places,[49] the Stevens treaties with tribes in the Pacific Northwest generally reserved to the tribes "the privilege of hunting and gathering roots and berries on open and unclaimed lands."[50] Treaties with some northern tribes similarly reserved rights such as "the right to hunt on the unoccupied lands of the United States."[51] By contrast, treaties with tribes in the western

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[42] United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975). Litigation among the tribes to determine usual and accustomed stations and other relative rights continues. *See*, *e.g.*, United States v. Lummi Nation, 763 F.3d 1180, 1187–88 (9th Cir. 2014) ("We hold that no prior decision in this case has yet explicitly or by necessary implication determined whether the waters immediately west of northern Whidbey Island are a part of the Lummi's [usual and accustomed fishing grounds.])".

[43] Seufert Bros. Co. v. United States, 249 U.S. 194, 195, 198–199 (1919) (upholding Yakama right to fish on south side of Columbia River, which was outside tribe's ceded territory); Midwater Trawlers Coop. v. Dep't of Commerce, 282 F.3d 710, 718 (9th Cir. 2002) (upholding federal agency's recognition of Makah Tribe's usual and accustomed fishing areas beyond three-mile territorial limit of United States), *appeal after remand*, Midwater Trawlers Coop. v. Dep't of Commerce, 393 F.3d 994 (9th Cir. 2004).

[44] United States v. Washington, 384 F. Supp. 312, 332 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); United States v. Brookfield Fisheries, Inc., 24 F. Supp. 712, 716 (D. Or. 1938); State v. Petit, 558 P.2d 796, 797 (Wash. 1977). The treaties confer no off-reservation fishing rights in areas other than usual and accustomed grounds. Seufert v. Olney, 193 F. 200, 203 (E.D. Wash. 1911).

[45] Seufert Bros. Co. v. United States, 249 U.S. 194, 197–198 (1919); *see also* United States v. Brookfield Fisheries, Inc., 24 F. Supp. 712, 716 (D. Or. 1938) (fishery ground shared by four tribes, but fifth tribe excluded because no convincing testimony tribal members ever fished the location).

[46] Seufert Bros. Co. v. United States, 249 U.S. 194, 197 (1919).

[47] United States v. Lower Elwha Tribe, 642 F.2d 1141 (9th Cir. 1981); ***United States v. Washington, 626 F. Supp. 1405, 1486 (W.D. Wash. 1985)***.

[48] United States v. Washington, 384 F. Supp. 312, 362 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *see also* United States v. Brookfield Fisheries, Inc., 24 F. Supp. 712, 716 (D. Or. 1938) (where state constructed dam and altered topography of area since time of treaty, it could not exclude Indians merely because channel was changed).

[49] *See* § 18.04[2][e][ii].

[50] *See* Treaty of Neah Bay, 1855, ***12 Stat. 939***; Treaty of Point No Point, 1855, ***12 Stat. 933***; Treaty of Point Elliott, 1855, ***12 Stat. 927***; Treaty of Medicine Creek, 1854, ***10 Stat. 1132***. In some treaties the privilege to hunt and gather roots and berries also includes the right to pasture cattle and horses on open and unclaimed land. *See, e.g.*, Treaty with the Flathead, Kootenay, and Upper Pend d'Oreilles, 1855, ***12 Stat. 975*** (Treaty of Hell Gate); Treaty with the Qui-nai-elt and Quil-leh-ute Indians, 1855, ***12 Stat. 971*** (Treaty of Olympia); Treaty with the Nez Perce, 1855, 12 Stat. 957; Treaty with the Yakama Nation, 1855, ***12 Stat. 951***; Treaty with the Walla Walla, 1855, ***12 Stat. 945***.

[51] *See, e.g.*, Treaty with the Crows, 1868, art. 4, ***15 Stat. 649***.

Great Lakes generally reserved hunting, fishing, and gathering rights throughout the ceded territories.[52] Although the differences in language among the three types of treaties mean that the rights have been interpreted somewhat differently, courts generally have found that the locations at which the treaty rights may be exercised are limited by the treaties.

In all three regions, courts have held that the tribes would have understood their treaties to contemplate settlement or occupation of the lands burdened with the treaty rights, and that settlement or occupation would be incompatible with unrestricted tribal hunting and gathering rights.[53] Accordingly, the courts have found that the rights are defeasible because actual human settlement or occupation terminates the treaty rights on the settled or occupied lands. Courts have also held that other state or federal action can remove the land from a treaty's coverage.

In the Pacific Northwest, treaty language guarantees hunting and gathering rights on "open and unclaimed lands." This treaty language expressly restricts the rights to particular lands, although there is no requirement that the open and unclaimed lands be located within the territory ceded by the tribe.[54] Several courts have considered the extent of tribal hunting and gathering rights in these treaties. In *United States v. Hicks*,[55] the court upheld the conviction of a tribal member for elk hunting in Olympic National Park.[56] Other courts have held, for example, that national forest lands and a state wildlife area open for recreational uses, including hunting, are open and unclaimed lands.[57]

Treaties with some northern tribes included language expressly limiting the right to hunt, although the language used was different from the Northwest treaties. The northern treaties guaranteed "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."[58] The Supreme Court in *Ward v. Race Horse*, and later the Tenth Circuit in *Crow Tribe v. Repsis*, held that such treaty provisions were abrogated at statehood pursuant to the equal footing doctrine.[59] In 1999, however, in *Minnesota v. Mille Lacs Band of Chippewa Indians*, the Supreme Court repudiated *Ward*'s equal footing approach on the ground that it "rested on a false premise" that tribal hunting, fishing, and gathering rights were inconsistent with state sovereignty over natural resources.[60] The outcome in *Crow Tribe v. Repsis* is not affected by *Mille Lacs*, because the Tenth Circuit made an alternative

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[52] *See, e.g.*, Treaty with the Chippewa, 1837, art. 5, ***7 Stat. 536*** ("[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded").

[53] *See, e.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 365 n.14 (7th Cir. 1983); ***State v. Cutler, 708 P.2d 853, 858 (Idaho 1985)*** (construing "unoccupied lands of the United States"); State v. Arthur, 261 P.2d 135, 141 (Idaho 1953) (construing Stevens treaty).

[54] As in all treaty-interpretation cases, the question is what the tribes would have understood the treaty to mean. *See* Ch. 2, § 2.02.

[55] United States v. Hicks, 587 F. Supp. 1162 (W.D. Wash. 1984).

[56] United States v. Hicks, 587 F. Supp. 1162, 1166 (W.D. Wash. 1984) ("[b]ecause of the preservation purpose and the goal of permanently protecting the Roosevelt elk herds in creating Olympic National Park, the lands, although remaining wild and unsettled except for preexisting entries, were no longer 'open and unclaimed' for hunting purposes, within the meaning of the Treaty").

[57] State v. Buchanan, 978 P.2d 1070, 1081–1082 (Wash. 1999) (since state had "designated the Oak Creek Wildlife Area for use for hunting, fishing and recreation," it was open and unclaimed); State v. Arthur, 261 P.2d 135, 141 (Idaho 1953) (national forest lands are open and unclaimed within meaning of Nez Perce Treaty); *cf.* State v. Watters, 156 P.3d 145 (Or. App. 2007) (privately owned forest land was not open and unclaimed within the meaning of the Nez Perce Treaty).

[58] *See* Treaty with the Eastern Band of Shoshonees and the Bannock Tribe, 1868, art. 4, ***15 Stat. 673*** (Treaty of Ft. Bridger); Treaty with the Crows, 1868, art. 4, ***15 Stat. 649***.

[59] Ward v. Race Horse, 163 U.S. 504, 514–516 (1896); Crow Tribe v. Repsis, 73 F.3d 982, 992 (10th Cir. 1995).

[60] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) ("Finally, we note that there is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by *implication* at statehood. Treaty rights are not impliedly terminated upon statehood."). The Court did not, however, overrule the outcome in *Race Horse*, but rather preserved the ruling that the specific rights reserved in the Shoshone-Bannock treaty were intended to terminate upon statehood. *Id.* at 206–208.

holding that the national forest lands in question were not unoccupied lands.[61] Although that holding seems doubtful as courts in analogous circumstances have ruled that national forest lands are "open and unclaimed" land subject to the exercise of Indian hunting and gathering rights,[62] courts have interpreted the phrase "unoccupied lands of the United States" more narrowly than "open and unclaimed lands." For example, courts have found that a national forest[63] and a state wildlife area that was once a private cattle ranch[64] were "occupied" lands on which the treaty right to hunt had been terminated. Courts also have determined, however, that "unoccupied lands" may include lands outside a tribe's ceded territory if the lands were traditionally used by the tribe.[65]

In the Great Lakes, treaties generally provide for reserved hunting, fishing, and gathering rights "in the territory ceded."[66] In consequence, the hunting, fishing, and gathering rights extend throughout the ceded lands.[67] In some cases, usually involving fishing rights, the tribal rights also extend outside the ceded territory, if the tribe would have understood its rights to reach those lands.[68]

Nonetheless, courts in the Great Lakes region have found the geographic scope of tribal rights within the ceded territories to be limited. In Michigan, the district court determined that treaty language guaranteeing "the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement"[69] limited hunting and related rights on settled lands, but did not limit fishing rights in the Great Lakes because the tribes would not have understood that the ceded water areas would be needed for settlement.[70] In Wisconsin, despite the lack of any express limits in the treaty, courts similarly have found geographic limits on the exercise of the treaty rights. Based on the tribes' understanding that settlement would limit their rights, courts have held the treaty-reserved hunting, fishing, and gathering rights are "limited to those portions of the ceded lands that are not privately owned."[71] However, lands may not be "laundered" through private ownership in order to defeat the hunting, fishing, and gathering rights on public lands.[72] Even private lands are subject to tribal rights if the private

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61 Crow Tribe v. Repsis, 73 F.3d 982, 993 (10th Cir. 1995).

62 *See* State v. Buchanan, 978 P.2d 1070, 1081–1082 (Wash. 1999) (collecting authorities).

63 Crow Tribe v. Repsis, 73 F.3d 982, 993 (10th Cir. 1995).

64 ***State v. Cutler, 708 P.2d 853, 859 (Idaho 1985)***.

65 State v. Tinno, 497 P.2d 1386, 1390–1391 (Idaho 1972).

66 *See, e.g.*, Treaty with the Chippewa, 1837, art. 5, ***7 Stat. 536***.

67 *See, e.g.*, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 707 F. Supp. 1034, 1037 (W.D. Wis. 1989); United States v. Michigan, 471 F. Supp. 192, 259 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981).

68 *See* United States v. Michigan, 471 F. Supp. 192, 257 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981) (tribes reserved fishing rights in waters of Great Lakes, because treaty reserved their aboriginal rights to fish in those waters); People v. Jondreau, 185 N.W.2d 375, 378 (Mich. 1971) (because ceded lands bordered Keweenaw Bay, tribe would have understood its reserved right to fish extended to bay); *cf.* State v. Buchanan, 978 P.2d 1070, 1079 (Wash. 1999) ("right reserved by the treaty was limited to the right previously exercised—that is to the ceded lands or to lands upon which the Nooksack Tribe traditionally hunted").

69 Treaty with the Ottawa and Chippewa, 1836, art. 13, ***7 Stat. 491***.

70 United States v. Michigan, 471 F. Supp. 192, 235–238, 259 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981); *see also* People v. Le Blanc, 399 Mich. 31, 248 N.W.2d 199, 207 (Mich. 1976) (same).

71 Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 365 & n.14 (7th Cir. 1983). The district court subsequently held, however, that "if at a given time the Chippewa can show, in a lawsuit if necessary, that this diminution in their hunting, fishing, and gathering rights is preventing them from enjoying a modest living, appropriate measures must be taken for Chippewa activity on privately owned lands to permit the Chippewa to enjoy a modest living." Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1432 (W.D. Wis. 1987).

72 Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177, 182 (7th Cir. 1985).

lands are open to general public hunting, fishing, and gathering.[73] In addition, the Seventh Circuit has suggested that tribal rights may be limited on public lands if the use of the public lands is inconsistent with hunting.[74]

[f] Access Rights: Easement over Privately Owned Land

Off-reservation hunting, fishing, and gathering rights are servitudes over the burdened lands.[75] Neither states nor private property owners may bar tribal access to areas subject to treaty hunting, fishing, and gathering rights.[76]

Tribal members possess an easement of access over privately held land as necessary to the exercise of the treaty hunting, fishing, and gathering rights.[77] In *United States v. Winans*,[78] the United States Supreme Court held that an access easement was necessarily implied from the treaty's specific reservation of fishing rights at a usual and accustomed station.[79] This principle ensures that reserved treaty rights are not rendered a nullity by shifting patterns of property ownership and development.[80]

The Sixth Circuit determined that the Grand Traverse Band's reserved fishing rights in Lake Michigan entitled the tribe to mooring access in two municipally owned marinas adjacent to the tribe's reserved fishing areas.[81] The court found that tribal fishing from small boats in the reserved areas of Lake Michigan was too dangerous, that large fishing boats could not be brought to the area by trailer, and that the marinas occupied the only harbors within reasonable distance of the reserved fishing location.[82] Consequently, the court held, denial of transient mooring rights at the public marinas would both "frustrate the purpose of the treaties" and "simply destroy all rights to commercially fish that were conveyed by them."[83]

[g] Habitat Protection

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[73] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1432 (W.D. Wis. 1987).

[74] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177, 182 (7th Cir. 1985) (public lands such as schools, highways, and hospitals might be considered "settled" lands).

[75] *See* § 18.02. Geographic restrictions on burdened lands are discussed at § 18.04[2][e].

[76] *See* United States v. Winans, 198 U.S. 371, 384 (1905).

[77] United States v. Winans, 198 U.S. 371, 381–382 (1905); *accord* New York *ex. rel.* Kennedy v. Becker, 241 U.S. 556, 562 (1916) (nonexclusive easement to obtain access to fishing and hunting grounds on ceded lands); United States v. Michigan, 471 F. Supp. 192, 238 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981) (right to fish in Great Lakes includes easement in lands surrounding portions of Lake Michigan and Traverse Bay). In the context of land access to shellfish beds, the Ninth Circuit affirmed a district court's conclusion "emphasiz[ing] that land access is not to be granted unless there is a proper showing of the need for such." ***United States v. Washington, 157 F.3d 630, 646–647 (9th Cir. 1998)***. *But see* United States v. Vulles, 282 F. Supp. 829 (D. Mont. 1968) (holding, in apparent conflict with United States v. Winans, 198 U.S. 371 (1905), that treaty right to gather roots and berries on open and unclaimed land did not authorize members of tribe to cross private land from public highway to gain access to open and unclaimed land on-reservation).

[78] United States v. Winans, 198 U.S. 371 (1905).

[79] United States v. Winans, 198 U.S. 371, 381 (1905) ("[n]o other conclusion would give effect to the treaty"); *accord* Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Resources, 141 F.3d 635, 638–639 (6th Cir. 1998).

[80] United States v. Winans, 198 U.S. 371, 381 (1905).

[81] Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Resources, 141 F.3d 635, 641 (6th Cir. 1998). The district court earlier had held that the tribe's reserved right to fish in Lake Michigan encompassed an easement over certain lands bordering the lake. United States v. Michigan, 471 F. Supp. 192, 238 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981).

[82] Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Resources, 141 F.3d 635, 639–640 (6th Cir. 1998).

[83] Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Natural Resources, 141 F.3d 635, 640 (6th Cir. 1998); *cf.* United States v. Gotchnik, 222 F.3d 506, 511 (8th Cir. 2000) (easement to reach fishing locations did not permit tribal members to use modern methods of transportation in violation of federal wilderness law prohibiting motorized vehicles, because restriction on

Courts have not yet definitively determined whether off-reservation reserved rights include the right to habitat protection for the species subject to the rights. In 1980, a Washington district court ruled in *United States v. Washington*,[84] that the right to fish included a right to habitat protection, because "[t]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[85] An en banc panel of the Ninth Circuit, however, vacated the district court's declaratory judgment, finding it imprudent in the absence of "concrete facts which underlie a dispute in a particular case."[86]

Although no other court has found expressly that tribes have a right to habitat protection that is implied from the treaty hunting, fishing, and gathering rights, several decisions indicate the courts' willingness to consider habitat a necessary part of the tribes' reserved treaty rights.[87] A number of cases provide that protection of Indian treaty rights will preclude federal or state action that could adversely affect those rights by harming the species habitat,[88] or the places at which the tribes are entitled to exercise their rights.[89] One court recently held that Washington State has an obligation to build and maintain culverts under state highways in such a way so as to not "hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest."[90] In addition, courts addressing tribal-reserved water rights for fisheries[91] have fashioned the water right in terms of the amount of water necessary for habitat protection.[92] Nonetheless, one court has rejected a claim for monetary damages for private destruction of fish runs on the ground that the tribe had "only a treaty right" to take fish and not a "property interest in the fish" that would entitle

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method of access did not prohibit access or preclude exercise of treaty rights). The decision seems inconsistent with the rule that limits on reserved treaty rights must be clearly and plainly expressed. *See* § 18.07[1].

84 United States v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980), vacated, 759 F.2d 1353 (9th Cir. 1985).

85 United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980), vacated, 759 F.2d 1353 (9th Cir. 1985).

86 United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985), *vacating* 694 F.2d 1374 (9th Cir. 1982).

87 *See generally* Michael C. Blumm & Brent M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. Colo. L. Rev. 407, 462–500 (1998); Ruth Langridge, *The Right to Habitat Protection*, 29 Pub. Land & Resources L. Rev. 41 (2008).

88 *See* Kittitas Reclamation Dist.v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032, 1035 (9th Cir. 1985) (upholding district court's finding that Bureau of Reclamation had authority to release water from project to protect treaty fish habitat from dewatering); *see also* No Oilport! v. Carter, 520 F. Supp. 334, 372–373 (W.D. Wash. 1981) (ordering hearing on whether sedimentation caused by proposed oil pipeline would adversely affect spawning habitat).

89 N.W. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1521–1522 (W.D. Wash. 1996) (upholding denial of federal permit to construct net pens for fish farm at Lummi usual and accustomed fishing place); ***Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1515–1516 (W.D. Wash. 1988)*** (enjoining construction of marina that would eliminate portion of tribe's fishing place); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 554–555 (D. Or. 1977) (enjoining construction of dam and reservoir that would inundate fishing places); *see also* Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bur. of Reclamation, 426 F.3d 1082, 1086 (9th Cir. 2005) (noting that "tribes in the [Klamath River] area have treaty rights to Klamath River fish, and the Department of Interior must meet the United States' fiduciary duty to maintain these resources"), *decision on remand*, 2006 U.S. Dist. LEXIS 36894 (N.D. Cal. 2006) (issuing injunction). *But see* Gros Ventre Tribe v. United States, 469 F.3d 801 (9th Cir. 2006) (no enforceable general trust duty to force government to act, but "leaving open the question of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations").

90 United States v. Washington, 2007 U.S. Dist. LEXIS 61850 (W.D. Wash. 2007). The court subsequently issued a permanent injunction against the state. ***United States v. Washington, 20 F. Supp. 3d 986, 1022 (W.D. Wash. 2013)*** ("An injunction is necessary to ensure that the State will act expeditiously in correcting the barrier culverts which violate the Treaty promises.").

91 *See* § 18.04[2][d].

92 United States v. Adair, 723 F.2d 1394, 1414–1415 (9th Cir. 1983) ("confirm[ing] to the Tribe the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864"). In the *Adair* litigation, the district court subsequently determined, in a decision vacated as not ripe, that the moderate living standard, *see* § 18.04[2][d], referred to by the Ninth Circuit "cannot be applied to have the effect of reducing water levels below a level that would support productive habitat." United States v. Adair, 187 F. Supp. 2d 1273, 1276–1277 (D. Or. 2002), *vacated*, United States v. Braren, 338 F.3d 971 (9th Cir. 2003); *see also*; Colville Confederated Tribes v. Walton, 647 F.2d 42, 48 (9th Cir. 1981) (*Walton I*) (awarding amount of water "necessary to maintain" on-reservation replacement fishery for traditional fishing sites

it to damages.[93] Although the court was careful to distinguish the damages claim at issue from decisions mandating protection from or mitigation of injury to treaty rights,[94] its holding is at odds with the weight of authority acknowledging that treaty hunting, fishing, and gathering rights are property rights.[95]

Tribes have had mixed results in cases seeking to challenge hydroelectric power dam licenses issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act.[96] For example, the Skokomish Tribe sought damages from the city of Tacoma, claiming that operation of a dam that was constructed pursuant to a partial license interfered with the tribe's treaty hunting, fishing, and gathering rights and fishing and shellfishing grounds.[97] The court dismissed the damages action against Tacoma on the ground that the treaty did not support an implied cause of action for damages against a third party for harm to treaty fishing rights.[98] Damages claims against the licensee were held to be barred by the statute of limitations.[99] By contrast, the Kalispel Tribe's damages claim against a licensee for trespass was upheld.[100] The court determined that the licensee had flooded reservation land even though it knew it had no right to do so.[101]

[3] Regulation of Indian Off-Reservation Rights

[a] Tribal Regulation

As an attribute of their inherent sovereignty,[102] Indian tribes retain the right to regulate the conduct of tribal members.[103] It follows that Indian tribes may regulate the off-reservation exercise of treaty-reserved hunting, fishing, and gathering

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destroyed by dams); *aff'd*, Colville Confederated Tribes v. Walton, 752 F.2d 397, 404 (9th Cir. 1985) (*Walton II*); United States v. Anderson, 6 Indian L. Rep. F-129, F-130 (E.D. Wash. 1979) (awarding sufficient water in on-reservation creek to maintain water temperature of 68 degrees or less, with minimum flow of 20 cubic feet per second, in order to assure fish propagation).

93 ***Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 810 (D. Idaho 1994)***.

94 ***Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791, 810 (D. Idaho 1994)***.

95 *See* Ch. 19, § 19.03[5][c].

96 16 U.S.C. §§ 791a–823c. The statute specifically provides that "licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired." 16 U.S.C. § 797(e).

97 Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005) (en banc).

98 Skokomish Indian Tribe v. United States, 410 F.3d 506, 512–14 (9th Cir. 2005) (en banc). Claims for damages against the United States were transferred to the Court of Federal Claims for proceedings under the Indian Tucker Act. *Id*. at 511–12. The Court of Federal Claims dismissed the case on jurisdictional grounds. Skokomish Indian Tribe v. United States, 115 Fed. Cl. 116, 131 (2014). For a discussion of the Tucker Act, see Ch. 5, §§ 5.05[1][b] and 5.06[4][c]. For further discussion of this case, *see* Ch. 15, § 15.08[1].

99 Skokomish Indian Tribe v. United States, 410 F.3d 506, 517–18 (9th Cir. 2005) (en banc) (state law claims for damages barred by statute of limitations). The court also denied the tribe's claim that a private right of action for damages was available under 16 U.S.C. § 803(c), which requires licensees to maintain project works in a condition so as not to impair navigation. *Id*. at 519; *see also* City of Tacoma v. Fed. Energy Regulatory Comm'n, 460 F.3d 53 (D.C. Cir. 2006) (decision on cross-appeals of underlying power license).

100 United States v. Pend Oreille Pub. Util. Dist. No. 1, 28 F.3d 1544 (9th Cir. 2004).

101 United States v. Pend Oreille Pub. Util. Dist. No. 1, 28 F.3d 1544, 1547 (9th Cir. 2004).

102 *See* Ch. 4, § 4.01.

103 *See*, *e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330 (1983) (recognizing inherent tribal authority to regulate hunting and fishing on reservation without state interference); United States v. Mazurie, 419 U.S. 544, 557 (1975) (tribal authority to regulate liquor).

rights by their members.[104] The tribes' authority to regulate necessarily includes the authority to enforce their off-reservation regulations through arrests and equipment seizures.[105] Although tribes and states ordinarily possess concurrent authority to regulate off-reservation tribal exercise of reserved rights in the interests of conservation,[106] effective tribal regulation of members' off-reservation hunting, fishing, and gathering activities will preclude concurrent state regulation.[107]

[b] State Regulation

State regulation of off-reservation Indian hunting, fishing, and gathering activities pits federal preemption against state police power. On the one hand, the states' general police power contains within it the power to regulate the taking of fish and game,[108] subject, however, to substantive constitutional constraints[109] and the supremacy clause.[110] On the other hand, Indian treaties that reserve hunting, fishing, and gathering rights preempt state laws that would interfere with those rights.[111]

The United States Supreme Court has arrived at an uneasy accommodation of these principles.[112] Construing language in the Pacific Northwest treaties that Indian rights to fish at usual and accustomed places are held "in common with" non-Indians, the Court stated that because non-Indians could be regulated by the states, "we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State."[113] The Court did not, however, grant the states broad regulatory authority. Instead, it held that "[t]he right to fish 'at all usual and accustomed' places may, of course, not be qualified by the State… . But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided

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[104] *See* Settler v. Lameer, 507 F.2d 231, 236 (9th Cir. 1974); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987); United States v. Michigan, 471 F. Supp. 192, 274 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981).

[105] Settler v. Lameer, 507 F.2d 231, 233, 238 (9th Cir. 1974); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987).

[106] United States v. Washington, 520 F.2d 676, 686 n.4 (9th Cir. 1975); *see also* § 18.04[3][b].

[107] *See, e.g.*, United States v. Washington, 520 F.2d 676, 686 n.4 (9th Cir. 1975); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1241–1242 (W.D. Wis. 1987) (preliminarily defining effective tribal regulations as including adequate provisions for conservation, effective enforcement, form of official tribal identification, and full tribal-state exchange of relevant information); United States v. Michigan, 471 F. Supp. 192, 274 (W.D. Mich. 1979), *aff'd as modified*, 653 F.2d 277 (6th Cir. 1981); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 707 F. Supp. 1034, 1055 (W.D. Wis. 1989) (despite "inadequacies" in tribal plan, tribes entitled to exclusive regulation of members' off-reservation muskellunge and walleye fishing if tribes "enact plans that correct the defects").

[108] *See, e.g.*, Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 391 (1978).

[109] Hughes v. Oklahoma, 441 U.S. 322 (1979) (***commerce clause***); Toomer v. Witsell, 334 U.S. 385 (1948) (privileges and immunities clause).

[110] *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 691–692 (1979) (Sockeye Salmon or Pink Salmon Fishing Act of 1947, *repealed by* Pacific Salmon Treaty Act of 1985, Pub. L. No. 99-5, § 13, 99 Stat. 7); Missouri v. Holland, 252 U.S. 416 (1920) (Migratory Bird Treaty Act).

[111] *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979) (states required to comply with federal court orders interpreting Indian treaties); Antoine v. Washington, 420 U.S. 194, 201 (1975) (statute ratifying agreement with tribe, like Indian treaties, is binding on states under supremacy clause); United States v. Winans, 198 U.S. 371, 381–382 (1905) (rights secured by treaties run against states and their grantees).

[112] *See* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400, 1421 (W.D. Wis. 1990) ("the basis for state regulation has never been explained satisfactorily.").

[113] Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968). For a critical analysis, see Ralph W. Johnson, *The State Versus Off-Reservation Fishing: A United States Supreme Court Error*, 47 Wash. L. Rev. 207 (1972).

the regulation meets appropriate standards and does not discriminate against the Indians."[114] Thus, states may impose nondiscriminatory regulations on off-reservation treaty hunting, fishing, and gathering rights for the purpose of conservation.[115] But they may not, for example, condition tribal members' exercise of hunting, fishing, and gathering rights on obtaining a state hunting or fishing license.[116]

A state must satisfy several criteria in order to apply its conservation laws to tribal members in their exercise of off-reservation hunting, fishing, and gathering rights:[117] First, the state law must be reasonable and necessary for conservation. Conservation generally means the perpetuation or preservation of a particular species, rather than general maintenance of the species.[118] A state regulation will be necessary for conservation if the state demonstrates both a need to limit the take of a given species in a given area and that the regulation at issue is necessary to accomplish that restriction.[119] The Sixth Circuit requires an arguably higher standard: a showing that "irreparable harm" to the species is "highly probable."[120] In addition, courts provide that the state regulation must be the least restrictive alternative method available to the state.[121] Second, application of the state regulation to the treaty harvest must be necessary: that is, the state must not be able to achieve its conservation goals by regulating only the nontreaty users.[122] Third, the state

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[114] Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968); *see also* Tulee v. Washington, 315 U.S. 681, 684 (1942). Even though this standard was announced in the context of the Pacific Northwest tribes' fishing rights, courts have adopted the standard widely for off-reservation hunting, fishing, and gathering rights. *See, e.g.*, United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400, 1421–1422 (W.D. Wis. 1990).

[115] Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968); *see also* Sohappy v. Smith, 302 F. Supp. 899, 908 (D. Or. 1969) (expressly rejecting idea that state could "subordinat[e]" treaty rights "to some other state objective or policy"). In Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), Justice Thomas attempted to draw a distinction between treaty "rights," such as "the right of taking fish" at usual and accustomed fishing places (*see, e.g.*, Treaty of Point Elliott, 1855, art. 5, ***12 Stat. 927***) and "privileges," such as "the privilege of hunting, fishing, and gathering the wild rice" (Treaty with the Chippewa, 1837, art. 5, ***7 Stat. 536***). He argued that the conservation limitation on state regulatory power applies to treaty rights and not necessarily to treaty privileges. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 222–226 (1999) (Thomas, J., dissenting). The Court expressly rejected this distinction, noting that it had never been used, that it was contrary to the Indians' understanding of the treaty, and that it would render the treaty "an empty promise because it gave the Chippewa nothing that they did not already have." *Id.* at 205–206.

[116] Tulee v. Washington, 315 U.S. 681, 684 (1942).

[117] The burden is on the state to show that its regulations meet the required standards. *See, e.g.*, United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981). There is some early authority for the proposition that tribal members harvesting off-reservation in violation of tribal law are outside their treaty rights and thus fully subject to state regulation. Op. Sol. Interior, M-36638 (May 16, 1962); State v. Gowdy, 462 P.2d 461, 465 (Or. App. 1969). *But see* State v. Jim, 725 P.2d 365, 367 n.6 (Or. App. 1986) (questioning *Gowdy*, because the requirement that states prove conservation necessity arises from treaty, not tribal law). These authorities have not been followed and have been superseded by the cases set out below.

[118] *See*, *e.g.*, Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973); United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983) ("Conservation, properly understood, embraces procedures and practices designed to forestall the imminence of extinction. Preserving a 'reasonable margin of safety' between an existing level of stocks and the imminence of extinction is the heart and soul of conservation. Limitations on the geographical aspect of the tribes' treaty rights to promote that end are permissible."); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1235–1236 (W.D. Wis. 1987).

[119] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1236 (W.D. Wis. 1987); Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683, 691–692 (W.D. Wash. 1981); United States v. Washington, 384 F. Supp. 312, 342 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); Sohappy v. Smith, 302 F. Supp. 899, 908 (D. Or. 1969).

[120] United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981).

[121] United States v. Oregon, 769 F.2d 1410, 1416 (9th Cir. 1985); United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1236 (W.D. Wis. 1987).

[122] Antoine v. Washington, 420 U.S. 194, 207 (1975); United States v. Washington, 520 F.2d 676, 685–686 (9th Cir. 1975); Purse Seine Vessel Owners Ass'n. v. Washington, 966 P.2d 928 (Wash. App. 1998); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1236 (W.D. Wis. 1987).

law must not discriminate, in language or effect, against the treaty harvesters or in favor of nontreaty users.[123] A facially neutral state law may nonetheless discriminate against off-reservation hunting, fishing, and gathering rights. In *Puyallup II*,[124] for example, the Supreme Court ruled that a regulation that prohibited all net fishing for steelhead trout in areas subject to treaty fishing rights was discriminatory, even though it was equally applicable to both treaty and nontreaty fishers. Because Puyallup tribal members fished only by net, the regulation in effect awarded the entire steelhead run to non-Indian users, who had "entirely preempted" hook-and-line fishing.[125]

As a result of these standards, treaty and nontreaty users often are subject to different sets of regulations.[126] Because this creates a practical enforcement problem of identifying treaty and nontreaty users, courts generally have held that the requirement that treaty harvesters carry tribally issued identification cards is not an invalid restriction on the Indian exercise of off-reservation rights.[127]

There is some authority for the proposition that states also may apply state safety regulations to treaty harvesters.[128] Courts taking this approach generally require the state to make a showing parallel to that required for imposition of state conservation regulations. The state must show that the regulations are reasonable and necessary and do not discriminate against the Indians. The showing of necessity varies between the states: the federal district court in Washington requires the state to demonstrate a "public-safety threat," while the federal district court in Wisconsin requires the state to demonstrate "a substantial risk" to the public.[129] Employing this standard, the Wisconsin district court ruled that state prohibitions on summer deer hunting and shining deer were nondiscriminatory regulations necessary to public safety, but that the state's 24-hour closure prior to the state deer gun harvest was not.[130] The Washington Court of Appeals, by contrast, upheld a state statute prohibiting the possession of a loaded firearm in a motor vehicle as applied to Indians exercising their off-reservation treaty right to hunt, on the ground that the state law was "of general application and not

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123 Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968) *(Puyallup I)*; United States v. Michigan, 653 F.2d 277, 279 (6th Cir. 1981); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1237 (W.D. Wis. 1987).

124 Dep't of Game v. Puyallup Tribe, 414 U.S. 44 (1973) *(Puyallup II)*.

125 Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 46–48 (1973); *see also* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 682 (1979) (state cannot regulate fisheries in way that allows non-Indians to harvest more than fair share of fish); United States v. Winans, 198 U.S. 371, 381–382 (1905) (state-licensed fish wheel cannot be operated to exclude treaty fishers from traditional fishing place).

126 *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 682 (1979) (states can regulate nontreaty users for any legitimate purpose, but treaty users for necessary conservation purposes only); Purse Seine Vessel Owners Ass'n v. Washington, 966 P.2d 928 (Wash. App. 1998) (rejecting claim that state must allow non-Indian fishery if tribal fishery is harvesting same stock); *see also* § 18.04[3][a] (effective tribal regulation can preclude state conservation regulations).

127 *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 341 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *see also* Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1242 (W.D. Wis. 1987) (finding that official tribal identification for off-reservation treaty harvesters is necessary part of effective tribal regulation).

128 Confederated Tribes of the Colville Reservation v. Anderson, 903 F. Supp. 2d 1187 (E.D. Wash. 2011); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233 (W.D. Wis. 1987).

129 Confederated Tribes of the Colville Reservation v. Anderson, 903 F. Supp. 2d 1187, 1198 (E.D. Wash. 2011) (state must establish that its law: "a. reasonably prevents a public-safety threat; b. is necessary to prevent the identified public-safety threat; c. does not discriminate against Indians; and d. application to the Tribe is necessary in the interest of public safety."); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 668 F. Supp. 1233, 1238–1239 (W.D. Wis. 1987) (state regulations must be "reasonable and necessary to prevent or ameliorate a substantial risk to the public health or safety").

130 Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 740 F. Supp. 1400, 1421–1423 (W.D. Wis. 1990). A tribal request to reopen the case to lift the night-time hunting ban as a result of changed circumstances was granted in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*.[130.1]

limited to hunters."[131] That approach, however, was rejected expressly by the federal district court in Washington because it was inconsistent with treaty-interpretation principles set forth by the Supreme Court.[132]

[c] Federal Regulation

The Secretary of the Interior has promulgated regulations concerning treaty fishing at off-reservation locales under the Secretary's general authority over Indian affairs "when necessary to assure the conservation and wise utilization of the fisheries resource."[133]

The federal government may remove regulatory barriers to the exercise of treaty rights. For example, Congress provided in 1988 that no federal or state income or employment taxes could be levied against tribal members engaged in "fishing rights-related activity" under a treaty, statute, or executive order.[134] Both statutes are limited to fishing income, however, and may not apply to income from other hunting, fishing, and gathering activities, such as wild ricing. This omission may have been inadvertent, given that most commercial hunting, fishing, and gathering activity involves the fishing right.

The Secretary of the Interior is empowered to promulgate regulations concerning treaty fishing at off-reservation locales under the Secretary's general authority over Indian affairs "when necessary to assure the conservation and wise utilization of the fisheries resource."[135] These regulations may be promulgated at the Secretary's own initiative, or at the initiative of any Indian tribe or state governor.[136] The Secretary has exercised this regulatory power to promulgate comprehensive rules concerning the shared use by multiple tribes of treaty fishing "access sites" and treaty fishing "in lieu" sites on the Columbia River.[137] Such regulations are valid unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[138]

The treaty-related fisheries of the Pacific Northwest are protected by federal regulation under two statutes. First, the Magnuson-Stevens Fishing Conservation and Management Act[139] created eight regional fishery management councils, which are charged with recommending to the Secretary of Commerce ocean harvest limits in marine fisheries within the jurisdiction of the United States.[140] The Secretary of Commerce must either adopt these recommendations or determine that they are inconsistent with the standards set forth in the Act or "any other applicable law."[141] If the Secretary makes that determination, the Secretary is empowered to enact emergency regulations consistent with the Act and other relevant

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131 State v. Olney, 72 P.3d 235, 238 (Wash. App. 2003).

132 Confederated Tribes of the Colville Reservation v. Anderson, 903 F. Supp. 2d 1187, 1199 (E.D. Wash. 2011).

133 25 C.F.R. § 249.1. For discussion of federal laws of general applicability that abrogate or regulate the exercise of off-reservation rights, see § 18.07[3].

134 26 U.S.C. § 7873 (federal taxes); 25 U.S.C. § 71 (state taxes). The statutes apply to the exercise of off-reservation rights, as well as on-reservation rights.

135 25 C.F.R. § 249.2(a).

136 25 C.F.R. §§ 249.1–249.7.

137 25 C.F.R. §§ 247.1–247.21 and 248.1–248.10. Both the access sites and the in lieu sites are replacement fishing grounds for those destroyed by Bonneville Dam. ***Pub. L. No. 100-581, 102 Stat. 2938*** (1998) (access sites); *cf.* State v. Jim, 273 P.3d 434 (2012) (denying state jurisdiction at in-lieu fishing site)..

138 United States v. Eberhardt, 789 F.2d 1354, 1362 (9th Cir. 1986) (upholding federal regulation of an on-reservation fishery in a tribal regulatory vacuum and for the purpose of conserving the resource); *see* § 18.03[2][c].

139 16 U.S.C. § 1801 et seq.

140 16 U.S.C. § 1852.

141 16 U.S.C. § 1854(a)(1)(B).

law.[142] Because nothing in the Act was intended to abrogate tribal treaty rights, the treaties serve as a source of "other law" for purposes of the statute.[143] The Secretary of Commerce is therefore empowered to take treaty-based fishing rights into account when approving or disapproving ocean harvest levels.[144] Second, the Pacific Northwest Electric Power Planning and Conservation Act[145] created the Northwest Power Planning Council to, among other tasks, develop and implement a comprehensive fish plan on the Columbia River system.[146] Although the Northwest tribes do not have a representative on the council, the Act requires the council to solicit recommendations from the tribes and notify them of the council's recommendations.[147]

In addition to its authority to regulate off-reservation hunting, fishing, and gathering rights, the federal government undertakes activities and projects outside Indian country that may affect the exercise of the tribes' treaty-reserved rights. In conducting, authorizing, or funding these projects, federal agencies must take account of their fiduciary duty to ensure that tribal-reserved rights are not impaired or abrogated.[148]

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142 16 U.S.C. §§ 1854, 1855(b).

143 Wash. State Charterboat Ass'n v. Baldrige, 702 F.2d 820, 823 (9th Cir. 1983). The Ninth Circuit subsequently recognized the same protection for on-reservation fishing rights secured by executive order. Parravano v. Masten, 70 F.3d 539, 546–547 (9th Cir. 1995).

144 Parravano v. Masten, 70 F.3d 539, 547 (9th Cir. 1995); *see also* Midwater Trawlers Coop. v. DOC, 282 F.3d 710, 719 (9th Cir. 2002), *appeal after remand*, 393 F.3d 994, 997-998 (9th Cir. 2004) (federal regulation of fisheries under the Magnuson-Stevens Fishing Conservation and Management Act must be consistent with tribal treaty rights and must be based on the "best available scientific evidence") (although determination of harvestable fish must be based on statutory requirement of "best scientific information available," 16 U.S.C. § 1851(a)(2), regulatory allocation of harvestable fish passing through tribe's usual and accustomed fishing places must accord tribe either 50% or enough to satisfy moderate living standard, whichever is less); *see* § 18.04[2][d].

145 16 U.S.C. §§ 839–839h.

146 16 U.S.C. § 839b. *See generally* Michael C. Blumm, *The Amphibious Salmon: The Evolution of Ecosystem Management in the Columbia River Basin*, 24 Ecol. L.Q. 653, 660–663 (1997).

147 16 U.S.C. § 839b(h)(2), (4)(A).

148 N.W. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (Congress, and not federal agencies, can abrogate Indian treaties); *see also* No Oilport! v. Carter, 520 F. Supp. 334, 371–372 (W.D. Wash. 1981) (finding issue of fact whether trust obligation had been breached).

§ 18.05 The Effect of International Agreements

International agreements entered into by the United States can affect tribal hunting, fishing, and gathering rights in two ways. First, some international treaties expressly preserve reserved fishing rights. For example, the Pacific Salmon Treaty between the United States and Canada[1] provides that it "shall not be interpreted or applied so as to affect or modify existing aboriginal rights or rights established in existing Indian treaties."[2] The treaty establishes a bilateral commission that decides the manner in which the fishery resources will be conserved and managed. The United States delegation to the commission consists of one representative for Alaska, one for Washington and Oregon, one for the treaty tribes, and one nonvoting representative for the United States. Because the American section cannot act unless it has unanimous agreement among the voting members, the tribes have the power to make certain that their interests are represented.[3]

Second, even when international treaties appear to limit reserved tribal hunting, fishing, and gathering rights, the courts may interpret the federal implementing statute in a manner that preserves tribal rights. For example, the Migratory Bird Treaty Act,[4] enacted pursuant to several international agreements entered into by the United States and other nations with whom it shares its migratory bird populations,[5] restricts the hunting of numerous species of migratory birds. The Secretary of the Interior authorizes Indian tribes to set their own regulations under the Act, rather than being subject to state regulations, although tribes are still required to adhere to certain limitations of the international treaties.[6] In addition, the federal government employs an informal policy that members of federally recognized tribes may possess migratory bird parts.[7] Similarly, a district court held that the Act did not abrogate the Chippewas' tribal treaty right to hunt in their ceded territory, because there was no evidence that Congress had considered the impact of the statute on those rights.[8] Accordingly, the court dismissed the convictions of two tribal members charged with selling migratory bird feathers in violation of the Act.[9]

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1 Treaty Concerning Pacific Salmon, U.S.-Can., Jan. 28, 1985, T.I.A.S. No. 11,091; *see also* Pacific Salmon Treaty Act of 1985, 16 U.S.C. § 3631 et seq.; Joy A. Yanagida, *The Pacific Salmon Treaty*, 81 Am. J. Int'l L. 577 (1987).

2 Treaty Concerning Pacific Salmon, U.S.-Can., Jan. 28, 1985, art. XI, T.I.A.S. No. 11,091.

3 *See* Treaty Concerning Pacific Salmon, U.S.-Can., Jan. 28, 1985, art. II, T.I.A.S. No. 11,091.

4 16 U.S.C. §§ 703–712.

5 The Act regulates species of birds covered by treaties between the United States, Canada, Mexico, Japan, and Russia. *See* 16 U.S.C. § 703 notes.

6 50 Fed. Reg. 23,459, 23,467–23,468 (1985) (establishing guidelines for tribal regulations, but noting that tribal regulations must be consistent with closed season provisions of 1916 Migratory Bird Treaty with Canada).

7 *See* United States v. Eagleboy, 200 F.3d 1137, 1138 (8th Cir. 1999). The court rejected an equal protection challenge to the policy, noting that it is based on tribal membership and not race. *Id.* at 1138–1139. *See also* Ch. 14, § 14.03[2][b].

8 United States v. Bresette, 761 F. Supp. 658, 663–664 (D. Minn. 1991); *see* § 18.07[3].

9 United States v. Bresette, 761 F. Supp. 658, 665 (D. Minn. 1991).

§ 18.08 Cooperative Agreements, Compacts, and Comanagement

Although the existence and meaning of tribal hunting, fishing, and gathering rights most often have been determined through litigation and court order, the regulatory and jurisdictional confusion surrounding the rights also can be settled by cooperative agreements or compacts,[1] as well as comanagement of shared resources.[2] The nature of wildlife conservation transcends borders, making hunting and fishing a natural place for states and tribes to come to agreement,[3] as well as for tribes to work together. Tribes in the Pacific Northwest and the western Great Lakes with off-reservation hunting, fishing, and gathering rights, or shared rights to fish at usual and accustomed places, have created intertribal agencies to develop joint tribal plans, offer technical and legal expertise, provide law enforcement, and work with state agencies on comanagement of the shared resources.[4]

Often the use of agreements and compacts will be more efficient and less costly than continued litigation. Agreements and tribal-state comanagement of shared resources can address not only the myriad of practical issues such as bag limits, seasons, and enforcement, but also lingering mutual distrust and misunderstanding,[5] born of the often acrimonious disputes that hunting and fishing controversies have engendered.[6] The courts have recognized the benefits, and often encouraged the use, of tribal-state cooperation. Indeed, it is not uncommon for court opinions in hunting and fishing cases to feature a sentence or two either exhorting the parties to more faithfully negotiate their differences,[7] or commending them for having done so.[8] It is also not uncommon for these cases to conclude with the incorporation of a state-tribe agreement into

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[1] *See* Ch. 6, § 6.05.

[2] *See generally* Sara Singleton, Constructing Cooperation: The Evolution of Institutions of Comanagement (U. Mich. Press 1998); Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 Envtl. L. 279 (2000).

[3] *See*, *e.g.*, State v. Shook, 67 P.3d 863, 865 n.1 (Mont. 2002) (Montana's 2002 regulation limiting big-game hunting on reservations to tribal members only "unless otherwise provided for by agreements between the State of Montana and a Tribal Government"). *See generally* David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., & Matthew L.M. Fletcher, Cases and Materials on Federal Indian Law 847–849 (West, 6th ed. 2011) (describing cooperative wildlife management agreements involving eight states and 21 tribes); Frank Pommersheim, *State-Tribe Relations: Hope for the Future?*, 36 S.D. L. Rev. 240 (1991) (collecting state-tribe agreements of all types; reporting 18 hunting and fishing compacts in eight states as of 1991).

[4] The Chippewa Ottawa Resource Authority, formerly the Chippewa Ottawa Treaty Fishery Management Authority, represents the five Michigan tribes with rights under the 1836 treaty. *See* www.1836cora.org. The Great Lakes Indian Fish and Wildlife Commission represents 11 Ojibwe tribes in Michigan, Wisconsin, and Minnesota. *See* www.glifwc.org. The Columbia River Inter-Tribal Fish Commission represents four tribes with treaty rights on the Columbia River. *See* www.critfc.org. And the Northwest Indian Fisheries Commission represents 20 tribes in the state of Washington. *See* www.nwifc.org.

[5] *See* Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 Wis. L. Rev. 375, 403.

[6] For an overview of the resentment and political opposition engendered by the fishing rights disputes in both Washington and Michigan, see Karen Ferguson, *Aftermath of the Fox Decision and the Year 2000*, 23 Am. Indian L. Rev. 97 (1998); *see also* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 843 F. Supp. 1284, 1288–1289 (W.D. Wis. 1994), *aff'd*, 41 F.3d 1190 (7th Cir. 1994) (detailing abuse directed at treaty spear fishers).

[7] *See*, *e.g.*, Confederated Salish & Kootenai Tribes v. Montana, 750 F. Supp. 446, 451 (D. Mont. 1990).

[8] *See*, *e.g.*, Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 934 (8th Cir. 1997), *aff'd*, 526 U.S. 172 (1999).

the order disposing of the case.[9] Because the practice of tribal-state agreements is only recently becoming more widespread, and because it is founded on litigation avoidance, however, few cases discussing the validity and proper scope of tribal-state hunting, fishing, and gathering agreements have been reported.[10]

[9] *See* Minn. Stat § 97.431 (1984), *as renumbered at* Minn. Stat. § 97A.151 (1998) (ratifying a regulatory and jurisdictional agreement between the Leech Lake Band of Chippewa Indians and the State of Minnesota following the band's victory in ***Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971))***.

[10] In United States v. Oregon, 913 F.2d 576 (9th Cir. 1990), the court approved the Columbia River Fish Management Plan designed to settle ongoing litigation over the management of Columbia River salmon and steelhead. The plan was agreed to by several tribes, the United States, and the states of Oregon and Washington. It was approved over the objections of one tribe and the State of Idaho.

§ 18.07 Termination and Abrogation of Hunting, Fishing, and Gathering Rights

[1] Necessity of Clear and Specific Congressional Action

The principle that treaty rights remain unless abrogated by unambiguous congressional action has great legal and moral force.[1] As the Supreme Court has declared, "Indian treaty rights are too fundamental to be easily cast aside."[2]

Courts generally require that Congress make its intent to abrogate treaty-reserved hunting, fishing, and gathering rights clear and unambiguous.[3] In many cases, the Supreme Court has stated that Congress must make its intent to abrogate express through the use of "explicit statutory language."[4] In other cases, the Court has allowed a somewhat lesser standard, finding it sufficient if Congress's intent is "clear and plain."[5] In any case, however, the Court provides that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."[6] The "essential" factor "is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[7]

These standards are consistent with general principles regarding congressional intent to extinguish Indian property rights.[8] As applied to treaty-reserved hunting, fishing, and gathering rights, the principles are based partly on the Indian law canons

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[1] *See, e.g.*, FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

[2] United States v. Dion, 476 U.S. 734, 739 (1986).

[3] *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968). General principles of treaty interpretation are discussed at Ch. 2, § 2.02. In a significant departure from these principles, the Washington Supreme Court ruled that the Yakama Nation's fishing rights had been "diminished" by a series of unspecified "congressional, executive, administrative and judicial acts of the United States over a period of years" between 1905 and 1968. *In re* Yakima River Drainage Basin, 850 P.2d 1306, 1322 (Wash. 1993) (*Aquavella*). Without explanation, the court held that although treaty rights cannot be abrogated "merely through inconsistent actions by government," those governmental actions nonetheless constituted an "encroachment upon" the treaty rights; thus, despite the normal requirement of clear congressional intent, the rights were diminished even though they were not extinguished. For a critique of the court's diminishment ruling, see 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, 476–478 (1998). Perhaps because of the court's departure from the well-established principles of treaty abrogation, no other court has adopted its unprecedented diminishment approach.

[4] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979) ("[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968) ("[w]e find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred in a treaty.").

[5] United States v. Dion, 476 U.S. 734, 738 (1986). The Court stated that "[e]xplicit statement by Congress is preferable," but not "a *per se* rule." *Id.* at 740.

[6] United States v. Dion, 476 U.S. 734, 739 (1986); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

[7] United States v. Dion, 476 U.S. 734, 739–740 (1986).

[8] *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247–248 (1985).

of construction,[9] and partly on the fact that a deprivation of treaty-reserved hunting, fishing, and gathering rights would constitute a taking of property subjecting the federal government to a claim for just compensation.[10]

[2] Subsequent Treaty, Agreement, or Executive Order with Tribe

Whether a subsequent treaty, agreement, or executive order with a tribe terminates the tribe's previously reserved hunting, fishing, and gathering rights depends not only on the language of the documents, but "an analysis of the history, purpose, and negotiations" as well.[11] Thus, two treaties with similar language, but involving different tribes, may well have different meanings.[12]

In *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*,[13] the Court construed two agreements between the United States and the Klamath Tribe, both of which ceded to the federal government the tribe's full right and title to the lands covered by each agreement. The first agreement was an 1864 treaty that ceded the tribe's aboriginal lands, established a reservation, and reserved to the tribe "the exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits."[14] The treaty was silent as to any off-reservation hunting, fishing, and gathering rights, and thus did not reserve rights in the tribe's aboriginal territory.[15] The second agreement, made in 1901 and ratified by Congress in 1906,[16] was intended to rectify a surveyor's error that had omitted nearly a third of the reservation land described in the 1864 treaty.[17] In the 1901 agreement, in exchange for compensation, the tribe ceded "all their claim, right, title, and interest in and to" the omitted lands.[18] The agreement was silent as to hunting, fishing, and gathering rights on the omitted lands.

The Court held that the 1901 agreement, in language virtually identical to the 1864 treaty, ceded any hunting, fishing, and gathering rights with the land.[19] The Court thus concluded that "[i]n the absence of any language reserving any specific rights in the ceded lands, the normal construction of the words used in the 1901 Agreement unquestionably would encompass any special right to use the ceded lands for hunting and fishing."[20]

The Court subsequently confined the *Klamath* decision to its facts. In *Minnesota v. Mille Lacs Band of Chippewa Indians*,[21] the Court construed a Chippewa treaty with language of cession virtually identical to the Klamath 1901 agreement.[22] Nonetheless, the Court stated that "*Klamath* does not control this case."[23] Unlike the Klamath Tribe's hunting, fishing, and

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9 *See* Ch. 2, § 2.02.

10 Menominee Tribe v. United States, 391 U.S. 404, 413 (1968).

11 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).

12 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).

13 Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985).

14 Treaty with the Klamath, 1864, art.1, ***16 Stat. 707***. The Ninth Circuit found, and the Supreme Court did not dispute, that this treaty language also reserved an on-reservation right to hunt and trap. *See* Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 755 n.2 (1985); *see also* § 18.04[2][a].

15 Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 766 (1985).

16 Act of June 21, 1906, ***34 Stat. 325***.

17 Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 755–760 (1985).

18 Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 760 (1985).

19 Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 768 (1985).

20 Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 768 (1985).

21 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

22 Treaty with the Chippewa, 1855, art. 1, ***10 Stat. 1165***.

23 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 201 (1999).

gathering rights, the Chippewa rights were neither exclusive nor tied to possession of the land. But "[m]ore importantly," the Court noted, treaty interpretation depends on the "history, purpose, and negotiations" as well as the language, so that similar treaties may have quite different meanings.[24]

Mille Lacs addressed the impact of a subsequent treaty and an executive order on the hunting, fishing, and gathering rights reserved in an earlier treaty. In an 1837 treaty, the Mille Lacs Band had reserved hunting, fishing, and gathering rights on its ceded lands "during the pleasure of the President of the United States."[25] In an 1855 treaty, the band ceded "all right, title, and interest, of whatsoever nature the same may be" in any lands remaining outside its reservation.[26] The Court held that the 1855 treaty did not extinguish the usufructuary rights reserved in the 1837 treaty, because the later treaty was entirely silent as to those rights, and the historical record revealed that the Indians would not have understood that they were surrendering those rights with their cession of land.[27] At the least, the Court noted, there was no unambiguous termination of the 1837 usufructuary rights and, because ambiguities in treaties are to be resolved in favor of the Indians, the cession language of the 1855 treaty did not terminate the 1837 rights.[28]

The *Mille Lacs* Court also considered whether the 1837 usufructuary rights, reserved "during the pleasure of the President of the United States,"[29] had been extinguished by an 1850 executive order. In 1850, President Zachary Taylor issued an executive order purporting to terminate the Chippewas' hunting, fishing, and gathering rights on their ceded lands and requiring them to remove to the unceded portion of their territory.[30] The Court held that the executive order did not successfully terminate the Mille Lacs' 1837 treaty hunting, fishing, and gathering rights, because it was beyond President Taylor's lawful authority to issue the order.[31] The order was not authorized by the Removal Act of 1830,[32] because the statute required tribal consent and the Chippewa bands had not consented to removal.[33] The order also was not authorized by the 1837 treaty, because it was a removal order that only terminated the usufructuary rights as an incident of removal, and the 1837 treaty did not purport to authorize the President to order the removal of the Chippewa Indians.[34]

[3] Statutes of General Applicability

Federal statutes of general applicability,[35] like statutes directly addressing Indian issues, may operate to abrogate treaty-reserved hunting, fishing, and gathering rights, but only if there is "clear evidence" that Congress has considered the conflict between the statute and Indian treaty rights, and chosen to abrogate the treaty rights.[36] In *United States v. Dion*,[37] the Supreme Court used this consideration-and-choice approach to hold that the rights of the Yankton Sioux to hunt eagles

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[24] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202–203 (1999).

[25] Treaty with the Chippewa, 1837, art. 5, ***7 Stat. 536***.

[26] Treaty with the Chippewa, 1855, art. 1, ***10 Stat. 1165***.

[27] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195–200 (1999).

[28] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999). *Cf.* Ottawa Tribe of Okla. v. Logan, 577 F.3d 634 (4th Cir. 2009) (tribe's fishing rights to Lake Erie were lost when the tribe abandoned the territory pursuant to a series of treaties ceding its remaining land and removed to Oklahoma).

[29] Treaty with the Chippewa, 1837, art. 5, ***7 Stat. 536***.

[30] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 179 (1999).

[31] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 193 (1999).

[32] Act of May 28, 1830, 4 Stat. 411.

[33] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188–189 (1999).

[34] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 189–190 (1999). The Court further held that the revocation of treaty rights in the executive order could not be severed from the removal portion of the order, and thus the entire 1850 order was invalid. *Id.* at 190–193.

[35] *See* Ch. 2, § 2.03.

[36] United States v. Dion, 476 U.S. 734, 740 (1986).

on their reservation[38] had been abrogated by the Eagle Protection Act.[39] The statute as originally enacted prohibited any traffic in bald eagles, but did not mention Indian tribes. When it was amended to extend to golden eagles, Congress included an exception to the prohibition on taking eagles, authorizing the Secretary of the Interior to grant permits to take eagles "for the religious purposes of Indian tribes."[40] The Court found that Congress was aware of the importance of eagles to Indian tribes and chose to provide limited access to the birds, thereby abrogating the greater treaty right to hunt.[41]

The Court's consideration-and-choice test for congressional abrogation of treaty-reserved rights by statutes of general applicability has led lower federal courts to inconsistent results. One district court determined that the Endangered Species Act (ESA) abrogated the Seminole Tribe's treaty rights to hunt.[42] The court held that the statute's "general comprehensiveness, its non-exclusion of Indians, and the limited exceptions for certain Alaskan Natives" constituted "clear evidence" that Congress had considered the conflict between the statute and reserved treaty rights, and chosen to abrogate the hunting, fishing, and gathering rights.[43] By contrast, another district court rejected an Alaska native exception in the Migratory Bird Treaty Act as sufficient to show that Congress had considered Indian treaty rights, "because Native Alaskans do not have treaty rights."[44] Finding it "disingenuous" to treat consideration of Alaska native rights as equivalent to consideration of Indian treaty rights, the court found "insufficient evidence" that Congress had considered the latter, and consequently concluded that the statute did not abrogate tribal reserved hunting, fishing, and gathering rights.[45]

Lingering confusion over the applicability of the ESA[46] has led to statements of understanding between the federal government and the tribes.[47] In addition, the Secretaries of Commerce and the Interior issued a joint order in 1997 on "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act."[48] In substance, the order is a broad recognition of tribal sovereignty over reservation fish and game resources. It requires agencies within the departments to consult with tribal authorities before enforcing the ESA against Indians exercising reserved hunting, fishing, and gathering rights, and it authorizes the creation of cooperative agreements between the departments and the tribes to

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[37] United States v. Dion, 476 U.S. 734 (1986).

[38] The Court did not question the tribe's right to hunt within reservation boundaries under the Treaty with the Yankton Sioux, 1858, ***11 Stat. 743***. United States v. Dion, 476 U.S. 734, 737–738 (1986); *see* § 18.02.

[39] 16 U.S.C. §§ 668–668d.

[40] *See* United States v. Dion, 476 U.S. 734, 741–745 (1986); *see also* 16 U.S.C. § 668a.

[41] United States v. Dion, 476 U.S. 734, 743–744 (1986). Despite its own test that Congress must have considered the conflict between the statute and treaty rights, the Court cited no evidence that Congress had in fact considered reserved Indian treaty rights. The Court did stress the fact that Congress was aware that Indians hunted eagles and used them for religious rituals—"Congress thus considered the special cultural and religious interests of Indians." *Id.* at 743. Treaty rights were not mentioned, however.

[42] United States v. Billie, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987). The Supreme Court expressly had not ruled on whether the Endangered Species Act abrogated Indian reserved rights. *See* United States v. Dion, 476 U.S. 734, 745 (1986).

[43] United States v. Billie, 667 F. Supp. 1485, 1490 (S.D. Fla. 1987).

[44] United States v. Bresette, 761 F. Supp. 658, 663 (D. Minn. 1991).

[45] United States v. Bresette, 761 F. Supp. 658, 663–665 (D. Minn. 1991).

[46] 16 U.S.C. §§ 1531–1544. As noted, the Supreme Court did not reach the issue in United States v. Dion, 476 U.S. 734, 745 (1986), and the lower federal courts have disagreed about whether Congress intended the ESA to abrogate treaty rights. *Compare* United States v. Billie, 667 F. Supp. 1485, 1492 (S.D. Fla. 1987) (finding sufficient evidence of congressional intent to abrogate), *with* United States v. Dion, 752 F.2d 1261, 1265–1267 (8th Cir. 1985), *rev'd on other grounds*, 476 U.S. 734 (1986) (insufficient evidence that Congress intended the ESA to apply to tribes). *See also* Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 Nat. Resources J. 859, 868–886 (1991) (arguing that the ESA does not abrogate treaty hunting, fishing, and gathering rights).

[47] William H. Rodgers, Jr., Environmental Law in Indian Country 762–67 (Thomson West 2005).

[48] Secretarial Order 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (1997). *See generally* Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 Wash. L. Rev. 1063 (1997).

promote conservation of those resources covered by the ESA.[49] Before enforcing the ESA against Indians exercising their reserved hunting, fishing, and gathering rights, the departments must determine that tribal conservation measures are inadequate, sufficient conservation cannot be had by regulation of non-Indian activity, and the proposed regulation of the Indians is the least restrictive means available to accomplish the goals of the ESA.[50]

The Supreme Court developed and applied the consideration-and-choice test for determining whether federal statutes of general applicability diminished tribal treaty rights in *United States v. Dion.*[51] The Ninth Circuit recently has taken a different approach. In *Anderson v. Evans*, the court applied a three-part test for determining whether federal conservation statutes affect Indian treaty-reserved hunting, fishing, and gathering rights.[52] Under this test, if the United States has jurisdiction over the area where the activity occurs and the statute is nondiscriminatory, the only remaining question is whether "the application of the statute to treaty rights is necessary to achieve its conservation purpose."[53] Applying the test, the Ninth Circuit held that the Makah Tribe, despite a specific treaty guarantee of the right to hunt whales,[54] could hunt gray whales only if it underwent the federal permitting process of the Marine Mammal Protection Act (MMPA).[55] Nonetheless, the court expressly disavowed any intent to abrogate the treaty: "[W]e need not and do not decide whether the Tribe's whaling rights have been abrogated by the MMPA. We simply hold that the Tribe, to pursue any treaty rights for whaling, must comply with the process prescribed in the MMPA."[56]

The Ninth Circuit's decision in *Anderson* cannot be reconciled with the Supreme Court's decision in *Dion*. The statutes at issue in both cases were conservation statutes, and both provided permit processes. Yet the Supreme Court specified that the question in these cases is whether the statute manifests clear congressional intent to abrogate treaty-reserved rights, not whether the statute is a conservation measure. By importing the conservation-necessity standard for the applicability of state regulation[57] into an analysis of a federal statute, the Ninth Circuit bypassed the crucial question whether Congress clearly intended the statute to affect tribal treaty rights.[58] In the case of the Marine Mammal Protection Act, moreover, congressional intent with respect to Indian treaty-reserved hunting, fishing, and gathering rights was plainly to preserve them, and not to abrogate them.[59]

The Tenth Circuit Court of Appeals held that a Navajo who was a convicted felon could not assert a treaty hunting right to possess a firearm.[60] Ruling that the general federal statute barring convicted felons from possessing firearms[61] applied

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[49] Secretarial Order 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, §§ 1, 3(A) (1997).

[50] Secretarial Order 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, § 5(C) (1997).

[51] United States v. Dion, 476 U.S. 734, 740 (1986).

[52] ***Anderson v. Evans, 371 F.3d 475, 497-498 (9th Cir. 2004)***. The court developed this test in a pre-*Dion* case, United States v. Fryberg, 622 F.2d 1010, 1015 (9th Cir. 1980). Although the court in *Fryberg* held, as did the Supreme Court in *Dion*, that the Endangered Species Act could affect tribal treaty rights, the *Dion* Court did not use the approach of *Fryberg*, but instead developed the consideration-and-choice test.

[53] ***Anderson v. Evans, 371 F.3d 475, 497 (9th Cir. 2004)***.

[54] Treaty with the Makah, 1855, § 4, ***12 Stat. 939***.

[55] ***Anderson v. Evans, 371 F.3d 475, 499-500 (9th Cir. 2004)***. The statute is codified at 16 U.S.C. 1361 et seq..

[56] ***Anderson v. Evans, 371 F.3d 475, 501 (9th Cir. 2004)***.

[57] *See* § 18.04[3][b].

[58] *See generally* Zachary Tomlinson, Note, *Abrogation or Regulation? How* Anderson v. Evans *Discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity*, 78 Wash. L. Rev. 1101, 1111–1129 (2003).

[59] The statute provides that nothing in the Act "alters or is intended to alter any treaty between the United States and one or more Indian tribes." Marine Mammal Protection Act Amendments of 1994, ***Pub L. 103-238***, § 14, ***108 Stat. 532*** (Apr. 30, 1994).

[60] United States v. Fox, 573 F.3d 1050 (10th Cir. 2009).

to a tribal member, the court reasoned that although the statute limited the tribal member's treaty rights, this situation is no different from that of a citizen forfeiting certain constitutional rights once convicted of a felony.[62] In addition, the court held that the "bad men" clause of the treaty[63] "envisioned that members of the Navajo Nation committing crimes would lose certain rights under the treaty."[64]

Federal statutes that otherwise abrogate treaty-reserved hunting, fishing, and gathering rights may include a limited exception for tribal members.[65] In addition, federal agencies implementing statutes that might adversely affect treaty rights may provide exceptions to accommodate treaty users. The availability of these special permits or exceptions for treaty users that allow the taking of resources that would otherwise violate federal law does not implicate equal protection concerns.[66] For example, disturbing or damaging plants or animals in a wildlife refuge is a federal crime.[67] The Fish and Wildlife Service, however, makes permits available to treaty users for federal wildlife areas within Indian reservations. The Eighth Circuit held that the agency's policy did not violate the equal protection rights of nontreaty users who were prosecuted for trapping leeches, because the treaties guaranteed the tribes the right to trap on the land involved.[68] Similarly, the same court held that an informal government policy that members of federally recognized tribes may possess migratory bird parts does not violate equal protection, because the classification is based on tribal membership, not race.[69]

[4] Equal Footing Doctrine

The admission of a state to the Union on an equal footing with the original states does not abrogate treaty hunting, fishing, and gathering rights.[70] In an 1896 case, *Ward v. Race Horse*,[71] the Supreme Court held that treaty rights to hunt "on the unoccupied lands of the United States" were extinguished upon statehood. That holding was called into question as early as 1905,[72] and expressly repudiated by the Court in the 1999 case of *Minnesota v. Mille Lacs Band of Chippewa Indians*.[73] The Court in *Mille Lacs* found that "*Race Horse* rested on a false premise" that treaty-reserved hunting, fishing, and gathering rights on state land are not reconcilable with state sovereignty over natural resources.[74] On the contrary, the *Mille Lacs* decision determined, the two are compatible, because the federal government acted pursuant to its constitutional powers in entering into the treaty and because the judicial "conservation necessity" standard allowing some state regulation of tribal treaty rights[75] adequately protects states' interests in their natural resources.[76]

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61 ***18 U.S.C. § 922(g)(1)***.

62 United States v. Fox, 573 F.3d 1050, 1054–55 (10th Cir. 2009).

63 *See* Ch. 9, § 9.02[1][d][iii].

64 United States v. Fox, 573 F.3d 1050, 1055 (10th Cir. 2009).

65 *See, e.g.*, 16 U.S.C. § 668a (exception to Eagle Protection Act prohibition on taking of eagles "for the religious purposes of Indian tribes").

66 *See generally* Ch. 14, § 14.03[2][b].

67 ***18 U.S.C. § 2***; 50 C.F.R. § 27.51.

68 United States v. Aanerud, 893 F.2d 956, 960 (8th Cir. 1990).

69 *See* United States v. Eagleboy, 200 F.3d 1137, 1138–1139 (8th Cir. 1999).

70 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999) ("[t]reaty rights are not impliedly terminated upon statehood").

71 Ward v. Race Horse, 163 U.S. 504, 514–515 (1896).

72 *See* United States v. Winans, 198 U.S. 371, 382–384 (1905) (rejecting argument that treaty-reserved fishing rights at usual and accustomed fishing places were terminated upon statehood).

73 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999).

74 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999).

75 *See* § 18.04[3][b].

Nonetheless, the *Mille Lacs* Court avoided overruling *Race Horse* in its entirety.[77] The Court stated that the decision in *Race Horse* was supported by that Court's alternative finding that "the particular rights in the Treaty at issue" in *Race Horse* "were not intended to survive statehood."[78] Under this approach, the parties to the *Race Horse* treaty contemplated that the right to hunt "on the unoccupied lands of the United States" was intended to terminate upon statehood.[79] The Court distinguished the treaty at issue in *Mille Lacs*, finding "no suggestion" that the parties intended the hunting, fishing, and gathering rights to end at statehood.[80]

[5] Termination Acts

Because abrogation of treaty rights requires clear evidence of congressional intent, even termination of the government-to-government relationship between a tribe and the United States[81] does not imply termination of treaty-reserved hunting, fishing, and gathering rights. In *Menominee Tribe v. United States*,[82] the Court held that the tribe's treaty rights had not been extinguished by the Menominee Termination Act.[83] The Court noted that the Termination Act was silent as to its effect on treaty rights,[84] but that Public Law 280,[85] to which the tribe was subject while its termination plan was drawn up, expressly disclaimed any effect on reserved hunting, fishing, and gathering rights.[86] Reading those two statutes in pari materia, the Court concluded that the Termination Act was not intended to abrogate treaty hunting, fishing, and gathering rights.[87] In the absence of an "explicit statement" of congressional intent, "[w]e decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians."[88]

[6] Compensability

Treaty-reserved hunting, fishing, and gathering rights are valuable property rights, congressional abrogation of which entitles the tribes to compensation under the *fifth amendment of the United States Constitution*.[89] When hunting, fishing,

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[76] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204–205 (1999).

[77] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207 (1999). The Chief Justice, however, stated his belief that the earlier case was "effectively overrule[d]." *Id.* at 219 (Rehnquist, C.J., dissenting).

[78] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206 (1999).

[79] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 206–207 (1999).

[80] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 207–208 (1999). In dissent, Chief Justice Rehnquist argued that *Race Horse* stood for the proposition that "temporary and precarious" treaty rights, *see* Ward v. Race Horse, 163 U.S. 504, 515 (1896), terminated upon statehood and that the treaty rights at issue in *Mille Lacs* were temporary and precarious because they could be extinguished at "the pleasure of the President." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 219–220 (1999) (Rehnquist, C.J., dissenting). The Court, however, rejected that approach as "simply too broad to be useful," because all treaty rights are precarious in the sense that Congress may terminate them. *Id.* at 206–207.

[81] *See* Ch. 3, § 3.02[8].

[82] Menominee Tribe v. United States, 391 U.S. 404 (1968).

[83] Act of June 17, 1954, ***68 Stat. 250*** (repealed 1973) (formerly codified at 25 U.S.C. §§ 891–902).

[84] In some cases, termination acts expressly preserved treaty hunting, fishing, and gathering rights. *See* 25 U.S.C. § 564m(b) (Klamath Termination Act); Or. Dep't of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 766 (1985) (Klamath rights survived termination).

[85] *See* Ch. 6, § 6.04[3].

[86] Menominee Tribe v. United States, 391 U.S. 404, 408–411 (1968).

[87] Menominee Tribe v. United States, 391 U.S. 404, 411 (1968).

[88] Menominee Tribe v. United States, 391 U.S. 404, 412–413 (1968).

[89] Menominee Tribe v. United States, 391 U.S. 404, 413 (1968); Hynes v. Grimes Packing Co., 337 U.S. 86, 105 (1949).

and gathering rights are regulated through congressional action, however, compensation is not ordinarily required.[90] If, however, a treaty reserving hunting, fishing, and gathering rights implied a right to be free from federal regulation, the imposition of a regulation might amount to an unconstitutional taking of tribal property that requires compensation.

If a tribe is awarded compensation for the loss or diminishment of its rights by the federal claims system,[91] courts disagree as to whether that award precludes a tribal claim that its rights persist. The Washington Supreme Court found that an award and settlement before the Indian Claims Commission "confirmed the diminishment" of the Yakama Nation's treaty rights to fish.[92] The Indian Claims Commission had entered an award and final judgment that incorporated a settlement of the Yakama Nation's claim for compensation for the inundation and destruction of its traditional fishing places by power and irrigation dams; the settlement dismissed that tribal claim with prejudice.[93] Conceding that the commission could not extinguish treaty rights, the Washington court nonetheless noted that a claims award is conclusive proof that a taking of the rights occurred, and thus precludes the tribe's claim to water to support full fishing rights.[94] The New Mexico Court of Appeals, however, expressly declined to follow this approach, noting that the Washington court ignored the fact that the claim of existing rights could not have been asserted before the commission, which had only the limited jurisdiction to award money damages.[95]

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[90] *See* Andrus v. Allard, 444 U.S. 51, 64–66 (1979) (statutory prohibitions on sale of preexisting avian artifacts is not taking of property right, because restriction is only on one means of disposal).

[91] *See* Ch. 5, § 5.06.

[92] *In re* Yakima River Drainage Basin, 850 P.2d 1306, 287–288 (Wash. 1993) (Acquavella). The claims decision at issue was Yakima Tribe v. United States, 20 Ind. Cls. Comm'n 76 (1968).

[93] *In re* Yakima River Drainage Basin, 850 P.2d 1306, 1323–25 (Wash. 1993) (Acquavella).

[94] *In re* Yakima River Drainage Basin, 850 P.2d 1306, 1324–26 (Wash. 1993) (Acquavella); *see also* United States v. Dann, 873 F.2d 1189, 1198-1199 (9th Cir. 1989).

[95] State *ex rel*. Martinez v. Kerr-McGee Corp., 898 P.2d 1256, 1260 (N.M. Ct. App. 1995) (commission award of money damages for water rights appurtenant to inundated lands did not preclude Pueblo's claim to water rights).

§ 18.06 Regulation of Nonmember Activities in Indian Country

[1] Tribal Regulation

Indian tribes have the right to exclude nonmembers from trust land and other tribal land and to place conditions upon their entry.[1] Because reservation economic development often depends in large part on non-Indian contacts, however, tribes rarely exercise their right to completely exclude nonmembers, and, in fact, often invite nonmembers into Indian country to take advantage of the resources available there.[2] In addition, many non-Indians own fee land within reservation boundaries and engage in hunting, fishing, and gathering activities within reservation boundaries. The general jurisdictional difficulties of determining the relative spheres of tribal and state authority in Indian country over nonmembers, whether Indian or non-Indian,[3] recur in hunting and fishing cases.

Indian tribes retain the broad power, exclusive of the states, to regulate the conduct of nonmembers on trust and tribal land in Indian country.[4] Tribes can enact game codes applicable to nonmembers who hunt, fish, and gather on tribal lands, as well as charge licensing and permit fees.[5] Although tribes may enforce tribal laws against nonmember violators through civil remedies such as revocation of licenses, civil penalties, or exclusion from trust lands,[6] tribes do not have criminal jurisdiction over non-Indians acting within Indian country.[7] Congress has, however, provided for the federal prosecution of non-Indians who enter Indian lands with the purpose of taking fish, game, or flora in violation of tribal law.[8]

In *Montana v. United States*,[9] the Supreme Court addressed two bases for tribal authority to regulate the hunting, fishing, and gathering activities of non-Indians on fee lands: The tribe's treaty and its inherent sovereign authority. The Court ruled first that the tribe's treaty right to the "absolute and undisturbed use and occupation" of the reservation[10] had been abrogated as to lands that were no longer within the tribe's exclusive use and occupation: that is, non-Indian owned fee lands.[11] Because the tribe had lost the treaty right to control the fee lands, the Court reasoned, it also had lost the lesser

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1 Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982); Montana v. United States, 450 U.S. 544, 557 (1981); *see* Ch. 4, § 4.01[2][e].

2 *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 327 (1983).

3 *See* Ch. 4, §§ 4.01–4.02; Ch. 6, §§ 6.02[2], 6.03[2].

4 *See* South Dakota v. Bourland, 508 U.S. 679, 688 (1993); Montana v. United States, 450 U.S. 544, 557 (1981). *But cf.* Nevada v. Hicks, 533 U.S. 353, 364 (2001) (tribal court has no adjudicative jurisdiction to hear tort claim against state game warden who entered on-reservation trust land to serve search warrant in connection with off-reservation, state-law crime); *see* Ch. 4, § 4.02[3][c].

5 *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330 (1983); Montana v. United States, 450 U.S. 544, 557 (1981); Quechan Tribe v. Rowe, 531 F.2d 408, 411 (9th Cir. 1976). Tribal game codes may be subject to approval by the Secretary of the Interior. *See* Ch. 4, § 4.04[3]; Ch. 5, § 5.03. Congress also may delegate its regulatory authority to the tribe. *See* Ch. 4, § 4.03. For example, under the Migratory Bird Treaty Act, the Fish and Wildlife Service established guidelines for tribal proposals to regulate on-reservation hunting of migratory birds. *See* § 18.05.

6 Quechan Tribe v. Rowe, 531 F.2d 408, 410 (9th Cir. 1976).

7 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

8 *See* § 18.06[3].

9 Montana v. United States, 450 U.S. 544 (1981).

10 Treaty of Fort Laramie, 1868, art. II, ***15 Stat. 649***.

11 Montana v. United States, 450 U.S. 544, 559 (1981).

power to control activities of nonmembers on those lands.[12] Having determined that the tribe lost its treaty-based authority to regulate nonmembers on fee lands, the Court in *Montana* turned to the tribe's inherent regulatory authority.[13] It determined that tribal regulation of nonmembers on fee lands was "inconsistent with the dependent status of the tribes," unless Congress had authorized tribal regulation or one of two exceptions existed.[14] An Indian tribe would retain authority over a nonmember on fee lands, the Court held, if the nonmember had entered into "consensual relationships with the tribe or its members" or if the non-Indian's "conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[15] The Court, however, found neither circumstance present, noting that no consensual relationship existed between the tribe and non-Indians hunting and fishing on non-Indian fee land, and that the tribe had not alleged that those activities "imperil[ed] the subsistence or welfare of the Tribe."[16] Subsequent attempts by tribes to use the *Montana* exceptions to regulate nonmember hunting and fishing activities on fee lands similarly have been rejected.[17]

[2] State Regulation

As a consequence of the United States Supreme Court's decisions in *Montana v. United States*[18] and *South Dakota v. Bourland*,[19] it appears settled that states may regulate the hunting, fishing, and gathering activities of nonmembers on fee land within Indian country, unless the governing tribe can demonstrate its right to regulate under one of the *Montana* exceptions.[20] The states' regulatory authority extends to the right to prohibit nonmember hunting and fishing, so long as the state law is rationally related to the state's federal-law obligation to Indian tribes.[21]

State regulatory powers over nonmember hunting, fishing, and gathering activities on trust lands or other lands held by tribes, however, generally are preempted by federal law. In *New Mexico v. Mescalero Apache Tribe*,[22] the Supreme Court held that "[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal

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[12] Montana v. United States, 450 U.S. 544, 558–559 (1981). In South Dakota v. Bourland, 508 U.S. 679, 689, 692 (1993), the Court extended its ruling in *Montana* to find that the Cheyenne River Sioux Tribe had lost its treaty right of exclusive use, and thus the lesser right to regulate conduct, on reservation lands that had been taken by the United States for a dam and reservoir project. *See* Ch. 4, § 4.02[3][c][i].

[13] Montana v. United States, 450 U.S. 544, 563 (1981).

[14] Montana v. United States, 450 U.S. 544, 564–565 (1981).

[15] Montana v. United States, 450 U.S. 544, 565–566 (1981).

[16] Montana v. United States, 450 U.S. 544, 566 (1981). For discussion of tribal regulatory authority over nonmembers, see Ch. 6, § 6.02[2].

[17] In South Dakota v. Bourland, 508 U.S. 679, 695–696 (1993), the Court remanded for a determination of the tribe's inherent powers to regulate on the federal reservoir lands, *i.e.*, for an application of the two exceptions to the *Montana* presumption. On remand, the Eighth Circuit found the first *Montana* exception not relevant, and upheld lower court findings that nonmember conduct was merely "vexatious" rather than sufficiently serious to meet the second *Montana* exception. South Dakota v. Bourland, 39 F.3d 868, 869–870 (8th Cir. 1994). For a similar result, see Lower Brule Sioux Tribe v. South Dakota, 104 F.3d 1017, 1023–1024 (8th Cir. 1997). None of the cases denying tribal authority involved tribes with both on- and off-reservation treaty rights.

[18] Montana v. United States, 450 U.S. 544 (1981).

[19] South Dakota v. Bourland, 508 U.S. 679 (1993).

[20] *See* Montana v. United States, 450 U.S. 544, 565–566 (1981); § 18.03[1].

[21] State v. Shook, 67 P.3d 863, 866–867 (Mont. 2002) (state's limitation of big-game hunting on reservations to tribal members only did not violate state constitutional guarantee of equal protection, because ban on nonmembers was political classification rationally related to preservation of wildlife for Indian hunting); *see* Ch. 14, § 14.03[2][b][iii]. *Cf.* State v. Guidry, 223 P.3d 533, 537 (Wash. App. 2009) (holding that "if a non-member spouse assists the member spouse to fish on the reservation or at the Tribe's usual and accustomed fishing places in a manner approved in the Tribal Code, the State cannot impose different conditions unless reasonable and necessary for the conservation of the resource.").

[22] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[23] Applying this preemption principle, the Court found New Mexico's game regulations inapplicable within the boundaries of the Mescalero Apache Reservation.[24] The Court found relevant several factors, including the extent to which the tribe, in cooperation with the federal government, had developed and managed the reservation game resources,[25] the substantial adverse impact the state regulations would have on tribal game management efforts,[26] and the absence of state interests or off-reservation effects that would justify state regulation.[27] Based on these factors, the Court held that "[t]he exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development."[28]

When a state is authorized to regulate nonmember hunting, fishing, and gathering activities within Indian country, enforcement of the state laws may present a problem. It is not clear that state game officials may enter trust lands without tribal permission in order to cite nonmembers for on-reservation violations of state game laws.[29] The Supreme Court held in *Nevada v. Hicks*[30] that a tribal court had no jurisdiction over a tort claim by a tribal member against a state law enforcement officer who entered trust land with a state warrant in order to investigate an alleged off-reservation crime. The Court did not, however, hold that state officials were empowered to enter trust lands without a warrant from a tribal court.[31]

[3] Federal Regulation

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[23] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). *See generally* Ch. 6, § 6.01[1].

[24] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 344 (1983). The state conceded that the tribe had exclusive jurisdiction as to tribal members, as well as the right to regulate nonmembers. The state claimed concurrent regulatory authority over nonmembers on trust lands. *Id.* at 330.

[25] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 327–329, 340 (1983). The federal government had actively facilitated the growth of the tribe's game resources. It operated a fish hatchery on the reservation, donated elk to foster the tribe's herd, and helped finance a resort complex designed to attract off-reservation hunters and fishers.

[26] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 338–341 (1983). Allowing concurrent state regulation would empower a state "wholly to supplant tribal regulations" because the state could enact more stringent standards than the tribe. *Id.* at 338. "The Tribe would thus exercise its authority over the reservation only at the sufferance of the State," entirely undermining tribal authority to regulate nonmembers on trust lands.

[27] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341–342 (1983).

[28] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 343–344 (1983). Some case law allowing concurrent state regulation preceded the *Mescalero* decision. *See* White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1138 (8th Cir. 1982); United States v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976); State v. Danielson, 427 P.2d 689, 691–692 (Mont. 1967). These cases, however, generally took the position that state law did not interfere with tribal sovereign interests and that no federal statute preempted state game law. *See* United States v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976) (state law not preempted by 18 U.S.C. § 1165; *see* § 18.06[3]); State v. Danielson, 427 P.2d 689, 691–692 (Mont. 1967) (same); *see also* White Earth Band of Chippewa Indians v. Alexander, 683 F.2d 1129, 1138 n.9 (8th Cir. 1982) (noting lack of federal statute). As *Mescalero* makes clear, however, the preemption doctrine in Indian law is a broader inquiry than whether a particular federal statute conflicts with state law. The pre-*Mescalero* cases are thus based on premises that no longer hold true.

[29] *See* California v. Quechan Tribe, 424 F. Supp. 969, 976–977 (S.D. Cal. 1977), vacated on other grounds, 595 F.2d 1153 (9th Cir. 1979) (state game wardens needed to obtain express tribal permission); *cf.* State v. Clark, 308 P.3d 590 (2013) (state may search tribal trust land to investigate a crime committed on a reservation over which the State has jurisdiction).

[30] Nevada v. Hicks, 533 U.S. 353, 364, 356 (2001). *See* Ch. 4, § 4.02[3][c][ii].

[31] *Cf.* South Dakota v. Cummings, 679 N.W.2d 484 (S.D. 2004) (tribal warrant required for state officer to effect arrest of tribal member on reservation for alleged off-reservation crime); *see also* Ch. 6, § 6.03.

Although Congress has the power to address nonmember hunting, fishing, and gathering activities on reservations pursuant to its broad authority over Indian affairs, it generally has exercised that authority in only two instances: the enactment of *18 U.S.C. § 1165*[32] and the Lacey Act.[33]

Section 1165 makes it a federal crime to knowingly trespass on Indian lands for the purpose of engaging in hunting, fishing, and gathering activities "without lawful authority or permission."[34] It thus reaches violations of tribal fish and game codes, providing another means to enforce those tribal laws against non-Indians.[35] The application of section 1165 is unaffected by a state's assumption of jurisdiction under Public Law 280,[36] because Public Law 280 expressly preserves federal law with respect to tribal hunting, fishing, and gathering rights.[37] Although on its face section 1165 appears to apply to all persons, courts have held that it does not apply to tribal members, who are subject to tribal jurisdiction for violations of tribal law.[38] Whether the statute applies to nonmember Indians, or only to non-Indians, has been the subject of some dispute.[39] In light of the Supreme Court's recent affirmation of a federal statute recognizing inherent tribal criminal authority over all Indians,[40] however, it appears that section 1165 prosecutions should be restricted to non-Indians.

The Lacey Act[41] prohibits the transportation, sale, receipt, acquisition, or purchase of any fish, wildlife, or plants taken by "any person" in violation of federal, tribal, or state law.[42] Although the Lacey Act incorporates tribal law only to "the extent that the regulation or rule applies within Indian country,"[43] nonmembers of tribes can be prosecuted for trafficking in fish, plants, or wildlife in violation of tribal law so long as those violations occurred within Indian country.[44] The Eighth Circuit rejected the argument that a Lacey Act prosecution of a nonmember for a violation of tribal law was permissible only if

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[32] 18 U.S.C § 1165.

[33] 16 U.S.C. §§ 3371–3378.

[34] 18 U.S.C. § 1165. Courts interpret "land" broadly to include waters as well. *See* United States v. Pollmann, 364 F. Supp. 995, 999–1000 (D. Mont. 1973).

[35] *See* United States v. Jackson, 600 F.2d 1283, 1287 (9th Cir. 1979); United States v. Greyfox, 727 F. Supp. 576, 577-578 (D. Or. 1989). Under § 1165, it is the act of trespass for purposes of taking fish or game without permission, and not the actual violation of tribal law, that constitutes the federal crime. *See* United States v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976). Nonetheless, because the tribal codes specify when nonmembers have "lawful authority or permission" to be on tribal lands, the federal statute necessarily incorporates tribal law. Tribes may not directly enforce their criminal laws, because tribal courts do not have criminal jurisdiction over non-Indians. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see also* Ch. 9, § 9.04. They may, however, enforce civil remedies, such as penalties, forfeitures, and exclusion from tribal territory. *See* Ch. 4, § 4.01[2].

[36] *See* Ch. 6, § 6.04[3].

[37] United States v. Pollmann, 364 F. Supp. 995, 1002 (D. Mont. 1973); *see* 18 U.S.C. § 1162(b).

[38] *See* United States v. Jackson, 600 F.2d 1283, 1287 (9th Cir. 1979). The statute does not violate equal protection, because it is not based on race. *See* United States v. Pollmann, 364 F. Supp. 995, 1002 (D. Mont. 1973); *see also* Ch. 14, § 14.03[2][b][ii].

[39] *Compare* United States v. Greyfox, 727 F. Supp. 576, 578 (D. Or. 1989) (because nonmember Indian is subject to tribal criminal jurisdiction for violations of tribal code, § 1165 does not apply), *with* United States v. Von Murdock, 919 F. Supp. 1534, 1539 (D. Utah 1996), *aff'd*, 132 F.3d 534 (10th Cir. 1997) (reading § 1165 as applying to nonmember Indians, as well as non-Indians).

[40] United States v. Lara, 541 U.S. 193, 197–207 (2004) (referencing 25 U.S.C. § 1301(2)).

[41] 16 U.S.C. §§ 3371–3378.

[42] 16 U.S.C. § 3372(a).

[43] 16 U.S.C. § 3371(c).

[44] United States v. Big Eagle, 881 F.2d 539, 540–541 (8th Cir. 1989). One court has ruled that 18 U.S.C. § 1165 cannot be used to establish an illegal take under the Lacey Act, because § 1165 does not criminalize the taking of fish and wildlife in violation of tribal law, but rather the knowing trespass onto Indian lands for the purpose of the taking. *See* United States v. Sanford, 547 F.2d 1085, 1088 (9th Cir. 1976).

the tribe would otherwise have the authority to enforce its law against the nonmember directly, finding that Congress authorized comprehensive federal enforcement of tribal fish and wildlife laws throughout Indian country.[45]

[45] United States v. Big Eagle, 881 F.2d 539, 540–541 (8th Cir. 1989).

Sealing Court Records and Proceedings: A Pocket Guide

Robert Timothy Reagan

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Introduction

Essential to the rule of law is the public performance of the judicial function. The public resolution of court cases and controversies affords accountability, fosters public confidence, and provides notice of the legal consequences of behaviors and choices.

On occasion, however, there are good reasons for courts to keep parts of some proceedings confidential. Courts will keep confidential classified information, ongoing investigations, trade secrets, and the identities of minors, for example.

The public in general and news media in particular have a qualified right of access to court proceedings and records. This right is rooted in the common law.[1] The First Amendment also confers on the public a qualified right of access. In 1980, the Supreme Court held that the First Amendment right of access to court proceedings includes the public's right to attend criminal trials.[2] The Court suggested that a similar right extends to civil trials, but they were not at issue in the case.[3] Some courts of appeals have held that the public's First Amendment right of access to court proceedings includes both criminal and civil cases.[4]

The process used by courts to keep some of their proceedings and records confidential is generally referred to as seal-

1. Nixon v. Warner Communications, Inc., 435 U.S. 589, 596–97 (1978).

2. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion, quotation marks omitted).

3. *Id.* at n.17.

4. *E.g.*, Lugosch v. Pyramid Co., 435 F.3d 110, 121 (2d Cir. 2006) Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1061 (3d Cir. 1984); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988).

ing.[5] If a proceeding is sealed, often referred to as closed, it is not open to the public. Usually that means that any transcript made of the proceeding will be regarded as a sealed record. Clerks of court traditionally protected sealed filings and records by storing them separately from the public case file in a secure room or vault. As court records have become more electronic in form, electronic methods of security have been developed.

The Public Right of Access

The common law and the Constitution afford the public a qualified right of access to judicial records and proceedings. The Constitution affords a criminal defendant both a right to public proceedings and limited protection from public proceedings.

The Common Law and the First Amendment

If the public has a First Amendment right of access to a court proceeding or record, then sealing the proceeding or record to preserve confidentiality must be narrowly tailored to a compelling confidentiality interest.[6] Some courts have said that the

5. This pocket guide discusses the sealing of court proceedings and records. It does not discuss the related issue of protective orders, which are orders that courts issue requiring parties to keep their own records confidential.

6. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982); Washington Post v. Robinson, 935 F.2d 282, 288, 292 (D.C. Cir. 1991); *Lugosch*, 435 F.3d at 124; United States v. Smith, 776 F.2d 1104, 1112 (3d Cir. 1985); Virginia Dep't of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004); United States v. Edwards, 823 F.2d 111, 115 (5th Cir. 1987); Grove Fresh Distribs, Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); *In re* Search Warrant, 855 F.2d 569, 575 (8th Cir. 1988); Times Mirror Co. v. United States, 873 F.2d 1210, 1211 n.1 (9th Cir.

First Amendment right of access requires a higher showing of the need for confidentiality than the common-law right of access.[7] The common-law right of access requires a balancing of the need for confidentiality against the public's strong right of access to court proceedings and records.[8] Some courts have said that even under the common law, sealing requires narrow tailoring[9] or a compelling showing.[10]

Courts have articulated a two-prong test to determine whether a public right of access is rooted in the First Amendment.[11] The *history,* or *experience,* prong is an analysis of whether the proceeding has historically been open. The *logic,* or *function,* prong is an analysis of whether the right of access fosters good operation of the courts and the government. Some

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1989); United States v. McVeigh, 119 F.3d 806, 814 (10th Cir. 1997); Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001).

7. *Lugosch*, 435 F.3d at 124; *In re* Cendant Corp., 260 F.3d 183, 198 n.13 (3d Cir. 2001); *In re* Baltimore Sun Co., 886 F.2d 60, 64 (4th Cir. 1989); Valley Broadcasting Co. v. U.S. Dist. Court, 798 F.2d 1289, 1293 (9th Cir. 1986).

8. *In re* National Broadcasting Co., 653 F.2d 609, 612–13 (D.C. Cir. 1981); Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994); SEC v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993); San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1102–03 (9th Cir. 1999).

9. Media General Operations, Inc. v. Buchanan, 417 F.3d 424, 429 (4th Cir. 2005).

10. *In re* Providence Journal Co., 293 F.3d 1, 10 (1st Cir. 2002); Pintos v. Pacific Creditors Assoc., 565 F.3d 1106, 1115 (9th Cir. 2009).

11. *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1331–32 (D.C. Cir. 1985); *Lugosch*, 435 F.3d at 120; United States v. Simone, 14 F.3d 833, 837 (3d Cir. 1994); *In re Baltimore Sun Co.,* 886 F.2d at 64; United States v. Corbitt, 879 F.2d 224, 237 (7th Cir. 1989); Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940 (9th Cir. 1998).

courts of appeals have determined that the constitutional right of access requires *both* a historical and a logical foundation.[12]

In practical terms, it may be of little consequence whether a right of access is rooted in the First Amendment or "only" in the common law. It may be a rare situation in which the need for confidentiality is strong enough to outweigh the common-law right of access, but the need for confidentiality is not compelling enough to overcome the First Amendment right of access and the court has determined that the First Amendment does not apply to the proceeding or record. On the other hand, some courts of appeals have said that appellate review of sealing decisions under the First Amendment is more searching than appellate review of sealing decisions under the common law.[13]

The Sixth Amendment

The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial, by an *impartial* jury . . . ."[14]

Courts have recognized limited exceptions to the defendant's right to a completely public trial. For example, it can be permissible to close the courtroom to the public while taking testimony from a witness whose safety would be endangered if the testimony were public.[15] Courts sometimes permit light

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12. *In re Reporters Committee*, 773 F.2d at 1332; *Phoenix Newspapers, Inc.*, 156 F.3d at 946.

13. *In re Providence Journal Co.,* 293 F.3d at 10; United States v. Smith, 123 F.3d 140, 146 (3d Cir. 1997); EEOC v. Westinghouse Elec. Corp., 917 F.2d 124, 127 (4th Cir. 1990).

14. Emphasis added.

15. Brown v. Kuhlmann, 142 F.3d 529, 531, 533, 537–38, 544 (2d Cir. 1998) (noting that the transcript, in which the witness, an undercover police officer, was identified only by his badge number, was neither sealed nor

disguise or visual screening of the witness instead of full closure of the courtroom.[16]

Although the Sixth Amendment guarantees a public trial, it also guarantees a fair trial.[17] Sometimes the right to a fair trial is served by withholding from the public, from which the jury will be drawn, preliminary information about the case.[18] One court of appeals approved a district court's delaying until the end of the trial the public release of evidentiary sidebar conferences, noting that one juror had already been excused because he had seen inadmissible evidence in the press.[19]

Specific Record and Proceeding Issues

Some sealing issues have arisen frequently enough for case law about them to be developed. Some types of information are understood to be properly protected by sealing, such as national security secrets. Some proceedings are understood to be properly held in secret, such as grand jury proceedings. The identities of some parties, such as juveniles, are properly protected by sealing or redaction. The following are summaries of the case law pertaining to several such issues.

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redacted, and the witness's testimony occupied less than six pages of the transcript, which was over 900 pages long).

16. Robert Timothy Reagan, National Security Case Studies: Special Case-Management Challenges 34, 49, 86, 115–16, 126–28, 161, 170–71 (Federal Judicial Center 2010) (describing procedures used to protect witnesses in national security cases).

17. *E.g.*, United States v. Raffoul, 826 F.2d 218, 223 (3d Cir. 1987); Associated Press v. U.S. Dist. Court, 705 F.2d 1143, 1145 (9th Cir. 1983).

18. *In re* Globe Newspaper Co., 729 F.2d 47, 49, 55 (1st Cir. 1984); United States v. Cojab, 996 F.2d 1404, 1404–05, 1408 (2d Cir. 1993); *In re* Charlotte Observer, 882 F.2d 850, 853 (4th Cir. 1989); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 431 (5th Cir. 1981).

19. Sacramento Bee v. U.S. Dist. Court, 656 F.2d 477, 479–80, 482–83 (9th Cir. 1981).

National Security

On rare occasions, adjudication of a case requires presenting to the court classified information, which is information an intelligence agency has determined could result in damage to national security if it were disclosed to the wrong person.[20] The Executive Branch decides access and storage limits for classified information.[21] The public is given access to cases involving classified information by redacting the classified information from the public record.[22]

Grand Jury Proceedings

Grand jury proceedings are held in secret.[23] Sometimes, however, justice may require the availability of portions of grand jury records for other proceedings.[24] In addition, one court of appeals found a qualified right of "access to ministerial records in the files of the district court having jurisdiction of the grand jury."[25]

Judicial proceedings ancillary to grand jury proceedings often arise. For example, a witness may move to quash a grand jury subpoena, or the government may initiate contempt pro-

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20. *See* Robert Timothy Reagan, Keeping Government Secrets: A Pocket Guide for Judges on the State-Secrets Privilege, the Classified Information Procedures Act, and Court Security Officers 1–2 (Federal Judicial Center 2007) [hereinafter Keeping Government Secrets]; *see also* Reagan, *supra* note 16 (providing case examples of how courts have protected national security).

21. *See* Reagan, Keeping Government Secrets, *supra* note 20, at 3, 19.

22. *E.g.*, United States v. Ressam, 221 F. Supp. 2d 1252 (W.D. Wash. 2002).

23. Fed. R. Crim. P. 6; *see* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 (1979).

24. *Douglas Oil Co.*, 441 U.S. at 219–20.

25. *In re* Special Grand Jury, 674 F.2d 778, 781 (9th Cir. 1982).

ceedings against an uncooperative witness. Such judicial proceedings are often conducted under seal,[26] but it has been held that there should be a public record of such proceedings and that only parts of the record should be sealed as necessary to protect grand jury secrecy.[27]

Juveniles

Courts must protect the identities of juvenile defendants in criminal cases, unless they are tried as adults.[28] Some courts seal the entire case,[29] but protection of the juvenile's identity can also be accomplished by using initials for the juvenile's name and sealing or redacting filings as necessary.[30]

The identities of minors who are parties in civil cases can also be protected by using their initials and sealing documents that must include their complete names.

False Claims Act

The False Claims Act permits persons to file qui tam actions on behalf of the government against entities that the filers claim have defrauded the government.[31] Such an action is filed initially under seal, without notice to the defendant, to give the government time to investigate the complaint and decide

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26. Tim Reagan & George Cort, Sealed Cases in Federal Courts 14 (Federal Judicial Center 2009).

27. *In re* Motions of Dow Jones & Co., 142 F.3d 496, 500, 504 (D.C. Cir. 1998).

28. 18 U.S.C. §§ 5038(a), (e).

29. Reagan & Cort, *supra* note 26, at 18; C.D. Cal. Civ. R. 79-5.4; D. Idaho Civ. R. 5.5(c); C.D. Ill. Crim. R. 49.4(B)(3); D. Me. Crim. R. 157.6(a)(3).

30. Reagan & Cort, *supra* note 26, at 18.

31. 31 U.S.C. § 3730(b).

whether or not to take the lead in the action.[32] The statute provides for a 60-day seal, but the government frequently requests long extensions of time to decide whether or not to intervene.[33]

After the government decides whether or not to intervene, the complaint is unsealed and served on the defendant. Sometimes courts grant the government's request to keep sealed court filings pertaining to the government's investigation, such as materials supporting motions for extensions of time.

If the government decides not to intervene, the qui tam filer, known as the relator, may determine that the action is unlikely to lead to a monetary recovery and may decide to dismiss the action voluntarily, or the parties may settle the case. Sometimes a party will ask the court to keep the whole action permanently sealed. Courts typically deny this request.[34] Closed False Claims Act cases ordinarily should not be sealed.

Criminal Justice Act

When a court appoints and supervises counsel for an indigent criminal defendant, the court is not exercising the judicial function at the core of the common-law and constitutional rights of public access.[35] The Criminal Justice Act, however, affords the

32. *Id.* § 3730(b)(2).

33. Reagan & Cort, *supra* note 26, at 5–7.

34. *E.g.*, United States ex rel. Herrera v. Bon Secours Cottage Health Servs., 665 F. Supp. 2d 782, 785 (E.D. Mich. 2008) ("there is nothing in the FCA suggesting that the initial seal was imposed to protect the identity of the relator or that qui tam complaints in which the Government decides not to intervene should be permanently sealed"); United States ex rel. Permison v. Superlative Techs., Inc., 492 F. Supp. 2d 561, 564 (E.D. Va. 2007) ("the presumption in favor of public access to court filings is especially strong where, as here, the filings involve matters of particular concern to the public, such as allegations of fraud against the government").

35. *E.g.*, *In re* Boston Herald, Inc., 321 F.3d 174, 191 (1st Cir. 2003) ("neither the First Amendment nor the common law provides a right of ac-

public a qualified right of access to information about funds spent pursuant to the Act.[36]

Court approval of defense expenses in appointed-counsel cases, especially expenses for services other than counsel, is usually an ex parte process so that the confidentiality of the defendant's litigation strategy is protected.[37] However, the Antiterrorism and Effective Death Penalty Act of 1996 requires, in capital cases, a "proper showing" of a need for confidentiality to conduct ex parte proceedings concerning the approval of expenses for investigators, experts, and other service providers.[38]

Public disclosure of appointed-counsel expenses is often delayed until after judicial proceedings pertaining to the case are completed.[39]

Personal Identifiers

In light of court files' now being available for inspection on the Internet, federal rules of practice and procedure provide that certain identifiers be redacted in court filings: minors should be represented by their initials; Social Security, taxpayer-

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cess to financial documents submitted with an initial application to demonstrate a defendant's eligibility for CJA assistance"); United States v. Gonzales, 150 F.3d 1246, 1250, 1255 (10th Cir. 1998) ("the court essentially acts in an administrative, not a judicial, capacity when approving voucher requests and related motions for trial assistance"); *but see* United States v. Suarez, 880 F.2d 626, 631 (2d Cir. 1989) (holding that news media had a First Amendment right of access to payment documentation once payment had been approved).

36. 18 U.S.C. § 3006A(d)(4), (e)(4).

37. *Id.* § 3006A(e)(1); 7A Guide to Judiciary Policy §§ 310.30, 640.20.

38. 18 U.S.C. § 3599(f), formerly 21 U.S.C. § 848(q); *see* Pub. L. No. 109-177 § 222(a), 120 Stat. 231 (recodifying); Pub. L. No. 104-132 § 108, 110 Stat. 1226 (enacting provision).

39. 7A Guide to Judiciary Policy § 510.40.

identification, and financial-account numbers should be represented by the last four digits only; and only years should be given in birth dates.[40] The Federal Rules of Criminal Procedure extend this protection to a home address, which should be represented by the city and state only.[41] The rules provide for optional filing of more complete unredacted information under seal, in the form of either unredacted versions of the redacted filings or separate reference lists.[42]

Search Warrants

Law enforcement entities typically obtain search warrants from magistrate judges in ex parte proceedings that often are sealed to protect the confidentiality of ongoing investigations. This is a temporary justification for sealing, although for some information in supporting affidavits permanent redaction from the public record may be justified.

Some courts have held that the public has a qualified right of access to judicial records of search warrants and their supporting documentation, once temporary reasons for keeping them sealed have expired.[43]

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40. Fed. R. Bankr. P. 9037(a); Fed. R. Civ. P. 5.2(a); Fed. R. Crim. P. 49.1(a); *see also* Fed. R. App. P. 25(a)(5) (incorporating by reference the other rules of procedure on this matter).

41. Fed. R. Crim. P. 49.1(a).

42. Fed. R. Bankr. P. 9037(e)–(f); Fed. R. Civ. P. 5.2(f)–(g); Fed. R. Crim. P. 49.1(f)–(g).

43. *In re* Newsday, Inc., 895 F.2d 74, 79 (2d Cir. 1990*); In re Search Warrant,* 855 F.2d 569, 573, 575 (8th Cir. 1988); United States v. Peterson, 627 F. Supp. 2d 1359 (M.D. Ga. 2008); *In re* New York Times, 585 F. Supp. 2d 83 (D.D.C. 2008); *In re* Search of 8420 Ocean Gateway, Easton, Md., 353 F. Supp. 2d 577 (D. Md.).

Some local rules provide that search warrant files are public records unless otherwise ordered.[44] Other local rules provide for keeping search warrant files under seal.[45]

Discovery

Information exchanged by the parties during discovery is not subject to a First Amendment or common-law public right of access.[46] If the fruits of discovery are filed in conjunction with a dispositive motion, a qualified right of access attaches.[47] If

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44. D. Conn. Crim. R. 57(b)7(d); E.D. Mo. R. 13.05(B)(2); N.D. Okla. Crim. R. 4.1.A; W.D. Okla. Crim. R. 4.1; D.S.D. Crim. R. 41.1.D; W.D. Va. Loc. R. 9(h)(1).

45. N.D. & S.D. Iowa Crim. R. 41.d; D. Me. Loc. Crim. R. 157.6(a)(1); D. Neb. Crim. R. 41.1; D. Wyo. Crim. R. 6.2(b).

46. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984) ("pretrial depositions and interrogatories are not public components of a civil trial"); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1118–20 (3d Cir. 1986) (the standard for issuing a discovery protective order is good cause; First Amendment concerns are not a factor); *In re* Gannett News Serv., Inc., 772 F.2d 113, 116 (5th Cir. 1985) ("The results of pretrial discovery may be restricted from the public."); Bond v. Utreras, 585 F.3d 1061, 1066 (7th Cir. 2009) ("[T]here is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court. Unfiled discovery is private, not public."); Pintos v. Pacific Creditors Assoc., 565 F.3d 1106, 1115 (9th Cir. 2009) ("[discovery] documents are not part of the judicial record"); United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986) ("Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.").

47. Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) ("documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons"); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252 (4th Cir. 1988) ("if the case had gone to trial and the documents were thereby submitted to the court as evidence, such documents would have been revealed to the public and not protected"); Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 546 (7th Cir.

they are attached to a filing in conjunction with a discovery motion, however, the public right of access is substantially diminished.[48]

Pleas

Courts have found a qualified right of access to plea agreements[49] and plea hearings.[50]

2002) ("[*D*]*ispositive* documents in any litigation enter the public record notwithstanding any earlier agreement. How else are observers to know what the suit is about or assess the judges' disposition of it?"); Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1136–39 (9th Cir. 2003); Romero v. Drummond Co., 480 F.3d 1234, 1245 (11th Cir. 2007) ("Material filed in connection with any substantive pretrial motion, unrelated to discovery, is subject to the common law right of access."); Vulcan Materials Co. v. Atofina Chems. Inc., 355 F. Supp. 2d 1214, 1217 (D. Kan. 2005).

48. Anderson v. Cryovac, Inc., 805 F.2d 1, 11–13 (1st Cir. 1986); Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 165 (3d Cir. 1993) ("we hold there is a presumptive right to public access to all material filed in connection with nondiscovery pretrial motions, whether these motions are case dispositive or not, but no such right as to discovery motions and their supporting documents"); Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002); *see* D. Alaska Civ. R. 5.4(a)(4); W.D. Wash. Civ. R. 5(g)(2).

49. Washington Post v. Robinson, 935 F.2d 282, 292 (D.C. Cir. 1991) (vacating orders sealing the plea agreement of a criminal defendant cooperating in the prosecution of Mayor Barry for cocaine possession) ("Under the first amendment, plea agreements are presumptively open to the public and the press."); United States v. Haller, 837 F.2d 84, 85–89 (2d Cir. 1988) (holding that it was improper to seal the whole plea agreement but proper to redact one paragraph specifying the defendant's obligation to testify before a grand jury); *In re* Copley Press, Inc., 518 F.3d 1022, 1026 (9th Cir. 2008) (finding a First Amendment right of access to a cooperation addendum to a plea agreement).

50. *In re* Washington Post Co., 807 F.2d 383, 389–90 (4th Cir. 1986); *but see* United States v. El-Sayegh, 131 F.3d 158, 159, 162 (D.C. Cir. 1997) (holding that the right of access does not attach until the plea agreement is

It is common for courts to temporarily seal records of criminal defendants' cooperation in order to protect the confidentiality of ongoing investigations, and to either temporarily or permanently seal records of cooperation to protect the safety of the cooperating defendants and the defendants' families.[51]

Some courts have local rules that call for the filing under seal of a plea supplement in all cases in which there is a plea agreement. If the defendant is a cooperator, then the document contains details of cooperation; if the defendant is not a cooperator, then the document is empty and there is no public clue concerning the defendant's cooperation.[52] The rules for one district specify that the sealing of the supplement is temporary, unless the court orders otherwise.[53]

Voir Dire

The Supreme Court has determined that the public has a qualified First Amendment right to attend jury voir dire in criminal trials.[54] Balancing the public's right of access to jury selection against legitimate privacy interests of prospective jurors presents the court with the sometimes challenging obligation to keep confidential only what needs to be kept confidential.

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filed as such; the public did not have a right of access to an agreement filed with a motion to seal it but withdrawn before the court ruled on the sealing motion).

51. Reagan & Cort, *supra* note 26, at 19.

52. D. Alaska Crim. R. 11.2(e), 32.1(e); D. Me. Crim. R. 111(b), 157.6(a)(10); N.D. & S.D. Miss. Crim. R. 49.1(B)(2); D.P.R. R. 111(b); D.S.D. Crim. R. 11.1.A.

53. D. Me. Crim. R. 111(c).

54. Presley v. Georgia, 558 U.S. ___, ___ (2010) (p. 4 of slip op.) (concluding that a state court's exclusion of the defendant's uncle from voir dire was error); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505 (1984).

> To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge in camera but with counsel present and on the record.
>
> By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure. The exercise of sound discretion by the court may lead to excusing such a person from jury service. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's valid privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.[55]

Trial Evidence

Courts have determined that a qualified right of public access attaches to evidence admitted at trial.[56] In high-profile cases,

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55. *Press-Enterprise Co.*, 464 U.S. at 511–12.

56. Poliquin v. Garden Way, Inc., 989 F.2d 527, 532–34 (1st Cir. 1993); *In re* NBC, 635 F.2d 945, 952 (2d Cir. 1980); United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981); United States v. Guzzino, 766 F.2d 302, 303–04 (7th Cir. 1985); United States v. Massino, 356 F. Supp. 2d 227 (E.D.N.Y. 2005); United States v. Sampson, 297 F. Supp. 2d 342 (D. Mass. 2003); *but see In re* Providence Journal Co., 293 F.3d 1, 17 (1st Cir. 2002) (the news media did not have a right of access to original tapes, portions of which were played at trial); Littlejohn v. BIC Corp., 851 F.2d 673, 682–83 (3d Cir. 1988) (a newspaper did not have a right to copy trial exhibits that it

courts work with the parties to make copies of exhibits that are entered into evidence available to news media, to the extent practical, and courts often post these exhibits on their websites.

Some courts have held that it is proper to deny news media the right to copy and broadcast audiovisual evidence so that the court can protect the fairness of a possible retrial[57] or another defendant's subsequent trial.[58] A district court held that audiovisual recordings played at a motion hearing in a criminal case should not be released for broadcast until after the trial, but transcripts of the evidence were released publicly in advance of trial.[59]

Sentencing

Courts have found qualified rights of access to sentencing.[60] In one illustrative case, a district judge concluded that a psychiatric evaluation of the defendant submitted as part of the sentencing process should be publicly filed with limited redactions to protect the privacy of information on the defendant's personal history that was not germane to sentencing.[61]

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did not request to copy until after they had been returned to the parties); United States v. McDougal, 103 F.3d 651, 657 (8th Cir. 1996) (denying a right of access to an electronic copy of a videotape deposition entered into evidence).

57. United States v. Webbe, 791 F.2d 103, 107 (8th Cir. 1986).

58. Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 425–26, 429, 431 (5th Cir. 1981); United States v. Edwards, 672 F.2d 1289, 1296 (7th Cir. 1982).

59. *In re* NBC Universal, Inc., 426 F. Supp. 2d 49 (N.D.N.Y. 2006).

60. *In re* Washington Post Co., 807 F.2d 383, 389–90 (4th Cir. 1986); CBS, Inc. v. U.S. Dist. Court, 765 F.2d 823, 824–26 (9th Cir. 1985).

61. United States v. Sattar, 471 F. Supp. 2d 380, 387–90 (S.D.N.Y. 2006).

Presentence reports, however, are not considered judicial records to which the public has a right of access.[62]

Settlement Agreements

Parties may wish to settle their cases according to confidential terms, and often there is no need to file settlement agreements.[63] Often, however, the agreement requires court approval or the parties wish to retain the court's jurisdiction over enforcement. In those situations, the agreement may be filed, and then a qualified right of public access attaches.[64] As one court observed, "The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."[65]

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62. *In re* Siler, 571 F.3d 604, 610 (6th Cir. 2009) (presentence reports are not court documents: they are documents prepared by and maintained by the U.S. Probation Office, and they are released to courts for the limited purpose of sentencing); United States v. Corbitt, 879 F.2d 224, 239 (7th Cir. 1989) ("Only where a compelling, particularized need for disclosure is shown should the district court disclose [a presentence] report; even then, however, the court should limit disclosure to those portions of the report which are directly relevant to the demonstrated need."); United States v. McKnight, 771 F.2d 388, 391 (8th Cir. 1985) ("Generally, pre-sentence reports are considered as confidential reports to the court and are not considered public records, except to the extent that they or portions of them are placed on the court record or authorized for disclosure to serve the interests of justice.").

63. *See generally* Robert Timothy Reagan, Sealed Settlement Agreements in Federal District Court (Federal Judicial Center 2004).

64. Bank of Am. v. Hotel Rittenhouse Assocs., 800 F.2d 339, 343–45 (3d Cir. 1986); SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993).

65. Jessup v. Luther, 277 F.3d 926, 929 (7th Cir. 2002).

General Considerations

In the end, whether a judicial record should be sealed depends on the judgment and discretion of the presiding judge. Appellate review of sealing decisions is by interlocutory appeal in some circuits and by mandamus in others. Local rules concerning sealing often were crafted to help clerks clean out their vaults; for paper records, storage of sealed files was often a substantial burden.

Discretion

The court has discretion to weigh the need for secrecy against the public's right of access.[66] Court records should be sealed to keep confidential only what must be kept secret, temporarily or permanently as the situation requires. Sealing of judicial records is not considered appropriate if it is done merely to protect parties from embarrassment.[67] Public versions of court documents are sometimes redacted, however, to protect the privacy interests of persons who are not parties, such as clients, employees, or witnesses.

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66. *In re* Nat'l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981) ("Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court."); Siedle v. Putnam Invs., Inc., 147 F.3d 7, 10 (1st Cir. 1998) ("The trial court enjoys considerable leeway in making decisions of this sort."); San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999); United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997).

67. *Siedle,* 147 F.3d at 10; Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1178–79 (9th Cir. 2006).

Appeals

Some courts of appeals have determined that they have jurisdiction to hear interlocutory appeals of trial court decisions to seal, to not seal, or to unseal judicial records.[68] Other courts of appeals review district court sealing orders by mandamus.[69]

Appellate review is for abuse of discretion, but some courts of appeals have determined that review must be more searching than ordinary abuse-of-discretion review.[70] Some courts have determined that appellate review of the constitutional right of access is more searching than appellate review of the common-law right of access.[71]

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68. United States v. Raffoul, 826 F.2d 218, 222 (3d Cir. 1987); *In re* Tribune Co., 784 F.2d 1518, 1521 (11th Cir. 1986).

69. *McVeigh,* 119 F.3d at 810 (noting that the Courts of Appeals for the First, Fourth, Eighth, and Ninth Circuits review district court sealing orders by mandamus and that the Courts of Appeals for the Second, Third, Fifth, Sixth, Seventh, and Eleventh Circuits review district court sealing orders by appeal).

70. *In re* Providence Journal Co., 293 F.3d 1, 10 (1st Cir. 2002).

71. *Id.* ("constitutional access claims engender de novo review"); United States .v Smith, 123 F.3d 140, 146 (3d Cir. 1997) ("[W]hen we deal with a First Amendment right of access claim, our scope of review of factual findings is substantially broader than that for abuse of discretion. With respect to the newspapers' common law right of access to judicial proceedings and papers, we review the district court's order for abuse of discretion.") (citations and quotation marks omitted); EEOC v. Westinghouse Elec. Corp., 917 F.2d 124, 127 (4th Cir. 1990) ("Under the common law the trial court's denial of access to documents is reviewed for abuse of discretion, but under the First Amendment, such denial is reviewed de novo and must be necessitated by a compelling government interest that is narrowly tailored to serve that interest.").

Storage

Some local rules provide presumptive time limits for sealing records, and these rules were motivated in substantial part by storage considerations. When case files were in paper form, before the advent of electronic filing, clerks of court kept sealed records in their vaults.[72] When it was time to send case files to National Archives records centers, the clerks usually kept the sealed records, because the records centers were ill-equipped to keep records sealed.[73]

Many courts enacted local rules specifying a time limit after which sealed documents would be unsealed, returned, or destroyed. It is important to observe that the return or destruction of sealed documents makes them even less available to the public than they were when they were sealed but in the court's care. Some local rules, therefore, provide for unsealing documents after the expiration of a time limit, unless the court orders otherwise, and do not list return or destruction as options.

Procedural Checklist

Courts generally require the following when a record is sealed or a proceeding is closed:

1. Absent authorization by statute or rule, permission to seal must be given by a judicial officer.

Clerks' offices should not agree to seal a record unless directed to by a statute, rule, or court order.[74] Also, sealing requires more than an agreement among the parties.[75]

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72. *See, e.g.*, *In re* Orion Pictures Corp., 21 F.3d 24, 26 (2d Cir. 1994).

73. *See, e.g.*, *In re* Estate of Martin Luther King, Jr. v. CBS, Inc., 184 F. Supp. 2d 1353, 1356–61 (N.D. Ga. 2002).

74. *See, e.g.*, United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (reviewing sealed reports by a special master, the court observed, "While

2. Motions to seal should be publicly docketed.

Public notice of motions to seal gives the public, the news media, and interested parties an opportunity to be heard on the matter.[76]

3. Members of the news media and the public must be afforded an opportunity to be heard on motions to seal.

Courts routinely permit non-parties to intervene for the purposes of challenging motions to seal.[77]

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we think that it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document, we consider it improper for the district court to delegate its authority to do so."); Media Gen. Operations, Inc. v. Buchanan, 417 F.3d 424, 429 (4th Cir. 2005) ("The decision to seal documents must be made after independent review by a judicial officer, and supported by findings and conclusions specific enough for appellate review.") (quotation marks omitted).

75. R&G Mortgage Corp. v. Fed. Home Loan Mortgage Corp., 584 F.3d 1, 12 (1st Cir. 2009) ("Sealing orders are not like party favors, available upon request or as a mere accommodation."); *see* N.D. & S.D. Miss. Civ. R. 79(d).

76. *See* Washington Post v. Robinson, 935 F.2d 282, 289 (D.C. Cir. 1991); *In re* Herald Co., 734 F.2d 93, 102 (2d Cir. 1984); United States v. Criden, 675 F.2d 550, 554 (3d Cir. 1982); *In re* Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 475 (6th Cir. 1983).

77. *Washington Post*, 935 F.2d at 289, 292; *In re* Globe Newspaper Co., 729 F.2d 47, 56 (1st Cir. 1984); United States v. Aref, 533 F.3d 72, 81 (2d Cir. 2008); United States v. Raffoul, 826 F.2d 218, 221–22 (3d Cir. 1987); *In re* Knight Publ'g Co., 743 F.2d 231, 234 (4th Cir. 1984); Ford v. City of Huntsville, 242 F.3d 235, 241 (5th Cir. 2001); *In re* Knoxville News-Sentinel Co., 723 F.2d 470, 475–76 (6th Cir. 1983); *In re* Associated Press, 162 F.3d 503, 507 (7th Cir. 1998); Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940, 949 (9th Cir. 1998); *In re* Tribune Co., 784 F.2d 1518, 1521 (11th Cir. 1986).

4. There should be a public record of permissions to seal.

There should be a public record of what is sealed and why, consistent with the reason for sealing.[78]

5. Sealing should be no more extensive than necessary.

Although it is often easier to seal more than is necessary, courts should be careful to seal only the portions of the record that require sealing.[79] An entire case file should not be sealed to protect the secrecy of some documents. An entire filing should not be sealed to protect the secrecy of an exhibit. When possible, redacted versions of sealed documents should be filed

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78. *Washington Post*, 935 F.2d at 289; United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988) ("the fact that a sealing order [has] been entered must be docketed"); *In re Associated Press,* 162 F.3d at 510 ("Sealing of the entire explanation would indeed be an extraordinary step for a district court to take, given the heavy burden it would place on the Press . . . ."); *In re* Search Warrant, 855 F.2d 569, 575 (8th Cir. 1988) ("The fact that a closure or sealing order has been entered must itself be noted on the court's docket, absent extraordinary circumstances."); *cf. In re* Washington Post Co., 807 F.2d 383, 391 (4th Cir. 1986) ("if the court concludes that a denial of public access is warranted, the court may file its statement of the reasons for its decision under seal"); *In re* Copley Press, Inc., 518 F.3d 1022, 1028 (9th Cir. 2008) (the public does not have a First Amendment right to documents explaining why something should be sealed if those documents contain secrets that the sealing is designed to protect).

79. SEC v. TheStreet.com, 273 F.3d 222, 231 (2d Cir. 2001); United States v. Criden, 675 F.2d 550, 554 (3d Cir. 1982); Media Gen. Operations, Inc. v. Buchanan, 417 F.3d 424, 429 (4th Cir. 2005); United States v. Chagra, 701 F.2d 354, 365 (5th Cir. 1983); Doe v. Blue Cross & Blue Shield United of Wisconsin, 112 F.3d 869, 872 (7th Cir. 1997); United States v. Brooklier, 685 F.2d 1162, 1172 (9th Cir. 1982); Sibley v. Sprint Nextel Corp., 254 F.R.D. 662, 667 (D. Kan. 2008); United States v. Polsen, 568 F. Supp. 2d 885, 928 (S.D. Ohio 2008); *see* D. Alaska Civ. R. 5.4(a)(3); N.D. Cal. Civ. R. 79-5(a); N.D. Cal. Crim. R. 55-1; E.D. Mich. Civ. R. 5.3(c)(2); N.D. & S.D. Miss. Civ. R. 79(b); W.D. Wash. Civ. R. 5(g)(3).

publicly. Courts should be skeptical of arguments that following proper procedures is too burdensome.[80]

6. The record of what is sealed and why should be complete for appellate review.

The record of the case should include specific reasons for sealing and specific reasons for not employing more limited forms of secrecy, such as redacting a document instead of sealing the whole document.[81] If part of the record of what is sealed and why must itself be sealed to protect necessary secrecy, it should still be included in the case record for possible appellate review.

7. Records should be unsealed when the need for sealing expires.

Records are often sealed for a temporary purpose, and courts should follow procedures that ensure records become unsealed when they can be.[82]

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80. *See* Banks v. Office of the Senate Sergeant-at-Arms, 233 F.R.D. 1, 10–11 (D.D.C. 2005).

81. EEOC v. Nat'l Children's Ctr., Inc., 98 F.3d 1406, 1410 (D.C. Cir. 1996); *In re* Globe Newspaper Co., 729 F.2d 47, 56 (1st Cir. 1984); *In re Herald Co.*, 734 F.2d at 100; *In re* Knight Publ'g Co., 743 F.2d 231, 234–35 (4th Cir. 1984); *In re Washington Post Co.,* 807 F.2d at 391; *In re Associated Press,* 162 F.3d at 510, 513 ("district courts should articulate on the record the reason for any order that inhibits the flow of information between the courts and the public."); *In re Search Warrant,* 855 F.2d at 574.

82. *See* United States v. Antar, 38 F.3d 1348, 1362 (3d Cir. 1994) ("Under the First Amendment, once an overriding interest initially necessitating closure has passed, the restrictions must be lifted."); Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940, 948 (9th Cir. 1998) ("consistent with history, case law requires release of transcripts when the competing interests precipitating hearing closure are no longer viable"); United States v. Valenti, 987 F.2d 708, 714 (11th Cir. 1993).

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Comment

*679 THE REPERCUSSIONS OF ORALITY IN FEDERAL INDIAN LAW

Glen Stohr [a1]

e'ey mhaag naa gjaljaj s uulg

gmweeg g'gwagaj, gweevg, thavg ma

hay gmung ga'gwagaj, ba mhag ma

gluulgaj m'yahl hla ingajahj hamsi myavl

gjaavaj ba mhaag'g mwiwjom gwe gav hi haivj

ba mhag ba m'iiwjom o'waavg g'gaya

Sun coming out, look at us. The winds from

the four directions, the universe, help me to

say what I want. Help me to be strong, for

someone to hear me, and to help my people go about

strong. Look at us and help us. Forgive me for

telling these stories when it is not appropriate,

in my culture. [1]

Plaintiffs who claim to be the only experts on the Havasupai religion would not speak of their religion directly or reveal details concerning the manner in which the proposed mining activity would interfere with their religious beliefs and or practices. [2]

*680 I. Introduction and Thesis

The battle between orality and literacy is a battle over what constitutes truth. The triumph of literacy is a triumph of certainty over reason. Perhaps for that reason, courts generally celebrate this victory. It is also a battle over how to remember, or what it is that constitutes history. This comment takes the position that the oral basis for Native American religions is the most important factor explaining the lack of success experienced by Indian Tribes and individuals attempting to use federal courts to protect sacred sites and to recognize the Indians' Free Exercise claims. Relying on the work of anthropologists, historians, and legal scholars, this Comment attempts to explore the complexities that surround the role of oral tradition in Federal Indian Law.

A handful of legal scholars, most notably Robert S. Michaelsen, have noted the importance of the distinction between the oral tradition of Native American religions and the literate culture of the dominant Western institutions.[3] Michaelsen identified several challenges faced by Native Americans when attempting to convince courts that certain sites or areas are sacred: (1) Indian conceptions of land are very different from the majority of Americans;[4] (2) courtrooms are alien environments;[5] (3) Anglo judges and juries often misunderstand Indian religions and suspect fraud on the part of Native American plaintiffs;[6] (4) Indians must rely on often inappropriate analogies to explain their beliefs and customs, which adds to the confusion;[7] (5) the use of Native American or anthropological experts is fraught with difficulties, including the common situation in which sacred knowledge is secret and may not be shared with non-tribal members.[8] Subsuming all of the above is "what may be the biggest challenge of all for Indian litigants-that of dealing with a system in which the written word carries much more authority than the spoken word."[9]

***681** It is not surprising that this preference for writing emerged in European and American courts. Literacy permeates Western culture. With few exceptions, government, science, religion and entertainment all are centered around the written word.[10] Verna C. Sanchez identifies the relationship between the preference for writing in Western religions and in Western law: "In Judeo-Christian theologies, there is a disproportionate emphasis and significance given to the written word. . . . The jurisprudence [likewise] reflects a certain entrenched cultural predisposition to trust only that which is documented or documentable ('scientific') and to distrust that which is not ('intuitive,' 'irrational')."[11] This preference for written, documentary proof originated in the Middle Ages[12] and is so thoroughly ensconced in law that it is now seldom questioned. Both historically and in contemporary litigation, the preference for literacy prejudices courts against a variety of litigants and their testimonies. The documentation of doctors and hospitals is privileged over the oral histories of patients.[13] Courts disregard evidence illustrating the basis of minority language based in the oral poetry tradition.[14] Moreover, courts often suppressed women's voices because they historically lacked literacy or because they communicate in a manner related to non-literate traditions.[15]

*682 II. Non-literate and Literate Cultures Compared

A. Generally

The scholarly interest in oral literature in the West probably dates to the collecting of folk tales by the Brothers Grimm in the early nineteenth century.[16] Influenced by the theories of Jacob Grimm, most early study of "folk lore" was organized by the historic-geographic method by which scholars sought to categorize stories, myths, and the like by region in their attempt to find out how these stories had been disseminated.[17] One of the early and abiding interests was to weed out the ur-text: the elusive, "authoritative" first version of a tale.[18]

As the study of oral literature grew, scholars of many disciplines (anthropology, religious studies, linguistics, and history) took interest in the subject. Early in the twentieth century, anthropologist Franz Boas and his students compiled the first major collections of Native American oral texts. Boas called this project "salvage" anthropology because he was convinced

that the Indians he was studying and their languages all would be dead or forgotten within a generation.[19] While Boas and his contemporaries took an approach to the materials that was "largely impressionistic-rather than 'scientific,'"-his fieldwork initiated the standard for the collection and organization of such materials that continues today.[20] The broad-based study of oral materials has provided a now familiar taxonomy of speech types: myth, proverb, legend, folktale, etc.[21] Contemporary definitions of oral literature show a greater concern for the relationship between orality and culture:

> Oral literature or verbal art is defined as a set of speech genres constituting part of the linguistic resources of a speech community. ***683** The advantage of this type of conceptualization is that it sharply delineates the place of oral literary research within the broader theoretical domain of understanding the relationship between language and social life.[22]

A brief survey of scholars from various disciplines provides the necessary background to understand the differences between cultures and social orders based on oral and literate traditions. In his now classic study Orality and Literacy, literature scholar Walter Ong argues that the fundamental differences between literate and nonliterate cultures are the ways in which they categorize experience and develop their world-views.[23] Importantly, Ong illustrates that the literate cultures always will view themselves as being in conflict with oral ones.[24]

The religion scholar Sam D. Gill distinguishes between "primitive" as a value-laden term and "non-literate" as value-neutral.[25] Thus, Gill rejects any evolutionary implication in distinguishing oral and literate cultures: "Nonliteracy is not a stage of development that need yield to one distinguished by literacy."[26] Gill identifies, however, substantial differences in the social organization associated with the two modes of sharing information.[27] Literacy affects the transmission of culture from one generation to the next, permits cultures of greater size and extent, and changes the character of the legal, economic and religious systems.[28]

Anthropologist James Fentress and historian Chris Wickham disagree that the world-views of oral cultures are necessarily incompatible with those of literate ones. Based on their study of differences in the poetry of literate and oral societies, they take a more complex view of the issue. For Fentress and Wickham, both types of cultures have more and less stable media for the transmission of history and cultural knowledge.[29] They illustrate the distinction by explaining that the mnemotechnology of the classical authors is that of the eye, while the mnemotechnology of poets in oral cultures is that of the ear.[30] They agree with Gill, however, that it does not make sense to consider orality and literacy as "stages" in the evolution or progress of cultures: "Describing the activity of oral poets as 'prelogical' simply ***684** obscures a perfectly rational process whereby they are able to conceptualize language as both sense and sound, and use these intuitions as the basis of their poetic skills."[31]

For our purpose, it is essential to take note of one theme that runs through all of the scholarship on oral cultures: the story, myth, or tale is no longer the possession of the speaker; it is "collected" by the literate scholar, who, along with the text, acquires the privilege of interpreting or translating its meaning.[32] The Native speaker becomes an "informant." The story is frozen in time and a continuous present is created. The recorded version-not the on-going, spoken performances-becomes the authentic, authoritative text.[33]

B. Native American Views of History

One theme of Indian Law reiterated throughout the history of the United States is that Native American cultures represent a "survival" of ancient lifeways. This has been a double-edged sword. The idealized, "noble savage" view of Indians has provided some protection for aspects of their cultures, but likewise has been used to prevent them from modernizing or changing in accordance with their own choices. On the other hand, the view that they are primitive, uncultured peoples has motivated policymakers to force assimilation into the larger culture and destroy "traditional" Indian culture. [34]

In reality, Native American cultures are not static; they changed and evolved radically both before and after European contact, and as living cultures continue to do so today. Through their oral literature, Native Americans have preserved this history, although the differences in emphasis, style and organization often have led non-Natives to view this history skeptically or to deny its existence altogether.

A culture's view of history is intimately related to its religion. Fabian contrasts the linear Judeo-Christian conception of time-"a sequence of specific events that befall a chosen people"-with non-Christian, cyclical views of time. [35] Fabian calls this conception of history a "spatial ***685** metaphor." [36] Fentress and Wickham refine that description tellingly: "All societies, even the most primitive, possess ways and techniques of preserving their 'memory of things'. . . . We call these information-bearing representations, functioning as aides-memoire, 'maps' for short." [37] By viewing history as a technique for remembering things (a "mnemotechnology," if you will), Fentress and Wickham give us a clue as to where to look for differences between the histories that cultures tell: histories will recall what is important for that culture to remember.

The view of history shared by oral cultures exhibits a lack of concern for narrative linearity. [38] This causes great consternation for non-Native scholars. Anthropologists are fond of citing the example of the Hopi language, which lacks words indicating past and future. The casual listener-and first-year anthropology student-often mistakes this to mean that Hopis cannot identify temporal experience, which is patently absurd. The more important temporal distinction for oral cultures is between the "mythological time" of origin or emergence, and the more recent, "remembered" past. [39] According to Ramsey, the "mythological past" has a chartering function, that is, this history establishes the social order, the kinship relations, and the central ("sacred") place of the Tribe. [40]

That origin myths contain information about location is not incidental: place is one of the chief mnemonic devices in oral literature. [41] Writing about the Western Apache, Keith Basso explains how historical tales, which have a socially normative function, are distinguished by opening and closing lines identifying the place name where the story is located. [42] Vine Deloria, Jr. explicitly contrasts the temporal orientation of "Christianity and its interpretation of history" with the geographical basis of Native American history: [43]

***686** The Navajo, for example, have sacred mountains where they believe that they rose from the underworld. Now there is no doubt in any Navajo's mind that these particular mountains are the exact mountains where it all took place. . . . No one can say when the creation story of the Navajo happened, but everyone is fairly certain where the emergence took place. [44]

Of course, any attempt to create a uniform description of Indian history (and there have been many) [45] is doomed to fail because there is no single monolithic Native American culture, but the diverse cultures of hundreds of Tribes and Indian nations. Even within Tribes, certain stories, myths or histories may be the property of an individual entrusted to remember and pass them on only to a chosen apprentice, or groups occupying different territory or neighboring Tribes may tell somewhat different versions of a mythology. [46] In some cases, exact "word for word" repetition of oral literature may be required, while in other types of history elaboration and personal touches may be added for entertainment, social commentary, or political oratory. [47]

Jo Carillos's review of Cheyenne author Henrietta Whiteman's "White Buffalo Woman"[48] captures the above comments nicely:

> [O]ne is reminded that event and place, not date, take precedence. Moreover, one is introduced to the idea that learning the collective experience of one's tribe is an interactive process, not a passive one. As such, the depth to which the story teller treats her listener depends on both the teller's and listener's respective capacity for and interest in intimate engagement.[49]

Carillo goes on to identify the chief problem for the non-Native audience in approaching Native oral history: the concern about reliability.[50] Given the preference for documentary history exhibited by Western scholars of all ***687** types,[51] it should not come as a surprise that the American courts are extremely skeptical of Native American testimony concerning the past.

Many attempts have been made to examine the reliability of oral history. Some have attempted to collaborate Native histories with documentary records, producing mixed results.[52]

Others have looked to geological or environmental evidence to confirm Indian testimony concerning land use and occupation.[53] Historian Jan Vansina has done the most extensive study withoral cultures in Africa. He concludes: "Oral traditions have a part to play in the reconstruction of the past . . . . But the relationship is not . . . [that] when writing fails, tradition comes on stage. This is wrong. Wherever oral traditions are extant, they remain an indispensable source for reconstruction."[54] Historian Alice Hoffman concurs that oral history should be considered an equal player in the reconstruction of the past.[55] She explicitly questions the assumption that written records are always more reliable: "Archives are replete with self-serving documents . . . written 'for the record.'"[56]

Courts must come to understand their prejudice for certainty for what it is. In both literate and oral societies, there are stable media for the transmission of information about the past, and even in literate societies, most of our knowledge comes from "word of mouth" sources, often in reference to something that they have read or heard.[57] In fact, people often prefer the spoken recollections of a trusted friend or associate to any document written by a source suspected of bias or mistake.

*688 C. Native American Religions

The importance of oral history to understanding Native American religion raises a central theme: the interconnectedness of many aspects of Indian culture. "Barney Old Coyote, a Crow [Indian explains], 'The area of worship cannot be delineated from social, political, cultural, and other areas of Indian lifestyle including his general outlook upon economic and resource development.'"[58] This undifferentiated approach to religion and other areas of culture subsumes several key differences that make tribal religious life very difficult for non-members to understand. First, many religious terms are difficult to translate between European languages, let alone from Native American languages into English. Many Native American languages do not have a term comparable to the English word "religion."[59] The translation of Christianity into Native languages was a chief stumbling block for early missionaries,[60] just as the translation of Native religion into the language of the courts is for Indian litigants today.

The second major difference between Native American and Western religions, and one that has perhaps the largest impact on litigation, is the importance of land and sacred places. Gill identifies three defining characteristics of the conception of space and time shared by the religions of nonliterate cultures: (1) centrality of place; (2) a non-linear conception of time; and (3)

the identification of a holy "center" of space, often considered the place of a people's origins or emergence from the earth.[61] These echo characteristics in oral peoples' conception of history mentioned in the preceding section.[62] Many have written about the centrality of sacred sites for Indian religions,[63] but only by identifying the relationship between orality, history and religion can non-Native lawyers and courts begin to understand the full extent of the relationship between what they perceive as discrete categories.

The third important distinction between oral and literate cultures' religions is that oral religious traditions are tribal and not universal in nature. ***689** This has been identified in American law, but is little understood. The report circulated to government agencies explaining the American Indian Religious Freedom Act of 1978 (AIRFA)[64] labels tribal religions as "continuing," that is, not founded by a known individual nor at a known historical moment,[65] while "world religions" are defined in the Act as "commemorative" because their historical roots are documented.[66] This distinction has two important effects. First, tribal religions do not attempt to proselytize or convert non-members to their theology.[67] Second, many aspects of tribal religions are secret, sometimes even to uninitiated tribal members.[68] As explained in the following section, this secrecy has been a great stumbling block for Native American litigants, aggravating courts and raising their suspicions of fraud or ignorance.[69]

III. How the Law Marginalizes Native American Oral Tradition

This part examines how the various aspects that distinguish oral cultures and religions have combined to prevent Native American litigants from establishing their cases for religious freedom and protection of sacred sites. From the time of the Cherokee decisions written by Chief Justice Marshall in the 1830s, federal Indian law has been a two-headed beast.[70] On one hand, Congress was given plenary power over the conquered Indian nations.[71] On the other hand, it was charged with guardianship over its Indian wards.[72] Early reference to Indian non-literacy came in the canons of construction handed down by the Supreme Court for interpreting Indian treaties. The Court explained in 1899 in Jones v. Meehan[73] that treaties are to be interpreted as the Indian signatories would have understood them because "Indians . . . are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression."[74]

***690** While these canons were formulated ostensibly to protect the Indians from "masters of a written language,"[75] Dussias explains how contemporaneously, the problem of non-literacy was being used to lobby Congress into passing legislation designed to accelerate Indian assimilation by suppressing Native religious ceremonies, dances, and prayers.[76]

A. Evidentiary Problems

As Indians began to bring their land claims into the federal courts in the early twentieth century, they relied on oral history to substantiate their occupation and use of the land. The earliest battles were over whether such testimony would be considered at all.

A Court of Claims case, Assiniboine Indian Tribe v. United States,[77] decided in 1933, exemplifies the extent to which the federal courts mistrusted such testimony. The court observed that the Tribe called a large number of witnesses, but found that:

> much of the evidence taken on its behalf [was] from a source that lessens its weight . . . . It was to be expected that [the tribe] would claim the land over which they had roamed and as to which they might believe they had a better title than other tribes who roamed over the same territory.[78]

The court preferred the testimony of government agents "supplemented by reliable historical accounts of [the Assiniboine Tribe's] early origin." [79]

One document the court considered reliable was the Fort Laramie Treaty, which several Indian witnesses testified that they had not signed or that only one tribal member had signed. Satisfied with the authenticity of the written treaty, the court discounted the Indian testimony by questioning the memory of the witnesses:

> These witnesses were either Indians who were children at the time of the signing of the treaty or very old men at the time when they gave their testimony, and on account of age having at best a very incomplete recollection of matters that occurred fifty years prior thereto. The circumstances . . . make this testimony so unsatisfactory as to be unworthy of any credit. [80]

***691** Here, one can see many of the elements outlined by Michaelsen. [81] The court found the oral histories unreliable and subject to fraud and mistake, preferring the testimony of employees of the adverse party because they had written corroboration, even though they had done the writing.

After years of rejecting legislation that would have created a tribunal for the settlement of Indian land claims, Congress passed the Indian Claims Commission Act in August 1946. [82] The Commission initially was comprised of three members-expanded to five in 1967-who would hear the case of any Indian Tribe who had a claim against the United States. [83] The claims covered a broad terrain from those of unjust takings and fraud, to treaty violations, and so on. By the time the Commission was terminated in 1978, it had heard 617 separate dockets. [84] Surveying the cases heard by the Commission directly demonstrates the clash between orality and literacy.

Indian Tribes, and in some cases individuals, could establish aboriginal title to land by proving the following two elements of the claim: (1) exclusive use or occupancy/joint aboriginal title; (2) for a long time/since time immemorial. [85] In Coos Bay Indian Tribe v. United States, [86] the court dismissed the testimony of twenty-one Indian witnesses who gave the oral history of their Tribe because their testimony was in conflict with contemporary documentary evidence. [87] The court alluded that the testimony may have been biased because seventeen of the witnesses had "a direct interest in the outcome of [the] case." [88] As Dukelow and Zakheim point out, however, all tribal members have a direct interest in the outcome of cases attempting to establish aboriginal title to lands they consider their own and wish to use. [89]

In Pueblo De Zia v. United States, [90] the Court of Claims responded to an Indian Claims Commission decision which dismissed entirely the testimony of Indian witnesses who had presented the oral history of the Tribe to prove aboriginal title, even though no evidence was presented to controvert it. [91] ***692** The witnesses were "leaders of their respective bands" within the Pueblo. [92] The Court of Claims noted that "tribal histories consist of oral accounts handed down from father to son in continuity . . . from time immemorial." [93] The Court of Claims decision held that "[s]uch evidence is entitled to some weight; it cannot be ignored or discarded as 'literally worthless.'" [94] The fact that the Indian evidence was corroborated by other testimony from historians and archaeologists convinced the Court of Claims that the oral testimony was somewhat trustworthy. [95]

The Court of Claims revisited the evidentiary issue in Confederated Tribes of the Warm Springs Reservation v. United States, [96] a case that allowed it to review thoroughly the procedures of the Indian Claims Commission. The primary issue was the scope of the Court of Claims review of Indian Claims Commission findings. [97] The Indian Claims Commission Act stated that the Court of Claims "shall determine whether the findings of fact of the Commission are supported by substantial evidence." [98] The evidence supporting the Warm Springs Tribes included oral history presented by tribal members and corroborated by the testimony of several academic experts, contemporary written accounts, and military reports. [99] Closely echoing its language of two years earlier in Zia Pueblo, the court summarized its view of oral traditions:

> Oral testimony of Indians who were descendants of members of the tribe who had actual knowledge of the extent of the use and occupancy of the land claimed by the tribe, which knowledge had been passed on by word of mouth, is entitled to some weight, and is not to be deemed worthless, particularly when it is corroborated by documents and the testimony of others. The importance of corroboration and cross-checking cannot be undervalued since informants can mislead researchers by describing some period . . . besides the aboriginal, pre-treaty period. [100]

***693** While the court stated that the oral history evidence must be considered, it implied that it is less important than the testimony of non-Indians. The court's discussion also limited the acceptable evidence to cases where the chain of oral transmission can be traced to Indians who had actual knowledge of the time of pre-contact occupancy; a circumstance that even in the recently settled Western states is increasingly impossible. [101] Finally, the court distanced itself from the process of hearing the testimony when it wrote that Indian "informants" can mislead "researchers." [102] The terms one would expect to find here would be something like "affiant" or "witness" and "court" or "jury," but the court seemed to suggest an ethnographic encounter or a social science paradigm for the act of hearing Indians speak.

In comparison, in a 1985 case heard by the Supreme Court of British Columbia, the Haida Indians attempted to prevent Western Forest Products, an American company, from harvesting timber in the Queen Charlotte Islands. [103] When the logging company sued to enjoin the tribe's interference, the Haida asked to represent themselves stating that "'the issue of our lands is too important to leave in the hands of lawyers who are unfamiliar with our people.'" [104] When the Haida testified, they did so in full ceremonial dress. As evidence of their ancestral claim to the islands, the Haida recounted at length the tribal origin myths and explained the symbolism of their art, totem poles, and poetry. [105] The judge affirmed the validity of the logging license, stating that the testimony of Tribe was irrelevant to the case. [106]

As in Warm Springs, it is the court's commentary, not its holding, that is informative. Goodrich reports that the judge told the Tribe that such testimony normally would not be allowed, but "in view of the fact that the [[[[tribe] had no other arena available to them, [the court was] prepared to listen and generously recommended that a record of the evidence presented should be kept for posterity." [107]

***694** Both Warm Springs and Western Forest Products reveal just how uncomfortable Western courts are with Native American oral history. When courts permit Indians to testify as to their own histories, the judges have difficulty fitting such views of the world into the parameters of the legal system. As such, they transform the court into a museum or ethnographic interview. While this fits the model of "collection" and appropriation by which Indian speech is usually presented to non-Indians, it seriously undermines the validity of such speech as courtroom testimony.

It is not surprising that one of the most successful uses of oral history before the Court of Claims came in a case where the Tribe worked closely with anthropologists, historians, and archaeologists in preparing its testimony. In Zuni Tribe v. United States,[108] the Tribe sought compensation for what it claimed was an unjust taking of lands to which it had aboriginal title.[109] The Court of Claims held that the Zuni proved their "exclusive use and occupancy from time immemorial."[110] Oral history was abundant, and formed the foundation of the Zuni's proof in the case. According to Andrew Wiget, an anthropologist who evaluated the validity of the oral history testimony in the case, the Zuni presented "twenty depositions totaling nearly 1,300 pages of testimony."[111]

Wiget's analysis helps explain why oral history testimony was so compelling in Zuni Tribe and provides important pointers for the direction that Indian litigants must take in presenting oral history in court. First, Wiget distinguishes deposition questioning from the normally more open-ended questioning preferred by ethnographers: "A deponent is never absolutely free to order his recollections as he wishes but concedes much of this to external direction."[112] This permits the court, counsel, or analysts to identify the areas of testimony in which the deponent is unwilling to alter his/her "settled sense" of the past.[113] Unlike the social science models used by the courts mentioned above, Wiget's analysis suggests that oral history is at its best in court when it conforms to established legal methods for its presentation.

Second, Wiget gives three criteria for assessing the usefulness of oral history testimony. The first criterion is "validity" which equates to ***695** corroboration.[114] In Zuni Tribe, Wiget was prevented from corroborating with outside sources, since his task was simply to assess the oral history portion of the evidence. However, he concluded that much of the testimony was validated by corroborating it with other oral testimony.[115] The second criterion is "reliability" which is a function of repeatability.[116] Here, he tested the consistency with which deponents told the same story on multiple occasions.[117] The third criterion Wiget used was "consistency" or the "degree to which the form or content of one testimony conforms with other testimonies."[118] Wiget rated the oral testimony presented in Zuni Tribe as better for long-term and culture-specific recollections than for absolute dating.[119] However, overall he gave the oral history high marks in his three criteria. Any Native American litigant or his/her counsel who is considering presenting oral history before a federal court should consider Wiget's analysis.

B. Sacrality and Secrecy

One feature of oral religions that troubles and confuses non-Natives is that these religions are tribal, as opposed to universal or world, religions. There is no drive to missionize or convert those outside the group. In fact, among many Native American groups-and other oral cultures[120]-divulging sacred knowledge to a non-tribal member may present grave spiritual dangers.

Although scholars analyzing Indian religions and the courts have noted this problem, few have made the direct association between secrecy and orality. According to Christopher Vecsey, Native American religions tend ***696** to "equate sacrality with secrecy."[121] In an article about the decline in myth-telling among Native Americans, anthropologist Don Bahr makes this statement more concrete: "Surely one of the meanings of 'sacred'. . . is 'Do not touch.'"[122] Bahr illustrates how the ephemerality of Native American mythologies helped to protect their sacredness, and argues that recording them can endanger that sacredness.[123]

The record of federal Indian law decisions is full of instances where the secrecy of sacred words, objects or sites frustrated courts and led to decisions against Tribes. Two cases from the American Southwest-New Mexico Navajo Ranchers Association v. Interstate Commerce Commission[124] and Havasupai Tribe v. United States[125]-illustrate the problems associated with the secrecy of religion as they relate to the protection of sacred sites.

In New Mexico Navajo Ranchers, the Indian plaintiffs sought judicial review of Interstate Commerce Commission (ICC) approval for construction of a coal-mining railroad easement across a portion of the Navajo Reservation in Northwest New Mexico.[126] The Ranchers Association made two arguments of interest here. First, they claimed that the Department of the Interior accepted fraudulently acquired consent forms, which the railroad had obtained from the Indian allottees whose lands would be used.[127] The court held that the challenge to the consents had been made academic by an earlier decision, but held that the approval of the consents did not violate the American Indian Religious Freedom Act (AIRFA),[128] despite the fact that the railroad may have used "misleading statements" and "coercive tactics" to acquire approvals from "commercially unsophisticated owners, many of whom [spoke] or read little English."[129] Since no action was taken by the Department of the Interior on the railroad's alleged misconduct, the court simply deferred to the ICC's conclusion that the railroad would mitigate any damage done by its sharp dealings.[130] What is striking here is the willingness of the court to accept an agency evaluation under circumstances strikingly ***697** similar to those which trigger the protective canons of construction in treaty interpretation.[131]

Second, the Ranchers Association claimed that the ICC had violated AIRFA[132] because the proposed railroad would cross over and disturb several Navajo sacred sites.[133] The Navajo Ranchers argued that the ICC should have consulted with tribal religious experts concerning the extent and importance of religious and burial sites within the proposed area.[134] The court denied the necessity of such consultation, holding that the ICC's requirement that a neutral archaeologist be present during construction of the railroad was sufficient to avoid interference with tribal religious practices.[135]

The court then examined the evidence (or what it considered a lack of evidence) presented by the plaintiffs concerning potentially affected sacred sites. The court was troubled that no sites identified were considered sacred by the whole Navajo Tribe.[136] The plaintiffs argued that they could not present some of the evidence required to reveal the location of the sites "on the ground that the Navajos' religion permits certain sites to be talked about only in winter."[137] The court paid this easily verifiable argument little heed, concluding simply that "the reason why the evidentiary cupboard is bare does not change the fact that it is."[138]

In Havasupai Tribe v. United States,[139] the Tribe sought to enjoin operation of a uranium mine on Forest Service land near the South Rim of the Grand Canyon.[140] Again, the Indian plaintiffs argued that the Forest Service had violated AIRFA by authorizing the mine permit on Red Butte, a sacred mountain used by the Tribe for gathering medicines and ritual materials and pilgrimages.[141] Before turning to the AIRFA claim, the ***698** District Court first examined the extinguishment of aboriginal title pursuant to the Havasupai Indian Claims Commission case and various aspects of the Grand Canyon Enlargement Act (which affected Havasupai Reservation and use area boundaries) and concluded that the Havasupai had no property interest in the mine area.[142] On the religion claim, the court was again persuaded that the agency had fulfilled its duty of investigating religious use of the area by contacting an anthropologist who had worked with the Tribe in the past[143] and by reviewing the record produced by archaeologists working for the mine company during exploratory drilling operations.[144]

The quote from the Havasupai case that introduces this comment shows that the district judge felt that the Tribe was uncommunicative.[145] During the Forest Service approval process the Tribe's legal counsel sent a letter to the agency which stated in part that "[d]etailed identification of the religious, cultural and ceremonial significance of the site would be considered sacrilege by the Tribe."[146] The court was content that the agency had taken a "hard look" at the issue through its use of written, expert opinions.[147] In the end, confronted by the Tribe's silence, the judge concluded: "The Havasupai continuously claim that

they are the only ones that know about their religion, yet the record clearly shows that they were not forthcoming on the subject during the scoping process . . . nor would they identify specific sites of religious significance." [148]

The element of secrecy often found in tribal religions puts Indian litigants in an untenable position. They must destroy their religion in order to save it. Federal agencies and courts should try to understand this dilemma by becoming more familiar with the cultures of Native American people in their courtrooms. Even if evidence of religious practices or sites is not forthcoming as a result, the court should inquire into the legitimacy of the Native American's refusal to speak and may come to understand that, in some cases, it does make a difference why the cupboard is bare.

*699 C. Tribal Identity

A quite different use of oral history is found in cases in which Indian litigants are required to prove their Tribe's very existence at some point in the past. In Mashpee Tribe v. New Seabury Corp., [149] the issue was whether the lands sold to non-Indians in the nineteenth century were improperly alienated under the Indian Non-Intercourse Act of 1790. [150] Under the rationale of protecting helpless Indian wards from sharp business practices, the Non-Intercourse Act forbade the sale of lands by Indians to non-Indians without congressional approval. [151] Thus, the central question in the case became whether the Mashpee people constituted an Indian Tribe for the purposes of the Non-Intercourse Act. The Mashpee relied on oral testimony by tribal members and the expert testimony of anthropologists to establish their existence as a Tribe.

Binder and Weisberg summarize the controversy with reference to the role of orality in determining the definition and scope of the word "tribe." [152] While the court used a definition of "tribe" offered by the Supreme Court in a 1901 case having no relationship to the Non-Intercourse Act, [153] the Mashpee witnesses and their anthropological experts used much more fluid and culturally-based definitions which frustrated the judge. [154] Binder and Weisberg conclude that "[t]he trial was essentially a conflict between two narratives of Indian history." [155]
The opposing sides held different images of tribal status, or, more generally, disparate notions of culture and social identity. The jury did not have the option of devising an equitable compromise between these visions but could only endorse one or the other. In this sense, the law follows the logic of literacy, of the historical archive, rather than the logic of changing collective memory; the shifting oral history of Mashpee had to be set in documentary stone. [156]

***700** The Supreme Court recognized the crucial importance of tribal membership and identity in Santa Clara Pueblo v. Martinez. [157] Justice Marshall, writing for the majority, stated that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." [158] In the same footnote, Marshall charged the federal courts with the responsibility to confront Native American traditions sympathetically: "Given the often vast gulf between tribal traditions and those with which the federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters." [159] Nowhere is this gulf wider than in the area of literacy and orality, and Marshall's eloquent charge should become a touchstone for the federal courts in considering matters of Indian religion and the law.

D. Antiquity

The Santa Clara Pueblo case involved a tribal statute that made the children of a union between a male tribal member and a female non-member full-fledged tribal members, but did not confer tribal membership on children of a female member and

a male non-member.[160] One question that the district and circuit courts considered essential was the antiquity of the tribal statute. Reviewing the anthropological analysis of Pueblo organization, the district court concluded that it was unclear whether the tribal statute (enacted in 1939) was a codification of pre-existing custom, because in the past marriage to non-members was infrequent.[161] The circuit court, on the other hand, considered testimony that prior to the 1939 statute such marriages had existed, and that children of female tribal members were granted membership status.[162]

The concern of the courts over the antiquity of the practice indicates a preference for Native Americans to act in accordance with tradition. In this case, which challenges a written tribal statute under the Indian Civil Rights Act,[163] it is puzzling that the courts should consider the inquiry into the antiquity of the practice relevant. The concern of the courts on this issue ***701** exemplifies a somewhat crude joke shared by anthropologists that "people like their savages naked." In other words, we hold tribal people to a standard of "tradition" that prefers that they preserve the (often artificial) past that we have somehow lost. This preservation ideal is reflected in the actions of the Supreme Court of British Columbia in Western Forest Products discussed above.[164] This creates a dilemma for Indian Tribes. On the one hand, courts protect their practices only to the extent that they are "traditional" while disparaging oral history, the only evidence available to prove the tribal past.

In a fascinating and thorough analysis of Martinez, Judith Resnik combed the evidence to conclude that nothing could really be concluded about the existence of the rule prior to 1939.[165] Anthropologists disagreed with one another in print and at trial; so did tribal members, who also, of course, disagreed with anthropologists.[166] Most important for Resnik is how alien the very question of the statute's interpretation is in Pueblo terms: "These concepts, formulated by Western anthropologists, assume gender as an organizing category, assume the utility of description of societies by these terms, sometimes assume interrelationship among lineage, locality, and gender control, and generally assume that societies are one or the other."[167] Resnik concludes that the recent or ancient vintage of a tribal practice should be irrelevant for Congress or the courts because Tribes, as sovereign entities, must be permitted to grow, adapt, and experiment just as any other government would.[168]

The point is not simply that courts look for proof of tradition in support of tribal customs and legislation, while denigrating other traditions in attempts to prove the use of sacred sites or land claims. More important is how the courts distort the meanings of each of these traditions through their failure to consider the impact of cultures based in orality. The Western prejudice favors written records as proof of the past. Likewise, the associated stereotype of the ancient, changeless Indian results in a static picture of tribal custom, legitimized not by sovereign, tribal decision making, but by its mysterious and unprovable antiquity.

The sovereignty issue is compelling, but notwithstanding the right of Native Americans to govern themselves, the preference for changeless "tradition" may be found in quite recent statutes promulgated by Congress. ***702** The text of AIRFA, for example, states that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right to believe, express, and exercise [their] traditional religions."[169] Not to demean the intent of the drafters of this legislation, which some hailed as a breakthrough in multi-culturalism when it was adopted, but the text reveals the strong prejudice in the majority culture for keeping Indian cultures as a kind of "living museum" with their (now harmless) old ways on display for the interest of art and science. One is tempted, therefore, to conclude that it is not the policy of the United States to protect the right of Native Americans to experiment, innovate, or function as living, changing cultures.

As the Martinez case illustrates, "tradition" is a vague term. One must ask rhetorically, "How old is 'old'"? This question has real world applications because of the existence of syncretic Indian religions such as the Native American Church, which combines the sacramental use of peyote, and Native American singing with certain elements of Christianity.[170] The religious use of peyote has pre-Columbian origins among some Tribes who lived within its range of growth (northern Mexico and southern Texas).[171] The organized Native American Church has its origins in late-nineteenth century Oklahoma among Tribes who

came there as a result of the Removal Policies of a half-century earlier.[172] The questions of "tradition" here are myriad. Is all religious peyote use by Native Americans "traditional?" Or are only those Tribes whose use extends to time immemorial acting traditionally? But the most difficult question, from the standpoint of Native American litigants, must be how tradition can be proved when only oral history records these practices.

IV. Conclusion: The Limits of Analogy

Shortly after the Ninth Circuit decided Havasupai Tribe v. United States[173], Havasupai elder Rex Tilousi addressed students at Arizona State University to explain the Tribe's religion in the context of the case. Tilousi's speech raised several central themes of this comment.[174] Tilousi began by telling the Havasupai origin mythology and then offered some comments about his Tribe's recent litigation, emphasizing the difficulties ***703** encountered in presenting this oral history in court. "So the religion . . . [w]e don't have that written in books, like the Bible. . . . Maybe that is also another reason courts are saying we don't have a religion. But we feelour religion is here. We feel it."[175] Tilousi expressed the Tribe's disappointment at not being informed that the archaeological team investigating the site had found cultural objects: "The broken pottery, the grinding stones that was [sic] found there meant that people lived there a long time ago, and that the area there shouldn't have been disturbed in the first place."[176]

Tilousi used analogies to the Bible in his attempt to explain the very foreign mythology of his people to the largely Anglo audience:

> So that is one of the stories. It is just like in the Bible. There are stories about Moses; and the ark when it rained for 40 days and 40 nights; there are stories about Samson and his hair was long, he had power, and when he cut his hair short he didn't have no [sic] power. And these are the stories we tell. It is similar to the Bible and the way you have been told I'm sure, sometime or another, in your lifetime.[177]

This rhetorical technique corresponds closely with Michaelsen's suggestion that lawyers representing Indian Tribes present their clients' religions through analogies to religious notions with which the finder of fact is more familiar.[178] He offers several examples from trial testimony and comments on how effective they were or were not in given cases.[179] While these strategies are important, they mask the fact that analogies are necessary precisely because tribal religions are very little understood and quite different than those of the majority of Americans.

A few striking examples of successful analogizing may be found in Supreme Court opinions on Native American religion-most, unfortunately, in dissent. In Employment Division v. Smith,[180] for example, Justice Blackmun argues that peyote use is "closely analogous to the sacramental use of wine by the Roman Catholic Church."[181] At times, even if a court accepts the analogy, the beliefs or practices of the Native American litigant may be ***704** too different or difficult for the court to fit into an acceptable framework.[182] The uniqueness of Native American culture should be celebrated, not disguised as a simplified version of the Judeo-Christian world view.

But a few successes do not make up for the overwhelming pattern of cases that deny protection to Indian religions, lands, and cultural identities. If our federal courts are to respond to this nation's commitment to cultural diversity, they must be prepared to hear and really listen to Native American voices, quite different from their own, speaking in terms shaped by their non-literate cultural heritage. By doing so, the federal courts would be honoring the Western, liberal tradition that they inherit based on the idea that everyone benefits by adding voices to the marketplace of ideas.

Footnotes

a1 J.D. Candidate, Arizona State University, 1999. The author would like to thank Professor Rebecca Tsosie and Arizona State University College of Law graduates Nhu-Hahn Le and Michael Mandel for their advice and guidance on this Comment.

1 Rex Tilousi, Hav'suw Ba'aja: Guardians of the Grand Canyon-Past, Present and Future, 9 Wicazo Sa Review 62, 62 (1993).

2 Havasupai Tribe v. United States, 752 F. Supp. 1471, 1499-1500 (D. Ariz. 1990).

3 See, e.g., Robert S. Michaelsen, American Indian Religious Freedom Litigation: Promise and Perils, 3 J.L. & Religion 47 (1985); see also Allison M. Dussias, Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases, 49 Stan. L. Rev. 773, 811-12 (1997); Sarah B. Gordon, Note, Indian Religious Freedom and Governmental Development of Public Lands, 94 Yale L.J. 1447, 1467-68 (1985); Rita Sabina Mandosa, Another Promise Broken, 40 Fed. B. News & J. 109, 110 (1993).

4 See Michaelsen, supra note 3, at 49-50.

5 See id. at 58.

6 See id. at 50.

7 See id. at 65.

8 See id. at 70.

9 Id. at 58.

10 Note some of the terms that courtrooms and Christian churches share: “testify” or “testimony,” “witness,” “atonement,” etc.

11 Verna C. Sanchez, All Roads Are Good: Beyond the Lexicon of Christianity in Free Exercise Jurisprudence, 8 Hastings Women's L.J. 31, 59-60 (1997).

12 See John H. Langbein, Historical Foundations of the Law of Evidence: A View from the Ryder Sources, 96 Colum. L. Rev. 1168, 1183 (1996) (identifying the early preference for written evidence in contract and conveyance).

13 See Ben A. Rich, Postmodern Medicine: Deconstructing the Hippocratic Oath, 65 U. Colo. L. Rev. 77, 120 (1993) (arguing that both law and medicine in the West disdain oral history).

14 See Kenneth W. Masters, Comment, Law in the Electronic Brothel: How Postmodern Media Affect First Amendment Obscenity Doctrine, 15 U. Puget Sound L. Rev. 415, 463-64 (1992) (citing Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578 (S.D. Fla. 1990), rev'd sub nom. Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992), where the court ignored testimony that certain lyrics in a “rap music” recording were closely linked to African-American oral poetry and song traditions).

15 See Aviva Orenstein, “MY GOD!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 Cal. L. Rev. 159, 194-95 (1997) (showing that women were historically prevented from acquiring the ability to read and write, and that courts have systematically marginalized women's media such as gossip, conversation, and “water-cooler” talk).

16 See William P. Murphy, Oral Literature, 7 Ann. Rev. Anthropology 113, 116 (1978).

17 See id. at 116-17.

18 This approach has a close analog in biblical hermeneutics. As scholars began to realize that many portions of the Bible must have evolved over time-some, in fact from oral sources-the search for the first texts became a central focus for biblical historians and theologians. See, e.g., Niels C. Nielsen, Jr. et. al., Religions of the World 375-77 (2d ed. 1988).

19 See, e.g., John Bierhorst, The Mythology of North America 3-4 (1985). Bierhorst notes that the increased scholarly interest in Native American mythology led to increased commentary by collectors on the cultures and people providing the materials. See id. at 5-6.

20 Brian Swann & Arnold Krupat, Introduction to Recovering the Word 1 (Brian Swann & Arnold Krupat eds. 1987).

21 See Murphy, supra note 16, at 113.

22 Id. at 116.

23 See Walter J. Ong, Orality and Literacy (1982).

24 See id. at 12-15.

25 See Sam D. Gill, Beyond 'The Primitive' 5-6 (1982).

26 Id. at 7.

27 See id.

28 See id.

29 See James Fentress & Chris Wickham, Social Memory 42-45 (1992).

30 See id. at 44-45.

31 Id. at 46.

32 See, e.g., Johannes Fabian, Time and the Other 80-87 (1983).

33 See id.

34 See, e.g., Charles F. Wilkinson, American Indians, Time, and the Law 13-14, 32 (1987).

35 Fabian, supra note 32, at 2. For a Native American-authored discussion of circularity in Indian conceptions of time and religion, see Paula Gunn Allen, The Sacred Hoop (1986).

36 Fabian, supra note 32, at 2.

37 Fentress & Wickham, supra note 29, at 17.

38 See, e.g., Gill, supra note 25, at 13-20. See also Mircea Eliade, The Myth of Eternal Return (1954); The American Indian and the Problem of History (Calvin Martin ed., 1987).

39 See, e.g., Elizabeth Derr Jacobs, Preface to Nehalem Tillamook Tales ix (Melvin Jacobs ed., 1959); Richard Nelson, Make Prayers to the Raven 16-19 (1983) (describing the time distinctions of the Alaskan Koyukan tribe); Dennis Tedlock, Introduction to Finding the Center: Narrative Poetry of the Zuni Indians xvi (Dennis Tedlock trans., 1972).

40 See Jarold Ramsey, Reading the Fire 22-23 (1983).

41 See Fentress & Wickham, supra note 29, at 93, 113; see also Keith H. Basso, 'Speaking with Names': Language and Landscape Among the Western Apache, in Western Apache Language and Culture 138, 160 (1990).

42 See Keith H. Basso, 'Stalking with Stories': Names, Places, and Moral Narratives Among the Western Apache, in Western Apache Language and Culture 99, 116-17 (1990).

43 Vine Deloria, Jr., God Is Red 138 (1973).

44 Id.

45 See, e.g., Ake Hultkrantz, The Religions of the American Indians 157-83 (Monica Setterwall trans., 1980); Stanley Diamond, In Search of the Primitive 213 (1974).

46 See, e.g., John Bierhorst, The Mythology of North America 5-12 (1985); Paul G. Zolbrod, Dine Bahane: The Navajo Creation Story 16-19 (1984).

47 See Wilhelmine Driver, Music and Dance, in Indians of North America 194, 194-207 (2d ed. 1969).

48 Jo Carillo, The American Indian and the Problem of History (C. Martin ed. 1987), 33 Ariz. L. Rev. 281, 285-86 (1991) (book review) (citing Henrietta Whiteman, White Buffalo Woman, in The American Indian and the Problem of History 162-70 (Calvin Martin ed., 1987)).

49 Id. at 286.

50 See id.

51 See supra notes 10-15 and accompanying text.

52 See generally Gordon M. Day, Oral Tradition as Complement, 19 Ethnohistory 99 (1972) (offering Abenaki legend of British raid as example of orally-transmitted history); Leanne Hinton, Flutes of Fire: Essays on California Indian Languages 87-93 (1994).

53 See, e.g., Andrew O. Wiget, Truth and the Hopi: An Historiographic Study of Documented Oral Tradition Concerning the Coming of the Spanish, 29 Ethnohistory 181, 191-94 (1982); Frederica de Laguna, Geological Confirmation of Native Traditions, Yakutat, Alaska, 23 Am. Antiquity 434 (1958).

54 Jan Vansina, Oral Tradition as History 199 (1985). On another tack, Hobsbawm reveals that much of what the literate Western world takes to be long-standing tradition is actually of quite recent origin. See Eric Hobsbawm, Introduction: Inventing Traditions, in The Invention of Tradition 1-6 (Eric Hobsbawm & Terrence Ranger eds., 1983). Sometimes this involves actual invention of ritual, while at other times ancient objects are used, but put to new uses or given novel meanings. See id.

55 See Alice Hoffman, Reliability and Validity in Oral History, in Oral History: An Interdisciplinary Anthology 67, 72 (David K. Dunaway & Willa K. Baum eds., 1984).

56 Id.

57 See Fentress & Wickham, supra note 29, at 97.

58 John D. Loftin, Anglo-American Jurisprudence and the Native American Tribal Quest for Religious Freedom, 13 Am. Indian Culture & Res. J. 1, 6 (1989) (quoting American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Senate Select Comm. on Anglo Affairs, 95th Cong., 2d Sess. 86-87 (1978)).

59 See Michaelsen, supra note 3, at 49. Native American languages themselves are quite a struggle for English speakers. Consider the fact that Navajo has, by one scholar's calculation, 356,200 conjugations of the verb "to go." See Gary Witherspoon, Language and Art in the Navajo Universe 21 (1977).

60 See Dussias, supra note 3, at 812.

61 See Gill, supra note 25, at 10-27.

62 See supra notes 41-49 and accompanying text.

63 See, e.g., Loftin, supra note 58, at 2-5.

64 American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469.

65 Federal Agencies Task Force, American Indian Religious Freedom Act Report (P.L. 95-341) 10 (1979).

66 Id. at 8.

67 See Dean B. Suagee, American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers, 10 Am. Indian L. Rev. 1, 9-10 (1982).

68 See Christopher Vecsey, Prologue to Handbook of American Indian Religious Freedom 7, 13-14 (Christopher Vecsey ed., 1991).

69 See infra Part III.B.

70 See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

71 See Worcester, 31 U.S. (6 Pet.) at 541; Johnson, 21 U.S. (8 Wheat.) at 584-85.

72 See Cherokee Nation, 30 U.S. (5 Pet.) at 17.

73 175 U.S. 1 (1899).

74 Id. at 11.

75 Id.

76 See Dussias, supra note 3, at 787-805.

77 77 Ct. Cl. 347 (1933).

78 Id. at 366-67.

79 Id. at 367 (emphasis added).

80 Id. at 369.

81 See supra notes 3-9 and accompanying text.

82 See Pub. L. No. 79-726, 60 Stat. 1049-56 (codified at 25 U.S.C. § 70a (1946), repealed 1978).

83 See Francis Paul Prucha, The Great Father 1019-20 (1984).

84 See id. at 1021.

85 See United States v. Santa Fe Pac. R.R., 314 U.S. 339, 345, 359 (1941).

86 87 Ct. Cl. 143 (1938).

87 See id. at 153.

88 Id. at 156.

89 See Gayle L. Dukelow & Rosalyn S. Zakheim, Recovering Indian Lands: The Land Patent Annulment Suit, 2 Ecology L.Q. 195, 209 n.71 (1972).

90 165 Ct. Cl. 501 (1964).

91 The Indian Claims Commission decision echoed Assiniboine Tribe and Coos Bay Tribe: ". . . all of these [Indian] witnesses were comparatively young men (ages 47 to 59) who, in point of time, are far removed from the issue in question and who have an obvious interest in the outcome of the case." Pueblo De Zia v. United States, 11 Ind. Cl. Comm'n 131, 168 (1962).

92 Pueblo De Zia, 165 Ct. Cl. at 504.

93 Id.

94 Id. at 505.

95 See id. at 506-08.

96 No. 2-64, 1966 WL 8893, at *1 (Ct. Cl. Oct. 14, 1966).

97 See id. at *1-*4.

98 Indian Claims Commission Act, Pub. L. No. 79-726, 60 Stat. 1049-56 (codified at 25 U.S.C. § 70a (1946), repealed 1978).

99 See Confederated Tribes of the Warm Springs Reservation, 1966 WL 8893, at *8-*10.

100 Id. at *12.

101 See id.

102 See id.

103 See Peter Goodrich, Languages of Law 179-208 (P. Goodrich ed., 1990) (referring to Western Forest Products, Ltd. v. Richardson, an unreported case in which "the only available record is the trial transcript which is available for personal inspection but cannot be copied or removed from the Supreme Court building").

104 Id. at 180. When the presiding judge attempted to dissuade them, the Haida quite reasonably concluded that "'[f]or whatever reason, [Justice McKay] does not want us to speak for ourselves.'" Id.

105 See id. at 181-83.

106 See id. at 183.

107 Id.

108 12 Ct. Cl. 607 (1987).

109 See id.

110 Id. at 608.

111 Andrew Wiget, Recovering the Remembered Past: Folklore and Oral History in the Zuni Trust Lands Damages Case, in Zuni and the Courts 173, 173-74 (E. Richard Hart ed., 1995).

112 Id. at 175.

113 See id. at 175-76.

114 See id. at 177.

115 See id.

116 See id. at 178.

117 See id. Here another problem with the "collection" method is broached. Once a certain story or myth telling is recorded, it receives an authoritative status. See supra note 33 and accompanying text. Mistakes and misunderstandings of the original recorder are hard to ferret out, and thus in a later telling, the story may appear to be changed.

118 Wiget, supra note 111 at 179.

119 See id. Wiget rated the aspects of the testimony as follows: "a. Excellent for long-term, recurrent behaviors and for evaluation of events from Zuni cultural perspective b. Very good for historical particularization. . . c. Fair for analysis of causation. . . d. Fair for absolute dating of idiosyncratic events. e. No poors because of the deponents' veracity." Id. at 184-85 (emphasis in original).

120 See, e.g., Jane Simpson, Confidentiality of Linguistic Material: the Case of Aboriginal Land Claims, in Language and the Law 428 (John Gibbons ed., 1994) (discussing the problem of secrecy in Australian aboriginal land claims cases).

121 Christopher Vecsey, Prologue, in Handbook of American Indian Religious Freedom 7, 13 (Christopher Vecsey ed., 1991).

122 Don Bahr, What Happened to Mythology, 9 Wicazo Sa Rev. 44, 44 (Fall 1993).

123 See id.

124 850 F.2d 729 (D.C. Cir. 1988).

125 752 F. Supp 1471 (D. Ariz. 1990), aff'd sub nom. Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991).

126 See New Mexico Navajo Ranchers Ass'n, 850 F.2d at 730-31.

127 See id. at 732.

128 42 U.S.C. § 1996 (1994).

129 New Mexico Navajo Ranchers Ass'n, 850 F.2d at 732.

130 See id. at 733.

131 See supra notes 73-76 and accompanying text.

132 42 U.S.C. § 1996 (1994).

133 See New Mexico Navajo Ranchers Ass'n, 850 F.2d at 733-34.

134 See id. at 734. "In discussing agencies' duties to learn about and avoid unnecessary interference with traditional Indian religious practices, the Wilson court stated that they 'ordinarily should consult Indian leaders before approving a project likely to affect religious practices.'" Id. at 733-34 (quoting Wilson v. Block, 708 F.2d 735, 746 (D.C. Cir. 1983)).

135 See id. at 733.

136 See id. at 734. Traditionally, the Navajo have been a wide-spread and loosely organized tribe, with no central government or priestly body to organize the whole tribe. It is therefore unlikely that any site fits this broad definition. See generally Gary Witherspoon, Navajo Social Organization, in Handbook of North American Indians, Vol. 10 Southwest 524 (Alfonso Ortiz ed., 1983).

137 New Mexico Navajo Ranchers Ass'n, 850 F.2d at 734.

138 Id.

139 752 F. Supp. 1471 (D. Ariz. 1990), aff'd sub nom. Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991).

140 See id. at 1475-76.

141 See id. at 1488-90.

142 See id. at 1477-88.

143 See id. at 1497-98 (stating that "Dr. Euler [the anthropologist contacted by the Forest Service] was unable to provide any information that would confirm that a conflict existed between the mine and any specific Havasupai religious practices or sites.").

144 See id. at 1494.

145 See supra note 2 and accompanying text.

146 Havasupai Tribe, 752 F. Supp. at 1496 (quoting letter from Joe Sparks, Attorney for the Havasupai Tribe, to the U.S. Forest Service (May 12, 1986)).

147 See id. at 1500.

148 Id.

149 427 F. Supp. 899 (D. Mass. 1978).

150 See id. at 901.

151 See 25 U.S.C. § 177 (1984); see also Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (a recent example of the use of the Non-Intercourse Act to recover lands). In Oneida, the Supreme Court held that the doctrine of laches did not bar Indian wards from bringing a cause of action under the Non-Intercourse Act. See id. at 244.

152 See Guyora Binder & Robert Weisberg, Cultural Criticism of Law, 49 Stan. L. Rev. 1149, 1180-87 (1997).

153 See Montoya v. United States, 180 U.S. 261, 266 (1901).

154 See Binder & Weisberg, supra note 152, at 1181 (quoting Mashpee Tribe, 427 F. Supp. at 899).

155 Binder & Weisberg, supra note 152, at 1181.

156 Id.

157 436 U.S. 49 (1978).

158 Id. at 72 n.32.

159 Id.

160 See id. at 51.

161 See id. at 61.

162 See Martinez v. Santa Clara Pueblo, 540 F.2d 1039, 1040 (10th Cir. 1976), rev'd, 436 U.S. 49 (1978).

163 25 U.S.C. §§ 1301-1341 (1983 & Supp. 1998).

164 See supra notes 103-107 and accompanying text.

165 See Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671, 705-12 (1989).

166 See id. at 706-07.

167 Id. at 706.

168 See id. at 709-10.

169 42 U.S.C. § 1996 (1994) (emphasis added).

170 For a general description of the history, rituals, and practices of various adherents to peyotism, see Omer C. Stewart, Peyote Religion (1987)

171 See id. at 45-60.

172 See id.

173 943 F.2d 31 (9th Cir. 1991).

174 See Tilousi, supra note 1.

175 Id. at 66.

176 Id.

177 Id. at 63.

178 See Michaelsen, supra note 3, at 65-68.

179 See id.

180 494 U.S. 872 (1990).

181 Id. at 913 n.6 (Blackmun, J., dissenting).

182 See, e.g., United States v. Thirty Eight Golden Eagle Feathers, 649 F. Supp. 269, 276 (D. Nev. 1986) (denying that depriving Indian plaintiff of eagle feathers was an unreasonable burden on his religion despite stating that the status of the feathers to the plaintiff was like that of the cross to a Christian).

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Comment

*281 TREATY FISHING RIGHTS: A HABITAT RIGHT AS PART OF THE TRINITY OF RIGHTS IMPLIED BY THE FISHING CLAUSE OF THE STEVENS TREATIES

O. Yale Lewis III [a1]

Abstract: The fishing right guaranteed by the fishing clause of the Stevens Treaties between the United States and the Indians of Western Washington should be considered a trinity of rights: a right of access, a right of equitable apportionment, and a habitat right. While seven different Supreme Court decisions and scores of lower court decisions examine the contours of the first two elements of the fishing right, the contours of the final element of the right remain unsettled. No appeals court has ruled on whether there is an implied habitat right. While some trial courts have skirted the issue, only one has addressed it directly, with the opinion vacated on appeal. This Comment examines the proposed implied habitat right and explains why courts should recognize it.

One of the most significant and long-simmering legal disputes in Western Washington entered a new phase in January 2001, when local Indian tribes filed a "Request for Determination" [1] in the context of *United States v. Washington*. [2] The Request for Determination is based on the fishing clause of the Stevens Treaties between the United States and the "fishing Indians" of what is now Western Washington. [3] It asks the court to impose a duty on *282 the State of Washington to construct and maintain culverts under state highways so that salmon and other fish have unobstructed passage between their spawning grounds and the sea. [4] According to three different studies by the State of Washington, improperly maintained culverts prevent anadromous fish [5] from accessing over 400,000 square meters of potentially productive salmonid spawning habitat. [6] If the culverts were fixed, salmon would regain access to this habitat, producing approximately 200,000 more adults per year. [7]

This Comment argues that courts should recognize the habitat right implicit in the tribes' Request for Determination. Without judicial recognition of a habitat right, anadromous fish populations will continue to perish and the treaty fishing right will become even emptier than it already is. [8] In today's world of polluted, riprapped, [9] channelized, unvegetated, and otherwise degraded streams, the Indians' fishing right is becoming an empty promise. [10] If the tribes had a habitat right, they could use it to make the fishing right meaningful, demanding that the state take simple, cost-effective steps to protect fish habitat, such as fixing the culverts.

*283 To place the proposed habitat right in the context of the other elements of the fishing right that courts already recognize, this Comment describes the fishing right as a trinity of subsidiary, interdependent rights: the right of access, [11] the right of equitable apportionment, [12] and the habitat right. [13] Each element of the trinity has its own constituent elements. [14] Although courts impliedly recognize the right of access [15] and the right of equitable apportionment, [16] they have not yet recognized the habitat right. [17]

This Comment is divided into four parts. Part I defines the proposed habitat right. Part II explains the historic importance of salmon to the Indians of what is now Western Washington and the negotiations that produced the Stevens Treaties. Part III mentions the canons of construction courts use to interpret Indian treaties.[18] Stevens Treaties case law is then ***284** discussed in terms of the three elements of the proposed trinity plus two corollary judicial doctrines that both support and limit the proposed habitat right: the reserved water right,[19] and the conservation necessity.[20] Finally, Part IV argues that the habitat right should be recognized as the third right in the proposed trinity.

I. Potential Scope of the Implied Habitat Right

Courts recognize that anadromous fish require certain basic environmental conditions to survive and prosper, including 1) access to and from the sea, 2) an adequate supply of good-quality water, 3) a sufficient amount of suitable gravel for spawning and egg incubation, 4) an ample supply of food, and 5) sufficient shelter.[21] The implied habitat right would give tribes a cause of action to preserve and restore those conditions in local watersheds.[22] Armed with the implied habitat right, tribes could force state and local governments as well as private developers to consider the environmental effects of a particular development long before a given fish population heads towards extinction and becomes subject to the Endangered Species Act.[23] In some cases, tribes could even go to court and demand removal of certain developments such as the Lower Snake River dams, that create an especially severe impact on salmon mortality.[24]

***285** The implied habitat right could also give tribes more leverage in Federal Energy Regulatory Commission proceedings to demand that a particular dam operate in a more fish-friendly fashion. For example, the Skokomish Indians could intervene in the Federal Energy Regulatory Commission proceedings re-authorizing the Lake Cushman Dams.[25] Potential habitat restoration projects in this case range from simply restoring flows below the lowermost dam, to equipping one or both of the dams with fish ladders, to removing the lowermost dam, or removing both dams.[26] To help select the appropriate restoration option, the tribes could measure the habitat right in terms of money, estimating the value of the fish killed by the dam, comparing the value of the fish to the value of the electricity produced by the dam, and then seek equitable relief based on a combination of habitat restoration and/or financial compensation.[27]

The implied habitat right would not create a "wilderness servitude" requiring the government to return salmon habitat to 1855 conditions.[28] Rather, it would be a tool the Indians could use to prevent threatened habitat destruction and, where appropriate, restore damaged habitat. It could be limited by the moderate living standard,[29] so that tribes couldn't prevent all development, only development that threatens their ability to catch enough fish to attain a moderate living from fishing.[30] Once a tribe achieves a moderate living from fishing, the habitat right would become a "negative right."[31] Tribes could prevent new developments that threaten their ability to achieve a moderate living, but they could not destroy old developments that might prevent higher tribal harvests.[32]

Judicial recognition of an implied habitat right would boost the Indian economy, preserve a treasured cultural icon, and begin restoration of ***286** ecological function to under-functioning wetland, riverine, and estuarine environments. For example, one report estimated that the Lake Cushman Dams caused over $5 billion worth of damage to the Skokomish tribe and economy between 1926 and 1997.[33] Simply returning flows to the North Fork of the Skokomish River would return life-giving water to formerly productive fish habitat and at least partially restore the normal process of sediment transportation, flushing out small gravel and other debris that degrades spawning habitat and restoring much-needed debris to the river delta.[34]

The implied habitat right would give tribes the ability to protect the environmental conditions needed for fish populations to survive and prosper. This tool would bring the needs of salmon to the bargaining table when land use planners and developers make decisions about development. It could also force citizens and political leaders to think proactively about how to restore salmon habitat in a cost-effective and creative manner. By recognizing and then enforcing the implied habitat right, the courts could initiate a process to strengthen the culture and spirit of Indians and non-Indians alike.

II. Treaty Negotiations Between the United States and the Fishing Indians of Western Washington

The Native Americans of the Pacific Northwest long relied on salmon for their physical and spiritual nourishment and[35] as the basis for their economy, religion, and culture.[36] Because of salmon, the Pacific Northwest Indians developed one of the few hunter/gatherer societies in the world that consistently produced more food and material wealth than it needed for subsistence.[37] The fishing clause of the Stevens Treaties was designed to protect the source of this wealth — the salmon.[38] When Isaac Stevens negotiated the treaties that bear his name, he was well aware of the significance the Indians attributed to salmon.[39] By assuring the Indians that ***287** the United States would always protect their right to catch salmon, he avoided a needless and potentially inhumane war and paved the way for non-Indian settlement in the Pacific Northwest.[40]

A. The Indian Salmon Fishery Before the Treaties

Salmon have always been at the heart of Pacific Northwest Indian culture.[41] Salmon were central to the Indians' diet, religion, calendar, and system of property rights.[42] To maintain their runs of salmon, the various Indian tribes in the Pacific Northwest developed religious practices that centered on salmon.[43] Salmon were also central to the Northwest Indians' calendar and understanding of the night sky. For example, the Quileute Indians, who lived on the coast near the mouth of the Quileute River, named four periods of the year for the four great runs of salmon that spawned on the Quileute River during the year.[44] The Nisquallys, meanwhile, spoke of a constellation called “edad,” meaning fish weir, saw Orion's belt as three fishermen and his sword as a school of fish, and regarded the northern lights as a school of herring exposing their white bellies to the night air.[45]

To the extent that an Indian system of private property rights existed, it focused on salmon. Each tribe maintained a winter village along a particular river.[46] Within the tribes, individual fisherman had hereditary rights to fish at particular spots along the river near their winter villages. There also existed shared rights to fish with people from other villages near their spring and summer fish camps based on ties of marriage and kinship.[47] This system, for the most part, eliminated any need for intertribal warfare over fishing grounds, allowed for escapement,[48] and allowed sufficient numbers of fish to become available for upstream fisherman.[49]

***288** *B. The Treaty Negotiations*

Isaac Stevens, first governor of Washington Territory and first Indian superintendent of Washington Territory,[50] made some attempts to preserve the Indian fishing allocation system when he negotiated the Stevens Treaties.[51] Indeed, he and his advisors discussed the need to preserve the Indians' fishing rights several months before beginning their treaty-making tour on Puget Sound and the Straits of Juan de Fuca in the winter of 1854-55.[52] Based on these discussions, Stevens also decided to “liberalize”[53] the terms of the treaty that his superiors in Washington D.C. suggested.[54] Stevens negotiated treaties that confined the Indians to their winter villages on their reservations in the winter, but in the summer allowed them to roam freely

over their aboriginal fishing and hunting grounds, set up fish camps, and catch fish as they always had.[55] The often-quoted[56] speech that Governor Stevens delivered to the Indians during treaty negotiations at Point-No-Point indicated Stevens' intent to protect the Indians' fish:

> Are you not my children and also children of the Great Father? What will I not do for my children, and what will you not do for yours? Would you not die for them? This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? .... This paper secures your fish. Does not a father give food to his children?[57]

Stevens conducted the negotiations in the Chinook jargon, a trade patois consisting of some 300 words from English, French, and various Indian dialects, inadequate to communicate the Indian equivalents of many of the ***289** English terms used in the treaty.[58] It is unclear why Stevens chose to use Chinook rather than translate directly from English to the appropriate Indian dialect.[59] In later years, an individual considering himself fluent in Chinook stated that the language could not have been used to translate the treaties' terms into words understandable to the Indians.[60]

C. The Stevens Treaties

Stevens began his treaty-making tour on Christmas Eve, 1854, on the banks of Medicine Creek in South Puget Sound.[61] Ten months later, on the banks of the Judith River in Montana, he negotiated his tenth and final treaty.[62] During each negotiation, he read from a pre-drafted document, each containing virtually identical terms.[63] As a result of each negotiation, the Indians ceded vast, if not all, swaths of their aboriginal territory in exchange for items and services such as blankets and blacksmith shops.[64] By far the most important element of the treaty negotiations, however, was not what the Indians either ceded or received, but what they retained.[65] In addition to small reservations of land, the Indians retained the fishing right as codified in the fishing clause:[66]

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at usual and accustomed places, in common with citizens of the Territory; and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed lands.[67]

***290** The general meaning of the fishing clause emerges clearly from the historical record. Stevens was under orders to extinguish Indian title to the vast majority of their aboriginal territory to make way for non-Indian settlement.[68] The Indians, meanwhile, wanted to preserve their way of life as much as possible, which to them meant preserving their right to catch as much salmon as they always had.[69] The fishing clause reflects these concerns.[70] The Stevens Treaties guaranteed individual fishermen the right to continue seasonal fishing at their usual and accustomed fishing places off the reservation.[71] It also allowed at least some Indians to continue living in their winter villages. Stevens allowed displaced Indians to build new winter villages on the reservations.[72]

Governor Stevens viewed the fishing clause in a similar vein.[73] To him, it was both cheap and humane to let the Indians continue fishing as they had always done.[74] In Stevens' view, the reservations were adequate in size because they were placed in locations where the Indians could continue to fish, hunt, and "participate in the labor of the Sound."[75] In his official communications to

the President, Stevens defended his decision to let the Indians continue fishing because it allowed them to be self-supporting and wouldn't interfere with non-Indians.[76] Furthermore, the fishing clause allowed the Indians to continue supplying the non-Indians with most of their fish and other seafood, including the salmon they cured for export.[77]

The historical record indicates that the Indians understood the fishing clause of the Stevens Treaties as a guarantee that the federal government would protect their fisheries in perpetuity. Stevens probably understood the treaty in the same light. It is unknown whether he was motivated by a sense of common humanity, noblesse oblige, or a simple desire to reduce the cost of feeding the Indians. From a legal standpoint, it is also irrelevant.

*291 *III. Stevens Treaty Case Law*

Courts recognize that the fishing clause guarantees the Indians enough fish to make the fishing right meaningful.[78] Indeed, Stevens Treaties case law can be read as a series of contemporaneous responses to declining fish runs and judicial efforts to fashion new doctrines designed to enforce the treaties central guarantee — that the Indians would always have enough fish to maintain their way of life.[79] To enforce this guarantee, over the last century, courts developed the right of access and[80] the right of equitable apportionment.[81] In addition, some lower court decisions laid the foundation for recognition of the proposed habitat right.[82] If recognized, this third right would be the final element of the proposed trinity.

Stevens Treaties case law recognizes two more doctrines that inform and limit these rights: the reserved water right[83] and the conservation necessity.[84] While the first two elements of the trinity, the right of access and the right of equitable apportionment, are firmly established, the habitat right is not. Likewise, the reserved water right is not unequivocally analogized to the reserved habitat right and the conservation necessity is not unequivocally interpreted so as to restrict the state's ability to destroy, or permit the destruction of, productive fish habitat.

A. The Canons of Construction

Since the tenure of Chief Justice John Marshall in the early days of the U.S. Supreme Court, courts interpret treaties between the United States and the tribes, including the Stevens Treaties, in light of the special canons of construction for Indian treaties.[85] At mid-century, the Court stated that these canons required consideration of "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[86] Citing multiple Supreme Court cases, Felix Cohen, a preeminent scholar of American Indian law,[87] stated that the canons of construction require the ***292** courts to construe the treaties liberally in favor of the Indians,[88] resolve ambiguous expressions in favor of the Indians,[89] and interpret the treaties as the Indians would have understood them at the time.[90] Echoing Cohen, the most recent U.S. Supreme Court case interpreting an Indian treaty uses identical language.[91]

B. The Right of Access

In *United States v. Winans*,[92] in 1905, the U.S. Supreme Court held that the fishing clause of the Stevens Treaties contained a right of access, also described as a "fishing servitude."[93] The conflict here began after the Winans brothers installed fishwheels at the Yakama[94] Indians' "usual and accustomed" fishing grounds on the Columbia River at the Washington / Oregon border[95] and attempted to prevent the Indians from accessing their traditional fishing stations.[96] The local U.S. Attorney then sought an

***293** injunction against the Winans brothers on the Indians' behalf.[97] The Court found for the Indians, articulating the canon of construction that the language of the fishing clause should be construed "as that unlettered people understood it."[98]

The Court observed that the fishing right is "not much less necessary to the existence of the Indians than the atmosphere they breathed."[99] Therefore, the Court reasoned, the Stevens' Treaties contained the implied right of access, because without access to the fishing sites, the sites were worthless.[100] The right of access included the right to camp on the fee land during the season and smoke or otherwise preserve the fish.[101]

The Court reaffirmed the right of access in 1919 in *Seufert Brothers Co. v. United States*.[102] In that case, the Court found that the Yakamas had a right to fish at their "usual and accustomed places" on the north and south side of the Columbia River, despite the fact that the lands ceded to the government during treaty negotiations were only on the north side.[103] To construe the Stevens Treaties otherwise would substitute "the natural meaning of the expression ... for the [artificial] meaning which might be given to it by the law and lawyers."[104]

The Steven Treaties right of access is well settled. The Indians may access their usual and accustomed fishing grounds, regardless of who actually owns the land on which the fishing grounds are located. If non-Indians, such as the Winans brothers, deny access to the fishing grounds, the Indians may get an injunction requiring the non-Indians to permit access.

C. The Right of Equitable Apportionment

The right to equitable apportionment guarantees the Indians the right to catch up to half the available fish. A federal district court first recognized the Indians' right to what is now known as "equitable apportionment" in 1969 in *Sohappy v. Smith*.[105] In this case, the Yakama Indians challenged a regulation allowing commercial fishing in coastal waters and on the Columbia River below Bonneville Dam, but, for the most part, forbade it above the dam.[106] This was discriminatory because the Yakama's usual and ***294** accustomed fishing places were primarily above the dam whereas the non-Indian commercial fishermen fished exclusively below the dam.[107] Adding insult to injury, additional regulations permitted sport fishing above and below Bonneville dam.[108] However, the Indians could not use this exception because they weren't sport fishermen.[109]

To protect their rights, the Indians filed suit in the Western District of Oregon, seeking a decree defining their Stevens Treaty fishing rights.[110] The Court found that during treaty negotiations, the Indians expressed their paramount interest as protecting their fishing rights.[111] Following the canons of construction for Indian treaties,[112] the *Sohappy* court struck down the regulations and directed the state to promulgate new ones guaranteeing the Indians a "fair share" of the fish produced by the Columbia River.[113]

In a series of cases known as the *Puyallup* cases, the U.S. Supreme Court recognized the Indians' right to a fair share of the fish.[114] In *Puyallup I* and *Puyallup II*, the Indians challenged state regulations banning the use of nets on the Puyallup and Nisqually Rivers and in Commencement Bay at the mouths of these rivers.[115] The State of Washington argued that because they helped guarantee escapement, the regulations were designed to protect the fish.[116] In *Puyallup I*, the Court held that the State could impose conservation measures on the Indians provided that the measures met "appropriate standards" and did not discriminate against the Indians.[117]

In *Puyallup II*, the Court applied the standard enunciated in *Puyallup I*, holding that the net bans, while conservation measures, were *discriminatory* conservation measures because they allowed in-river hook and line fishing (sport fishing), practiced exclusively by non-Indians, but forbade net fishing, practiced exclusively by Indians.[118] The Court held that the fish should be "fairly apportioned" between Indians and non-Indians.[119] Twelve years ***295** later, in *Puyallup III*, the Court upheld a trial court's determination that the Indians were entitled to catch forty-five percent of the harvestable run of natural steelhead on the river.[120]

In *United States v. Washington (Boldt Decision)*, a federal district court interpreted "fair apportionment" as the right to catch up to half the harvestable fish.[121] This litigation began in 1970 with the United States filing an action for declaratory and injunctive relief to define the scope of treaty fishing rights and require the state to promulgate and enforce regulations designed to protect that right.[122] To simplify the proceedings at trial, Judge Boldt bifurcated the issues into two phases.[123] *Phase I*, allocation, focused on who got how much of the pie.[124] *Phase II*, hatchery/habitat, focused on the size of the pie.[125]

At the end of *Phase I*, Judge Boldt found that the right of equitable apportionment implied in the fishing clause of the Stevens Treaties gave the Indians the right to catch up to half the harvestable fish that would pass through their traditional fishing places if not intercepted by non-treaty fishermen.[126] Judge Boldt based this finding primarily on the third canon of construction, requiring courts to construe Indian treaties as the Indians understood them at the time.[127]

Applying this canon to the treaty phrase "in common with" Boldt first noted that the Indians probably didn't know precisely what each term meant because the treaties were written in English and the treaty negotiations were conducted in Chinook, a jargon that many of the Indians did not understand and was inadequate in the first place.[128] Language barriers, Judge Boldt stated, put the Indians at a disadvantage.[129] Therefore, the canons required Judge Boldt to determine what the Indians thought they were bargaining for during treaty negotiations.[130] After three years of exhaustive discovery,[131] ***296** Judge Boldt found that the Indians bargained for the right to maintain their fisheries and their freedom to move about and gather food as they always had.[132] The allocation of up to half the fish was supposed to make this consideration meaningful.[133]

The Ninth Circuit, in *Puget Sound Gillnetters Ass'n v. United States District Court for the Western District of Washington*[134] and the U.S. Supreme Court in *Fishing Vessel*[135] affirmed the *Boldt Decision* on appeal with minor modifications. To affirm the right to a maximum of half the fish, the *Fishing Vessel* Court[136] engaged in its own historical analysis, using the canons of construction articulated in *Winans*.[137] The *Fishing Vessel* Court discussed the "vital importance" the Indians placed on their fishing rights during treaty negotiations.[138] The court then reasoned that the *Winans* Court found only the right of access because that was all the Indians needed to "adequately protect" the fishing right at the time.[139] But the fishing right didn't end with access. The right of access was part of a "greater right" — the right to harvest enough fish to provide the Indians with a "moderate living," subject to Judge Boldt's fifty percent ceiling.[140]

The allocation issue decided, Judge Boldt bequeathed the *Phase II* issues, hatchery and habitat, to a new Judge for the Western District of Washington, Judge Orrick.[141] Judge Orrick found that hatchery fish are included in the Indians' allocation because they were bred to replace wild fish in decline primarily because of non-Indian development.[142] The Ninth Circuit affirmed Orrick's decision allocating half the hatchery fish to the Indians three times, holding that one of the central purposes of the Stevens Treaties was to guarantee the Indians "an adequate supply of fish" and that including hatchery fish in the allocation would at least partially meet this guarantee.[143]

***297** The right of equitable apportionment, therefore, gives the Indians the right to catch enough fish to maintain a moderate living through fishing, up to the fifty percent ceiling recognized by Judge Boldt. Hatchery fish are included in the allocation. In the first few years after the *Boldt Decision*, tribal harvests improved.[144] Since the mid-eighties, however, fish runs and tribal harvests declined.[145] The problem for Indians today is not their *piece* of the pie, it is the *size* of the pie.[146] To address the size of the pie, some courts have considered the proposed habitat right.

D. The Habitat Right

The U.S. District Court for the Western District of Washington found a habitat right by focusing on the canons of construction requiring it to discern the central meaning of the Stevens Treaties.[147] According to Judge Orrick, the central concern of the Indians who negotiated the treaties was to "continue fishing as they had always done."[148] He based this finding on the fact that "fish were the mainstay of the Indian's economy and the focal point of their culture."[149] The canons of construction required Orrick to interpret the Stevens Treaties consistently with the Indians' contemporaneous understanding of their fishing rights.[150] Orrick articulated the canons as follows: 1) interpret the treaty so as to "promote [its] central purpose," 2) in a manner that is sensitive to the "intentions and assumptions" of the Indians as they entered the treaties, and 3) resolving "any ambiguities ... in the Indians' favor."[151]

Judge Orrick's analysis focused on the first canon. Orrick reasoned that the central premise of the fishing clause was to "reserve to the tribes the right to continue fishing as an economic and cultural way of life,"[152] which ***298** was predicated on "the existence of fish to be taken."[153] Fish survival was, in turn, dependent on habitat.[154] Orrick also held that "neither party to the treaties, nor their successors in interest, may act in a manner that destroys the fishery."[155] According to Judge Orrick, previous holdings were always based on this general rule.[156] Therefore, a habitat right was well within the footprint of the fishing right that the U.S. Supreme Court already recognized.[157] If Washington continued to allow, and participate in, habitat degradation, the fish runs would become extinct and the Stevens Treaties' guarantee would be broken.[158]

The Ninth Circuit heard the *Orrick Decision* three times. Initially, a three-judge panel affirmed but "modified" Orrick on the habitat issue.[159] An en banc panel of eleven judges then reheard the case and decided that the state's appeal should be dismissed because the "case was not ripe for judicial review."[160] Finally, a second en banc panel reheard the case but left the issue of the habitat right undecided.[161] The first en banc opinion was withdrawn and the opinion of the three-judge panel vacated.[162] None of the eleven judges hearing the final appeal said they would reverse the lower court's habitat holding on the merits.[163] However, the court of appeals did not have enough "concrete facts" to definitively hold that the Stevens Treaties created a habitat right.[164] Such guesswork, according to the Ninth Circuit, was contrary to "sound legal discretion."[165]

While the *Orrick Decision* is the only court decision explicitly recognizing a habitat right, several other lower courts' decisions come close. These decisions hold that the government may not destroy the Indians' usual and accustomed fishing grounds. In the first such case, *Confederated Tribes of the Umatilla Indian Reservation v. Alexander*,[166] the U.S. District Court ***299** for Oregon issued a declaratory judgment requiring the U.S. Army Corps of Engineers to seek congressional approval before constructing a dam across Catherine Creek in Northeastern Oregon because the dam would flood the Indians' usual and accustomed fishing grounds.[167] In an analogous case, *Muckleshoot Indian Tribe v. Hall*,[168] the U.S. District Court for the Western District of Washington enjoined a private developer from building a marina on usual and accustomed fishing grounds

and stations on Elliot Bay, Seattle.[169] More recently, in *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*,[170] the U.S. District Court for the Western District of Washington affirmed the U.S. Army Corps of Engineers' denial of a permit to build a fish farm that would restrict access to the Lummi Indian Nation's usual and accustomed fishing grounds and stations in the San Juan Islands of Northwestern Washington.[171] These cases effectively preserved productive fish habitat.

Using the canons of construction for Indian treaties as their guiding light, courts have stated that the Stevens Treaties guarantee the Indians a right of access to their traditional fishing grounds and a right of equitable apportionment of up to half the harvestable fish. One court expressly recognizes the implied habitat right. This right was not affirmed on appeal, but other courts' opinions are logically consistent with it.

E. The Reserved Water Right

The reserved water right supports the finding of an implied habitat right by analogy. The reserved water rights doctrine, also known as the *Winters* doctrine, holds that when Congress reserved land for "federal enclaves" such as Indian reservations and military bases, it implicitly reserved enough water to fulfill the reservation's purpose.[172] If the purpose of the reservation is to promote agriculture, the *Winters* doctrine reserves enough water to irrigate all the practicably irrigable acres on the reservation.[173] If the purpose was to protect fish species, the *Winters* doctrine reserves enough water to protect natural spawning and rearing habitat.[174] Today, the controlling question in any *Winters* rights dispute is "what was the purpose for which Congress ***300** created the reservation and what is the minimum amount of water necessary to achieve this purpose?"[175]

The U.S. Supreme Court first recognized the doctrine of reserved water rights in *Winters v. United States*.[176] In that case, the Court held that when Congress created the Fort Belknap Indian Reservation in what is now Eastern Montana, it implicitly reserved all the water the Indians needed to fulfill the purposes of the reservation.[177] The Court used the same reasoning that it used three years earlier in *Winans* to find the right of access.[178] First, the Court noted that the purpose of the reservation was conversion of Indians from a "nomadic and uncivilized people" into a "pastoral and civilized people."[179] Next, the Court applied the canons of construction for Indian treaties: "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians."[180] In finding an implied water right, the Court noted that, without water, the purpose of the reservation would be frustrated.[181]

The Supreme Court has examined the contours of the *Winters* right nine times over the twentieth century, holding that whenever Congress creates a federal reservation of land, including an Indian reservation,[182] national forest,[183] or a national monument,[184] it implicitly reserves enough water to fulfill the purposes of the reservation, but no more.[185] In 1963, in *Arizona v. California*,[186] the Court considered how to measure the scope of the implied water right. The Court reasoned that because the purpose of the Great Colorado River Indian Reservation was to provide a homeland for ***301** the Indians where they could practice agriculture, the measure of the water right was enough water to irrigate all the "practicably irrigable acreage on the reservation" in light of present as well as future needs.[187]

The next major refinement in the *Winters* Doctrine came in 1975, in *Cappaert v. United States*, when the U.S. Supreme Court recognized a *Winters*' right for the benefit of fish.[188] Here, a ranching family, the Cappaerts, began pumping well water from their land, lowering the water level in Devil's Hole National Monument. Declining water levels threatened the survival of the Devil's Hole pupfish, an endangered species.[189] The *Cappaert* Court found that the monument's purpose was to preserve both the pool and the pupfish.[190] It also noted that while the water right was based on the purpose of the reservation, it was also

limited by it.[191] Thus, the Cappaerts could pump from their wells until the water level in the pool dropped below a certain level and no further.[192]

Following *Cappaert*, in 1981, the Ninth Circuit applied the *Winters* doctrine to support a water right for fish habitat in *Colville Confederated Tribes v. Walton*.[193] The *Colville* court held that the confederated tribes on the Colville reservation in North Central Washington had a *Winters* right to "sufficient water to permit the natural spawning" of Lahontan trout.[194] Because the reservation was created for at least two purposes: agriculture and fishing,[195] and the Grand Coulee Dam destroyed tribal fishing grounds, the court reasoned that the Indians' had a right to enough water to support the Omak Lake Lahontan trout fishery established as a replacement fishery.[196]

The Ninth Circuit applied the *Winters* doctrine most recently in *United States v. Adair*,[197] holding that the Indians had a right to enough water to maintain fishing and hunting on lands once part of the Klamath Reservation. ***302** [198] The court first examined the treaty between the United States and the Klamath Indian Tribe, containing a clause guaranteeing the Indians "exclusive on-reservation fishing and gathering rights."[199] The court next considered the historical circumstances under which the treaty was negotiated, establishing the "central importance of the Tribe's hunting and fishing rights."[200] Finally, the Court found that "a quantity of water flowing through the reservation" was necessary to protect the hunting and fishing right.[201] If the purpose of the reservation is to preserve fishing rights, then the *Winters* doctrine guarantees the Indians enough water to maintain the fishery, even if the water originates off the reservation.[202]

In 1985, the Ninth Circuit reached a similar result in *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*,[203] affirming the lower court's order requiring the water master to release water to cover salmon redds.[204] Because releases of extra water the previous fall artificially raised the water level, causing the salmon to spawn higher in the watershed and further from the main channel than normal, the extra water was required to cover the redds in the spring.[205] If the water master hadn't maintained these flows through the spring, the redds would dry out, essentially destroying the salmon run for that year.[206]

Two district courts also recognize a *Winters* right for the benefit of naturally spawning fish. In *Pyramid Lake Paiute Tribe of Indians v. Morton*,[207] in 1973, the U.S. District Court for the District of Columbia overturned a regulation issued by the U.S. Secretary of Interior allocating the waters of the Truckee River between Indians, wanting the water to protect spawning habitat, and non-Indians, desiring the water for irrigation.[208] The court held that, as the tribe's trustee, the U.S. Secretary of Interior had a fiduciary duty to allocate "all water not allocated by court decree or contract" to the Indians.[209] In a similar case, *Confederated Salish* ***303** *and Kootenai Tribes of the Flathead Reservation, Montana v. Flathead Irrigation and Power Project*,[210] in 1985, the U.S. District Court for the District of Montana granted the Indian tribes an emergency injunction forcing the United States to release enough water from the Flathead Irrigation and Power Project to protect tribal fisheries from irreparable harm.[211]

The *Winters* doctrine established that when Congress creates a federal reservation it implicitly reserves enough water to fulfill the purposes of the reservation. If the reservation is an Indian reservation, and one of the purposes of the reservation is to protect the Indian's right to catch fish, then the *Winters* guarantee is that of enough water to maintain harvestable populations of fish. It would be but a small judicial step to analogize the *Winters* right to the habitat right.

F. The Conservation Necessity

Like the *Winters* right, the conservation necessity supports the implied habitat right by analogy. The conservation necessity is the flip side of the implied habitat right. Whereas the implied habitat right expands the scope of the Indian fishing right, the conservation necessity limits the scope of the non-Indian development right. The conservation necessity holds that the tribes' fishing right does not include the right to fish a given species to extinction. By analogy, it should also hold that non-Indians don't have the right to drive a given species of fish to extinction by destroying its habitat.

The conservation necessity flows from a stark biological fact unrecognized at treaty time: Stevens Treaties fishing rights are limited by the ability of a given watershed to produce fish.[212] At treaty time, these limitations were difficult to see because nature could produce more fish than humans could consume.[213] But since then, habitat degradation and overfishing has reversed the situation so that treaty fisherman can't even catch enough fish to support their moderate living needs.[214]

The Supreme Court first recognized the conservation necessity in *Tulee v. Washington*,[215] in 1942, when it struck a balance between the Indians' claim that the treaty allowed them to fish at usual and accustomed places ***304** free from state regulation of any kind and the State of Washington's claim that it could regulate Indian fishing at their usual and accustomed places to the same extent that it could regulate non-Indian fishing.[216] The *Tulee* Court held that the Indians' construction of the treaty was too broad while the state's construction was too narrow, forging the conservation necessity from the two extremes.[217] Fishing restrictions of a "purely regulatory nature ... as are necessary for the conservation of fish" do not violate the treaty. But the treaty would not tolerate restrictions designed merely to raise money.[218]

The Court revisited the conservation necessity doctrine in the first two *Puyallup* cases. In the 1968 *Puyallup I* decision, the Court held that the state had the power to regulate the "manner of fishing, the size of the take, the restriction of commercial fishing and the like" in the "interest of conservation," so long as the regulation met "appropriate standards" and did not discriminate against the Indians.[219] In the 1973 *Puyallup II* case, the Court was even more direct, stating that the treaty did not give the Indians "the right to pursue the last living steelhead until it enters their nets."[220] By the time the Court decided *Puyallup Tribe v. Department of Game of Washington (Puyallup III)*,[221] in 1977, and *Fishing Vessel*, in 1979, the conservation necessity had become a background principle of federal Indian law.[222]

Stevens Treaties case law provides a strong foundation from which to build the proposed implied habitat right. The Federal District Court for Western Washington explicitly found the proposed right, but the decision was vacated on appeal. Three other district courts have found that the fishing clause prevents both public and private parties from destroying usual and accustomed fishing grounds. Two additional doctrines of Stevens Treaties case law support the proposed habitat right by analogy: the reserved water rights doctrine, and the conservation necessity.

IV. The Stevens Treaties Created an Implied Habitat Right

Courts should recognize that the fishing clause of the Stevens Treaties creates an implied habitat right. Although the courts do not yet recognize ***305** such an implied right, they have recognized other rights also implied in the fishing clause: the right of access and the right of equitable apportionment. Courts recognized these two rights by applying both the canons of construction and case law to the facts at hand. The canons of construction require the courts to: 1) construe Indian treaties liberally in favor of the Indians, 2) resolve ambiguous expressions in favor of the Indians, and 3) construe the treaties as the Indians at that time

understood them.[223] Stevens Treaties case law requires courts to interpret the Stevens Treaties in a way that guarantees the Indians enough fish to make a "moderate living" through fishing.[224]

A. The Canons of Construction for Indian Treaties Support a Holding that the Stevens Treaties Contain an Implied Habitat Right

The first canon of construction requires the courts to construe Indian treaties "liberally in favor of the Indians."[225] Some courts go so far as to find hunting and fishing rights on former reservation land even after Congress abrogated the treaty creating the reservation. For example, the *Adair* court, discussed in Part III, *supra*, found that the Indians retained the reserved water right implied by the treaty creating their reservation even after Congress terminated the reservation.[226] If courts can find an implied reserved water right for hunting and fishing rights guaranteed by a treaty that is no longer in force, then surely they can find an implied habitat right for a treaty remaining in full force today.[227]

The second canon of construction requires courts to resolve ambiguous expressions in favor of the Indians.[228] For example, the phrase "in common with the citizens" is ambiguous. It could mean that the Indians share the right to catch fish off their reservations equally with non-Indians, so that if there were nine non-Indian fisherman for every one Indian fishermen, the non-Indians would get ninety percent of the catch, or the phrase could mean that the Indians got half the catch and the non-Indians got the other half, ***306** regardless of the ratio of Indians to non-Indians. The *Boldt Decision* interpreted the phrase in favor of the Indians, finding that the Indians and non-Indians were each entitled to "share equally" in the catch.[229] Therefore, the Indians received up to half the harvestable salmon and non-Indians the other half.[230]

Courts should interpret the phrase "right of taking fish" in a similar fashion. The phrase does not define how many fish the Indians may take or whether the government is obligated to protect the right in any way. Nonetheless, it is well settled that the right is not an empty one. The fishing clause guarantees the Indians something more than the "chance, shared with millions of other citizens, occasionally to dip their net into territorial waters."[231] To resolve the ambiguity in favor of the Indians and make the phrase meaningful, courts should find the implied habitat right because without the habitat, there are no fish.[232]

The third canon of construction has long been the primary canon used by courts to interpret the Stevens Treaties.[233] It requires courts to interpret an Indian treaty as the Indians understood it at the time.[234] This task is made somewhat difficult by the fact that historical accounts of the treaty negotiations do not indicate precisely what the Indians understood the treaty to mean when they signed it. Negotiations were conducted in the Chinook patios and precise meanings of the English terms were impossible to convey.[235] Nonetheless, Chinook was capable of conveying the general meaning of the fishing clause to the Indians.[236] To discern the Stevens Treaties general meaning, courts must explore the historical circumstances in which the United States and the Indians negotiated the treaty and the intent of each party, especially the Indians.[237] Once the court understands ***307** the circumstances and the Indians' intent, it must interpret the treaty to give effect to the Indians' intent.[238]

Historical accounts indicate that Stevens and the Indians understood the fishing clause as a guarantee that the Indians would be able to catch fish at their usual and accustomed fishing grounds in perpetuity.[239] As Stevens stated in his opening address at the Treaty of Point-No-Point, "this paper secures your fish."[240] The Indians took him at his word.[241] This was the consideration for which they ceded essentially all of their aboriginal territory to non-Indians.[242] It is in this sense that courts must interpret

the fishing clause today.[243] Courts should hold that the Stevens Treaties contain an implied promise to protect productive fish habitat. Otherwise, the salmon face extinction and the treaty guarantee will be broken.

The canons of construction for Indian treaties require the courts to construe Indian treaties liberally in favor of the Indians, resolve ambiguous expressions in favor of the Indians, and construe the treaties as the Indians understood them at the time.[244] Applying these canons to today's world of declining harvests, it is clear the fishing clause guarantee will be broken unless the courts recognize the implied habitat right.

B. Courts Have Expanded the Explicit Scope of the Fishing Clause to Protect Indian Fishing Rights in the Face of Declining Harvests

After nearly a century of Supreme Court and lower court decision making, the central meaning of the fishing clause is well established. The fishing clause guarantees the Indians enough fish to meet their "reasonable livelihood needs."[245] In other words, the treaty guarantees the Indians a "moderate living" through fishing.[246] The history of Court decision making on this subject can be described as a series of contemporaneous responses to the declining Indian harvest.[247] As anadromous fish populations ***308** declined, the Court consistently readjusted the scope of the fishing right to insure that the fishery would meet the Indians' needs.[248]

1. Today's Courts Should Meet the Challenge of Declining Tribal Fisheries Applying the Same Logic Used By Earlier Courts to Recognize the Right of Access and the Right of Equitable Apportionment

Courts should recognize the habitat right as an element of the fishing right by virtue of the same logic that spawned the rights of access and equitable apportionment. During the first half-century of non-Indian settlement in Western Washington, fish were so abundant that both Indians and non-Indians harvested all the fish they wanted.[249] After the turn of the nineteenth century, however, non-Indians began crowding the Indians from their traditional fisheries. Responding to this inequity, in *United States v. Winans*,[250] the Supreme Court recognized the right of access. Nearly half a century later, in the *Puyallup* cases, the Court began to hint that access wasn't enough.[251] This hint became black letter law in *Fishing Vessel* when the Court affirmed the Indians' right to half the catch.[252]

In the years immediately following *Fishing Vessel* and the *Boldt Decision*, the allocation scheme was enough to meet the Indian's reasonable livelihood needs, at least partially.[253] Now they need more. As the *Orrick Decision* held, "the most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[254] Without adequate fish habitat, there are no fish, making the right to take fish meaningless. If the trend in habitat degradation continues, "the right to take fish would eventually be reduced to the right to dip one's net into the water ... and bring it out empty."[255] Such a result violates the fishing clause, the canons of construction, and nearly one hundred years of litigation on the subject.[256] The *Fishing Vessel* Court all but resolved the habitat issue when it rejected the contention that the fishing clause guaranteed nothing more than an equal opportunity to try to catch fish.[257]

***309** Some federal district court cases came close to recognizing the same habitat right that the *Orrick Decision* recognized.[258] For example, the District Court of Oregon enjoined construction of a dam on Catherine Creek because it would "destroy" the steelhead fishery above the dam.[259] Likewise, the *Muckleshoot* court found that a proposed marina would harm the tribes'

fishing right because it would both deny them access to their usual and accustomed grounds and stations and damage the habitat.[260] Although these cases involved the right of access, it is only a small logical step from a finding based on access to a finding based on habitat.

2. Today's Courts Should Also Recognize the Habitat Right by Analogy to the Reserved Water Rights Doctrine and the Conservation Necessity

Courts should also recognize the habitat right by analogy to the reserved water rights doctrine and the conservation necessity. As discussed in Part III, *supra*, the Ninth Circuit found a reserved water right (*Winters* right) to support fish habitat on four different occasions.[261] These cases all arose from conflicts between Indians and non-Indians over water in the arid regions of the Pacific Northwest and they all explicitly found that the Indians needed the water in order to protect the fish habitat. The issue has not yet been joined in Western Washington because water is usually not the limiting factor in the production of wild fish. The limiting factor here is habitat.

In Western Washington, the *Winters* doctrine applies to the proposed habitat right by analogy. If *Winters* guarantees enough *water* to fulfill the purposes of an *arid* reservation, then, by analogy, it guarantees enough *habitat* to fulfill the purposes of a *wet* reservation. Without the *water* on the Colville reservation, for example, the Lahontan cutthroat trout fishery would have been destroyed. Likewise, by analogy, without the *habitat* on the Skokomish Reservation, the salmon fishery was destroyed.

Courts should also recognize the habitat right by analogy to the conservation necessity. Historically, courts always cite the conservation necessity as a reason to restrict Indian fishing, but non-Indians don't have the right to destroy the fishery either.[262] Each side is obliged to give something up to prevent salmon populations from falling below levels necessary to provide ***310** the Indians with a moderate living. The Indians' right to make a living by fishing is limited by the conservation necessity as expressed in restrictions on harvest. The citizen's right to make a living by developing natural resources, on the other hand, should be limited by restrictions on habitat degradation. While the conservation necessity restrains Indian activities that may limit salmon population growth (primarily harvest), it should also limit non-Indian activity affecting salmon production (primarily habitat destruction).

In terms of the treaty right, harvest and habitat degradation are equivalent. Both over-harvest and unrestricted habitat degradation violate the spirit of the treaty. Each activity reduces the number of fish available for escapement and propagation of the species. When the Puyallups asserted their exclusive right to harvest the fish running through their reservation on the Puyallup River, the U.S. Supreme Court held that they did not have the right to pursue the “last living steelhead”[263] on the river to extinction. Likewise, the state doesn't have the right to develop or degrade the last piece of steelhead habitat and drive the fish to extinction.

Habitat degradation is a form of harvest. For example, the Lake Cushman Dams on the North Fork of the Skokomish River on the Olympic Peninsula harvest nearly the entire natural run of anadromous fish. Before the dams, the Skokomish River, and more particularly the North Fork of the Skokomish River, was the most biologically productive river on the Hood Canal and provided the Skokomish Indians with ample quantities of fish.[264] After the dams, almost all of the water that previously flowed down the North Fork was diverted into a power tunnel to generate electricity.[265] Without the water, the habitat was completely unusable and the fish perished.[266] In the eyes of the treaty, the dams “harvested” the fish as completely as any Indian gillnet strung across the river.

V. Conclusion

The fishing right guaranteed by the fishing clause of the Stevens Treaties has long included the right of access and the right of equitable apportionment. Today, it is time for the courts to recognize the third element of the fishing right — the proposed habitat right. Following the canons of ***311** construction, the courts should interpret the Stevens Treaties by determining what consideration the Indians bargained for when they ceded all claims to their ancestral homeland, then determine how to honor that consideration today. This consideration emerges with unmistakable clarity from the historical record of the treaty negotiations and nearly a century of litigation on the subject. The Indians gave up their land in exchange for the United States' solemn guarantee that it would protect their right to fish at their usual and accustomed places so they could catch enough fish to make a moderate living from fishing.[267] The Indians' treaty fishing right is one right made manifest by three other rights: the right of access, the right of equitable apportionment, and the habitat right.

Footnotes

a1 J.D., 2002, University of Washington; M.S., 1992, Columbia School of Journalism; B.A., 1988, Middlebury College. Currently, the author is an attorney with the Swinomish Tribal Community, near La Conner, Washington.
First place winner, 2001-02 *American Indian Law Review* writing competition.

1 Request for Determination, United States v. Washington, Civ. No. C70-9213 (W.D. Wash. 2001).

2 *United States v. Washington* spawned the original Judge Boldt decision allocating up to half the harvestable salmon to the Indians. *See* United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975). In subsequent rounds of *United States v. Washington*, the courts have allocated half the shellfish and any other marine species with commercial value to the Indians. United States v. Washington, 157 F.3d 630, 651 (9th Cir. 1998). The tribes have also litigated disputes among themselves about the boundaries of their respective usual and accustomed fishing places in the context of *United States v. Washington* and progeny. *See, e.g.*, United States v. Lummi Indian Tribe, 235 F.3d 443 (9th Cir. 2000).

3 The term "fishing Indians" refers to any of the Indians who lived from the Pacific Coast to the Cascade foothills, subsisting primarily on fish and seafood when they signed the Stevens Treaties in 1855. *See, e.g.*, Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 287 (2000).

4 *See* Request for Determination, *supra* note 1, at 1-2.

5 Anadromous fish spawn in freshwater, emigrate to the sea during the spring floods, spend their adult years in the ocean, then return to their natal streams to spawn. Salmon and certain species of trout and char are anadromous. *See generally* JOHN R. MAGNUSON (CHAIR), NAT'L RESEARCH COUNCIL, UPSTREAM: SALMON AND SOCIETY IN THE PACIFIC NORTHWEST 7-8 (1996).

6 The three reports are: WASH. STATE DEP'T OF TRANSP. & WASH. STATE DEP'T OF FISH & WILDLIFE, FISH PASSAGE PROGRAM PROGRESS PERFORMANCE REPORT FOR BIENNIUM 1991-1993; WASH. STATE DEP'T OF TRANSP. & WASH. STATE DEP'T OF FISH & WILDLIFE, FISH PASSAGE PROGRAM PROGRESS PERFORMANCE REPORT FOR BIENNIUM 1993-1995; and WASH. STATE DEP'T OF TRANS. & WASH. STATE DEP'T OF FISH & WILDLIFE, FISH PASSAGE PROGRAM DEPARTMENT OF TRANSPORTATION FINAL REPORT, 1997.

7 *Id.*

8 *See, e.g.*, Mason B. Bryant & Fred H. Everest, *Management Condition of Watersheds in Southeast Alaska: The Persistence of Anadromous Salmon*, 72 NORTHWEST SCI. 249-67 (1998) (discussing the importance of unadulterated habitat for salmon production).

9 "Rip-Rap" refers to a layer of boulders or other hard material laid on an embankment to protect it from erosion. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1960 (1981).

10 For example, tribal harvests in Western Washington declined from over 5,000,000 anadromous fish in 1986 to about 500,000 fish in 1999. *See* Request for Determination, *supra* note 1, at 4.

11 *See infra* notes 92-104 and accompanying text. The right of access refers to the Indians' treaty right to trespass on and occupy non-Indian land in order to exercise their fishing rights at usual and accustomed places. It is a bedrock principle of Stevens treaty Indian law. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 444 (Rennard S. Strickland et al. eds., 1982) [hereinafter COHEN].

12 *See infra* notes 105-46 and accompanying text. The right of equitable apportionment guarantees the Indians the right to catch up to half the harvestable fish. The U.S. Supreme Court affirmed the right of equitable apportionment in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). *See also* Michael Blumm & Brett Swift, *The Indian Piscary Profit and Habitat Protection in the Pacific Northwest: A Property Rights Approach*, 69 U. COLO. L. REV. 407, 452-59 (1998).

13 *See infra* notes 147-71 and accompanying text. "Habitat" means the environmental conditions that fish populations need to survive and prosper. *See* United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980) (*Orrick Decision*), *aff'd*, 759 F.2d 1353 (9th Cir. 1985).

14 The right of access includes the right to trespass and camp on fee land during the fishing season, United States v. Winans, 198 U.S. 371, 381 (1905), the right to fish without paying state-imposed license fees, Tulee v. Washington, 315 U.S. 681, 685 (1942), and the right to fish free of discriminatory state regulations, Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 48 (1973); *accord* Sohappy v. Smith, 302 F. Supp. 899, 907 (D. Or. 1969); Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 398 (1968). The right of equitable apportionment includes the right to an equitable share of the hatchery fish, *Orrick Decision*, 506 F. Supp. at 197, and is not restricted by the treaty with Canada allocating Fraser River salmon, United States v. Washington, 384 F. Supp. 312, 411 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

15 *See infra* notes 92-104 and accompanying text.

16 *See infra* notes 105-46.

17 *See* Blumm & Swift, *supra* note 12, at 414-19; *see also* Brian J. Perron, *When Tribal 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, 784-85 (2001).

18 *See infra* notes 92-100. The canons of construction establish a methodology by which the courts interpret Indian treaties. *See* COHEN, *supra* note 11, at 221-25; *see also* David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37 (1999); Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

19 The reserved water rights doctrine holds that when Congress created a federal reservation, such as an Indian reservation, it implicitly reserved enough water to accomplish the purpose of the reservation. *See infra* notes 172-211 and accompanying text. The U.S. Supreme Court first articulated the reserved water rights doctrine in *United States v. Winters*, 207 U.S. 564, 577 (1908). The U.S. Supreme Court applied the right most recently in *Arizona v. California*, 530 U.S. 392, 396 (2000).

20 The conservation necessity recognizes that the Indians cannot fish their fish to extinction. The U.S. Supreme Court first recognized the conservation necessity in *Tulee v. Washington*, 315 U.S. 681, 683 (1942). Since the *Tulee* decision, the conservation necessity has been a feature of every U.S. Supreme Court decision interpreting the Stevens Treaties. *See infra* notes 212-21 and accompanying text.

21 United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353, 1360 (9th Cir. 1985).

22 *See* Blumm & Swift, *supra* note 12, at 473-76; *see also* Perron, *supra* note 17, at 784-85; *see also* Ivy Anderson, *Protecting the Salmon: An Implied Right of Habitat Protection in the Stevens Treaties and Its Impact on the Columbia River Basin*, 24 VT. L. REV. 143, 160-69 (1999).

23 *Id*.

24 *See* Nancy K. Kubasek & Chaz A. Giles, *Dammed to Be Divided: Resolving the Controversy over the Destruction of the Snake River Dams and Providing a Model for Future Decision-Making*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 675, 688-719 (2001). *See generally* Rollie Wilson, *Removing Dam Development to Recover Columbia Basin Treaty Protected Salmon Economies*, 24 AM. INDIAN L. REV. 357 (2000).

25 *See* FED. ENERGY REGULATORY COMM'N, FINAL ENVIRONMENTAL IMPACT STATEMENT CUSHMAN HYDROELECTRIC PROJECT NO. 460, at 2-2 (1996).

26 *Id*.

27 *Id*. at 2-16 to 2-17, 5-4 to 5-17.

28 *See* Blumm & Swift, *supra* note 12, at 493.

29 The moderate living standard refers to the number of fish the tribes need to harvest to earn a "moderate living" through fishing. The U.S. Supreme Court first articulated the moderate living standard in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 686-88 (1979).

30 *See* Blumm & Swift, *supra* note 12, at 490-500.

31 *Id*. at 500.

32 *Id*. at 490-500.

33 FED. ENERGY REGULATORY COMM'N, *supra* note 25, at 2-2.

34 *Id*.

35 *See* BARBARA LANE, POLITICAL AND ECONOMIC ASPECTS OF INDIAN/WHITE CULTURE CONTACT IN WESTERN WASHINGTON IN THE MID-19TH CENTURY, PART II, at 6 (1973); *accord* WILLIAM ELMENDORF & A.L. KROEBER, TWANA CULTURE 59-63 (1992).

36 *See, e.g.*, United States v. Washington, 384 F. Supp. 312, 350 (W.D. Wash. 1974) (*Boldt Decision*), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975) (*Phase I*); *accord* AM. FRIENDS SERV. COMM., UNCOMMON CONTROVERSY 3 (1970 ed.) [hereinafter UNCOMMON CONTROVERSY].

37 *See* UNCOMMON CONTROVERSY, *supra* note 36, at 3.

38 *See Phase I*, 520 F.2d at 685.

39 *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 (1979) (*Fishing Vessel*).

40 *See Boldt Decision*, 384 F. Supp. at 355; *see also* JOSEPH T. HAZARD, COMPANION OF ADVENTURE 121-23 (1952).

41 *See, e.g.*, UNCOMMON CONTROVERSY, *supra* note 36, at 3 (1967 ed.).

42 *See Boldt Decision*, 384 F. Supp. at 350; *see also* LANE, *supra* note 35, at 18.

43 *See Fishing Vessel*, 443 U.S. at 665.

44 *See* FAY G. COHEN, TREATIES ON TRIAL 22-23 (1986) [hereinafter TREATIES ON TRIAL].

45 *Id*.

46 Timothy Wold, After the Boldt Decision: The Question of Inter-Tribal Allocation 23 (1989) (unpublished Master's Thesis, University of Washington) (on file at the University of Washington library).

47 *Id*.

48 Escapement refers to the minimum number of spawners necessary to "escape" mankind's efforts to catch them, spawn, and produce the next generation of salmon. MAGNUSON, *supra* note 5, at 13.

49 *See id*. at 25; *accord* TREATIES ON TRIAL, *supra* note 44, at 24.

50 Stevens was also a West Point graduate, a Colonel in the prestigious U.S. Army Corps of Engineers, and Chief of the Northern Pacific Railroad Survey. *See* HAZARD, *supra* note 40, at 4-18.

51 *See* United States v. Washington, 384 F. Supp. 312, 355-57 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975).

52 *See* HAZARD, *supra* note 40, at 122-23.

53 For example, despite his reluctance to contravene orders, Stevens agreed with his staff that the Indians would be better served by many small reservations than one or two larger ones. *See* KENT D. RICHARDS, ISAAC I. STEVENS: YOUNG MAN IN A HURRY 202 (1979).

54 *See* HAZARD, *supra* note 40, at 122.

55 *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666 n.9 (1979).

56 *See* United States v. Washington, 506 F. Supp. 187, 192 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353 (9th Cir. 1985).

57 *Id*.

58 *See* TREATIES ON TRIAL, *supra* note 44, at 37.

59 Owen Bush, a member of Stevens' staff, knew many of the local dialects, but was not allowed to translate. The official interpreter, Colonel Shaw, only knew Chinook. *See* UNCOMMON CONTROVERSY, *supra* note 36, at 23.

60 *Id*. at 24.

61 *See* HAZARD, *supra* note 40, at 123.

62 Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657, *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES 736 (Charles J. Kappler ed., 1904).

63 *See* United States v. Washington, 520 F.2d 676, 683 (9th Cir. 1975); *accord* Puget Sound Gillnetters Ass'n v. U.S. Dist. Court for the Dist. of Or., 573 F.2d 1123, 1126 (1978) (vacated on other grounds).

64 *See* HAZARD, *supra* note 40, at 122.

65 *See* United States v. Winans, 198 U.S. 371 (1905).

66 *See* Treaty with the Yakamas, June 9, 1855, 12 Stat. 951 (1859).

67 *Id*.

68 *See* United States v. Washington, 157 F.3d 630, 639 (9th Cir. 1998).

69 *Id*.

70 *See* United States v. Washington, 384 F. Supp. 312, 355-58 (W.D. Wash. 1974) (*Boldt Decision*), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975); *accord* UNCOMMON CONTROVERSY, *supra* note 36, at 21.

71 *See Boldt Decision*, 384 F. Supp. at 353-54; *accord* UNCOMMON CONTROVERSY, *supra* note 36, at 21.

72 *See Boldt Decision*, 384 F. Supp. at 353-54; *accord* UNCOMMON CONTROVERSY, *supra* note 36, at 21.

73 *See* UNCOMMON CONTROVERSY, *supra* note 36, at 21.

74 *See* RICHARDS, *supra* note 53, at 201.

75 *Id*.

76 *Id*.

77 *See* TREATIES ON TRIAL, *supra* note 44, at 38.

78 *See infra* notes 96-174 and accompanying text.

79 *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676-79 (1979).

80 *See infra* notes 92-104 and accompanying text.

81 *See infra* notes 105-46 and accompanying text.

82 *See infra* notes 147-71 and accompanying text.

83 *See infra* notes 172-211 and accompanying text.

84 *See infra* notes 212-22 and accompanying text.

85 *See, e.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979).

86 Choctaw Nation v. United States, 318 U.S. 423, 432 (1943).

87 Felix Cohen wrote the definitive treatise on American Indian law. *See, e.g.*, Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 3 (1997).

88 Cohen cites the following cases for the proposition that courts must construe treaties liberally in the Indian's favor: *Choctaw Nation*, 318 U.S. at 431-32; Choate v. Trapp, 224 U.S. 665, 675 (1912); United States v. Walker Irrig. Dist., 104 F.2d 334, 337 (9th Cir. 1939). COHEN, *supra* note 11, at 222.

89 Cohen cites the following cases for the proposition that courts must resolve ambiguous expressions in favor of the Indians: McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576-77 (1908). COHEN, *supra* note 11, at 222.

90 Cohen cites the following cases for the proposition that courts should construe Indian treaties as the Indians would have understood them at the time: Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Jones v. Meehan, 175 U.S. 1, 11 (1899). COHEN, *supra* note 11, at 222.

91 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195-96 (1999) (holding that the Mille Lacs Band of Chippewa retained their usufructuary hunting, fishing, and gathering rights on lands ceded to the United States).

92 198 U.S. 371 (1905).

93 The U.S. Supreme Court used the term "servitude" to describe the Indian's right of access in *United States v. Winans*. *Id*. at 381-82. Commentators have since developed the term "fishing servitude." *See, e.g.*, Blumm & Swift, *supra* note 12. Blumm uses the

terms “fishing servitude” and “piscary profit a pendre” interchangeably. “Piscary” means fishing place. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1723 (1981). The holder of a “profit a pendre” has the right to take part in (profit from) the produce or soil of the land of another. BLACK'S LAW DICTIONARY 1211 (6th ed. 1990). Thus, a “piscary profit a pendre” is the right to fish on someone else's land.

94 The Yakama Indian Nation officially changed the spelling of “Yakima” to “Yakama” by resolution in 1972. Tribal Council Res. T-053-94 (Yakama Nation 1994).

95 United States v. Winans, 198 U.S. 371, 378 (1905) (quoting 1859 Treaty between United States and Yakima Nation).

96 *Id*. at 380.

97 *Id*. at 377.

98 *Id*. at 380.

99 *Id*. at 381.

100 *Id*.

101 *Id*.

102 249 U.S. 194 (1919).

103 *Id*. at 197-99.

104 *Id*. at 199.

105 302 F. Supp. 899 (D. Or. 1969).

106 *Id*. at 907-08.

107 *Id*. at 907, 909-11.

108 *Id*. at 908.

109 *Id*. at 907-08.

110 *Id*. at 903.

111 *Id*. at 906.

112 *Id*. at 905.

113 *Id*. at 911.

114 Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392 (1968) (*Puyallup I*); Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973) (*Puyallup II*); Puyallup Tribe v. Dep't of Game of Wash., 433 U.S. 165 (1977) (*Puyallup III*).

115 *Puyallup I*, 391 U.S. at 396; *Puyallup II*, 414 U.S. at 46.

116 *Puyallup I*, 391 U.S. at 401; *Puyallup II*, 414 U.S. at 46.

117 *Puyallup I*, 391 U.S. at 398.

118 *See Puyallup II*, 414 U.S. at 48-49.

119 *Id*.

120 Puyallup Tribe v. Dep't of Game of Wash., 433 U.S. 165, 177 (1977) (*Puyallup III*).

121 United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (*Boldt Decision*), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975) (*Phase I*).

122 *Id*. at 327-28.

123 *See* United States v. Washington, 506 F. Supp. 187, 191 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353 (9th Cir. 1985) (*Phase II*); *accord* Judith W. Constans, *The Environmental Right to Habitat Protection: A Sohappy Solution — United States v. Washington, 759 F.2d 1353 (9th Cir.)*, cert. denied, *106 S. Ct. 407 (1985)*, 61 WASH. L. REV. 731, 732 (1986).

124 *Phase I*, 520 F.2d at 689.

125 *Phase II*, 759 F.2d at 1360.

126 *Boldt Decision*, 384 F. Supp. at 343.

127 *Id*. at 312-31 (citing Jones v. Meehan, 175 U.S. 1, 10-12 (1899)).

128 *Id*. at 330.

129 *Id*.

130 *Id*. at 330-32.

131 *Id*. at 328.

132 *Id*. at 355.

133 *See id*.

134 573 F.2d 1123 (9th Cir. 1978).

135 Washington v. Wash. State Comm. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979).

136 *Id*.

137 *Id*. at 678.

138 *Id*. at 666-67.

139 *Id*. at 678-81.

140 *Id*. at 686.

141 United States v. Washington, 506 F. Supp. 187 (W.D. Wash. 1980) (*Orrick Decision*), *aff'd*, 759 F.2d 1353 (9th Cir. 1985) (*Phase II*).

142 *Id*. at 198-99.

143 *Phase II*, 759 F.2d at 1358.

144 Tribal harvests in Western Washington peaked in the mid to late 1980s, depending on species. *See* Northwest Intertribal Fisheries Comm'n, *Tribal Salmon Harvests 1970-1997*, at http://www.nwifc.wa.gov/esa/stats.asp (last visited Nov. 11, 2001).

145 *Id*.

146 *See* Northwest Intertribal Fish Comm'n, *Run Reconstruction Data*, http://www. nwifc.wa.gov/fisheriesdata/runreconstruction.asp (last visited Nov. 11, 2001).

147 *Orrick Decision*, 506 F. Supp. at 195.

148 *Id*. at 192.

149 *Id*. at 191.

150 *Id*. at 195.

151 *Id*. Precisely why the *Orrick Decision* articulated the canons of construction slightly differently than they were articulated by Felix Cohen is unclear. *See supra* notes 85-91 and accompanying text. The U.S. Supreme Court articulated the most recent, and therefore definitive, statement of the canons of construction in *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172 (1999). *See supra* notes 85-91 and accompanying text.

152 *Orrick Decision*, 506 F. Supp. at 205.

153 *Id*. at 203.

154 *Id*.

155 *Id*. at 204.

156 *Id*.

157 *Id*. at 203.

158 *Id*.

159 Phillip Katzen, Tribal Rights to Protect the Fishery Habitat Necessary to Exercise the Treaty Right of Taking Fish, Address Before the 13th Annual American Indian Law Conference, University of Washington Continuing Legal Education Foundation (Aug. 31, 2000) (on file with author).

160 The first en banc panel is unpublished. *Id*. at 3.

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

162 Katzen, *supra* note 159, at 3.

163 *Id*.

164 *Phase II*, 759 F.2d at 1357.

165 *Id*.

166 440 F. Supp. 553 (D. Or. 1977).

167 *Id*. at 556.

168 698 F. Supp. 1504 (W.D. Wash. 1988).

169 *Id*. at 1505.

170 931 F. Supp. 1515 (W.D. Wash. 1996).

171 *Id*. at 1518, 1525.

172 Cappaert v. United States, 426 U.S. 128, 138 (1976).

173 *See* Arizona v. California, 373 U.S. 546, 601 (1963); *accord* Arizona v. California, 530 U.S. 392, 398 (2000).

174 *See Cappaert*, 426 U.S. at 141.

175 *See, e.g.*, United States v. New Mexico, 438 U.S. 696, 700 (1978); Colville Confederated Tribes v. Walton, 647 F.2d 42, 47-48 (9th Cir. 1981).

176 207 U.S. 564 (1908).

177 *Id.* at 567, 576-77.

178 United States v. Winans, 198 U.S. 371, 379-81 (1905).

179 Winters v. United States, 207 U.S. 564, 576 (1908).

180 *Id.* at 576-77.

181 *Id.*

182 *Id.*

183 *See* United States v. New Mexico, 438 U.S. 696 (1978).

184 *See* Cappaert v. United States, 426 U.S. 128 (1976).

185 The scope of the *Winters* right was the central issue in the following Supreme Court cases: Arizona v. California, 530 U.S. 392 (2000); Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983); Nevada v. United States, 463 U.S. 110 (1983); Arizona v. California, 460 U.S. 605 (1983); United States v. New Mexico, 438 U.S. 696 (1978); Cappaert v. United States, 426 U.S. 128 (1976); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Arizona v. California, 373 U.S. 546 (1963); United States v. Powers, 305 U.S. 527 (1939).

186 373 U.S. 546 (1963).

187 *Id.* at 600.

188 Cappaert v. United States, 426 U.S. 128 (1975).

189 The federal government listed the Devil's Hole Pupfish on the Endangered Species List in 1967. Its existence in Devil's Hole has been precarious ever since. *See* James Deacon, *More Information on the Devil's Hole Pupfish, at* http://www.earthsky.com/2001/esmi010618.html (last visited July 2001).

190 *Cappaert*, 426 U.S. at 141.

191 *Id.* at 141-42.

192 *Id.*

193 647 F.2d 42 (9th Cir. 1981).

194 *Id.* at 48.

195 *Id.*

196 *Id.*

197 723 F.2d 1394 (9th Cir. 1984).

198 *Id*. at 1417.

199 *Id*. at 1409.

200 *Id*.

201 *Id*. at 1410.

202 *Id*. at 1410-11.

203 763 F.2d 1032 (9th Cir. 1985).

204 *Id*. at 1035. A "redd" is a shallow depression in a suitable gravel bed that the female salmon excavates with her tail before depositing her eggs. ROBIN ADE, THE TROUT AND SALMON HANDBOOK 6-7 (1989).

205 *Kittitas Reclamation District*, 763 F.2d at 1033-34.

206 *Id*.

207 354 F. Supp. 252 (D.C. Cir. 1973).

208 *Id*. at 257.

209 *Id*. at 256.

210 616 F. Supp. 1292 (D. Mont. 1985).

211 *Id*. at 1297.

212 *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 668-69 (1979).

213 *See* United States v. Washington, 384 F. Supp. 312, 351 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975).

214 *See* Request for Determination, *supra* note 1.

215 315 U.S. 681 (1942).

216 *Id*. at 684.

217 *Id*. at 685.

218 *Id*.

219 Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 398 (1968).

220 Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 49 (1973).

221 433 U.S. 165 (1997).

222 *See, e.g*., United States v. Eberhardt, 789 F.2d 1354, 1362 (9th Cir. 1986); *accord* Antoine v. Washington, 420 U.S. 194 (1975).

223 *See supra* notes 85-91.

224 Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979).

225 *See supra* note 88 and accompanying text.

226 Klamath Indian Tribe v. Adair, 723 F.2d 1394, 1416 (9th Cir. 1984).

227 *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (holding that the Indians' usufructuary fishing, hunting, and gathering rights on lands reserved to them by a treaty of 1837 survived an Executive Order from 1850 that removed the Indians from the lands in question, a treaty of 1855 that expressly abrogated all the Indians' "right, title, and interest, of whatsoever nature they may be, in the ceded lands," and the Admission of Minnesota into the Union).

228 *See supra* note 89 and accompanying text.

229 United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974) (*Boldt Decision*), *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975).

230 *Id*. at 343.

231 Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979).

232 *See, e.g*., RICHARD WILLIAMS (CHAIR), INDEPENDENT SCIENTIFIC GROUP, RETURN TO THE RIVER xvi-xx (1996).

233 *See Boldt Decision*, 384 F. Supp. at 331.

234 *See* COHEN, *supra* note 11, at 222 (citing Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970)). Chief Justice John Marshall first articulated this canon in *Worcester v. Georgia*, 31 U.S. 515, 593-95 (1832).

235 *See supra* notes 58-60 and accompanying text.

236 *See Boldt Decision*, 384 F. Supp. at 330.

237 *See* United States v. Winans, 198 U.S. 371, 381 (1905); *accord* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

238 *See* United States v. Washington, 157 F.3d 630, 642-43 (9th Cir. 1998).

239 *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 666-67 & nn.7-9 (1979); *accord* UNCOMMON CONTROVERSY, *supra* note 36, at 113-18; *see also supra* notes 51-57, 61-77 and accompanying text.

240 *See supra* note 57 and accompanying text.

241 *See supra* notes 50-77 and accompanying text.

242 *Id*.

243 *See, e.g*., United States v. Washington, 384 F. Supp. 312, 330 (W.D. Wash. 1974) *aff'd*, 520 F.2d 676, 689 (9th Cir. 1975).

244 *See supra* notes 85-91.

245 Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 685 (1979) (*Fishing Vessel*).

246 *Id*. at 686.

247 *See* Perron, *supra* note 17, at 790-99.

248 *See* Blumm & Swift, *supra* note 12, at 440-59.

249 *See Fishing Vessel*, 443 U.S. at 659; *see also* Perron, *supra* note 17, at 790-99.

250 198 U.S. 371 (1905).

251 Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 399-403 (1968); *accord* Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 48 (1973).

252 *Fishing Vessel*, 443 U.S. at 685-87.

253 *See* Request for Determination, *supra* note 1, at 3-4.

254 United States v. Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd*, 759 F.2d 1353 (9th Cir. 1985).

255 *Id*.

256 *Id*.

257 *Id*.

258 *See infra* notes 259-60.

259 Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 556 (D. Or. 1977).

260 Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1517 (W.D. Wash. 1988).

261 *See supra* notes 193-206.

262 Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 684-85 (1979).

263 Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 49 (1973).

264 *See* CHINOOK NORTHWEST, INC. & MARTINO & ASSOCS., ESTIMATED ECONOMIC DAMAGE TO THE SKOKOMISH INDIAN TRIBE FROM UNREGULATED CONSTRUCTION AND OPERATION OF THE CITY OF TACOMA'S CUSHMAN HYDROELECTRIC PROJECT, 1926-1997, REPORT FOR THE SKOKOMISH INDIAN TRIBE 2-3 (1998).

265 *Id*.

266 *Id*. at 2-2, 2-4.

267 *See* United States v. Winans, 198 U.S. 371, 380 (1905).