Implications Beyond Culverts: The Challenges Tribes Will Face Extending *United States v. Washington* to Other Habitat-Depleting Policies

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This past June 2018, the U.S. Supreme Court affirmed a Ninth Circuit decision interpreting the treaties of twenty-one tribes in western Washington to include a right to not have salmon habitat so depleted that it prevented significant salmon numbers from reaching the tribes' accustomed fishing grounds. The basis of this litigation was Washington State's culverts, structures built to allow roads to cross over streams. Unfortunately, these culverts were not built with sufficient consideration for fish passage, and many obstructed salmon migrations in streams. The result was the loss of a thousand miles of salmon stream habitat, which increased salmon competition in the remaining stream areas. The court ultimately required Washington State to efficiently fix these barrier culverts to allow salmon passage, a decision the State railed against as potentially costing billions of dollars. This Note will explore the implications of United States v. Washington*, analyzing how the holding may be used for future tribal litigation to protect more salmon habitat. Taking into account elements such as the risk of the Supreme Court narrowly interpreting tribal treaty rights, political realities, and the culvert-specific nature of the Ninth Circuit's holding, this Note strives to have a grounded consideration of how the western Washington tribes may continue their fight to ensure their right to fish is meaningful.*

DOI: https://doi.org/10.15779/Z38MK6586C

* J.D., University of California, Berkeley, School of Law, 2019. I would like to thank Professor Eric Biber and teaching assistant Amy Collier for their guidance and insightful suggestions throughout the process. Additionally, I would like to thank all of the Ecology Law Quarterly staff for their kind help and hard work on this Note. I would especially like to thank Elizabeth Glusman for her devoted effort throughout the editing process.

INTRODUCTION

One not familiar with Indians and how they think (at least the typical reservation Indians) cannot appreciate how important hunting and fishing rights are to them, not only because of their poverty, but also because of their Indian traditions. Hunting and fishing (by individuals for subsistence) has a symbolic, perhaps quasi-religious meaning to many Indians. It is a practicing of their ancient culture, something many of them cling to fiercely in the face of the efforts of the state governments, and sometimes even the federal government, to eliminate Indian rights in the name of progress.[1]

For the Indian Tribes of western Washington (Tribes),[2] salmon are central not only to their cultural identity, but also to their survival. For centuries these

1. John R. Schmidhauser, *Struggles for Cultural Survival: The Fishing Rights of the Treaty Tribes of the Pacific Northwest*, 52 NOTRE DAME L. REV. 30, 31 (1976) (quoting the National Congress of American Indians, Brief for Petitioner as Amicus Curiae, Puyallup Tribe v. Wash. State Dep't of Game, 391 U.S. 392 (1968) (No. 72-746), 1971 WL 172053).

2. The twenty-one western Washington tribes suing Washington State in *United States v. Washington* include the Suquamish Indian Tribe, Jamestown S'Klallam, Lower Elwha Band of Klallams, Port Gamble Clallam, Nisqually Indian Tribe, Nooksack Tribe, Sauk-Suiattle Tribe, Skokomish Indian Tribe, Squaxin Island Tribe, Stillaguamish Tribe, Upper Skagit Tribe, Tulalip Tribes, Lummi Indian Nation, Quinault Indian Nation, Puyallup Tribe, Hoh Tribe, Confederated Tribes and Bands of the

tribes have relied on salmon for nourishment.[3] Salmon are also paramount to these Tribes' belief systems and constitute an integral aspect of their ceremonies.[4] Despite the Tribes securing a right to fish at their accustomed locations in treaty negotiations, Washington State sought to limit tribal fishing off-reservation throughout the 1900s.[5] Yet, the Tribes persevered and continue to fish at their customary locations today.[6] One problem remains: the amount of fish at these customary locations has dwindled.[7]

When the Territory of Washington sought to acquire tribal land in the mid-1800s, the Tribes' primary concern was ensuring that they would always be able to fish salmon.[8] In 1854, Isaac Stevens, Washington's territorial governor, began the process of moving tribes to set reservation areas to open more land for American settlers.[9] This task originated in the convening of a treaty council near Olympia with several Puget Sound tribes and bands.[10] Seven other treaty councils with other tribes in Washington would follow.[11] The first treaty signed, the Medicine Creek Treaty, contained language closely resembling that of the nine other treaties that would come after in 1855.[12] All of the treaties signed between 1854 and 1855 (the Stevens Treaties) contained essentially identical language with regard to fishing rights.[13] To assure the Tribes that they would continue to have the fish needed for subsistence, the Stevens Treaties each contained a fishing clause securing the Indians' "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[14]

Although the Stevens Treaties promised the Tribes the right to fish in their accustomed places in perpetuity, the Tribes have struggled to ensure this right is meaningful in practice since the number of salmon per run has dropped precipitously over the past one hundred years. Across the Pacific Northwest, historic salmon runs have decreased by 95 percent.[15] As a result, salmon harvests

Yakama Indian Nation, Quileute Indian Tribe, Makah Indian Tribe, Swinomish Indian Tribal Community, and the Muckleshoot Indian Tribe. United States v. Washington, 853 F.3d 946, 953 (9th Cir. 2017).

3. Schmidhauser, *supra* note 1, at 31.

4. Erma Gunther, *A Further Analysis of the First Salmon Ceremony*, 2 UNIV. WASH. PUBLICATIONS IN ANTHROPOLOGY 135 (1928); Brief for Tribal Respondents at 5–6, *Washington v. U.S.*, 138 S. Ct. 1832 (2018) (No. 17-269).

5. *United States v. Washington*, 853 F.3d at 957.

6. *Id.*

7. *Id.* at 960.

8. Brief for Tribal Respondents, *supra* note 4, at 5–6.

9. Kent Richards, *The Stevens Treaties of 1854-1855*, 106 OR. HIST. Q. 3, 342 (2005).

10. *Id.* at 346.

11. *Id.* at 342.

12. *Id.* at 347.

13. *United States v. Washington*, 853 F.3d at 953.

14. *See, e.g.*, Treaty with the Nisqualli, Puyallup, etc., Dec. 26, 1854 [hereinafter, Medicine Creek Treaty of 1854], 10 Stat. 1132, Art. 3.

15. Duke's Seafood and Chowder, *Environmental Impact of Salmon Decline: This Isn't Just About Fish*, SEATTLE TIMES (Feb. 7, 2018), https://www.seattletimes.com/sponsored/environmental-impact-of-salmon-decline-this-isnt-just-about-fish/.

have been in sharp decline,[16] leaving tribal members unable to earn a living fishing.[17] For families who rely on salmon for subsistence and income, an unexpected drop in salmon harvests can lead to harsh consequences. As Charlene Krise, a lifelong tribal fisher in the Puget Sound, relayed: "One year it was so bad that I watched as cars were being repossessed, and people would talk about their eviction notices or losing electricity."[18] The Tribes' ability to perform ceremonies foundational to their culture has also been negatively impacted since these ceremonies depend on salmon. Lorraine Loomis, the chair of the Northwest Indian Fisheries Commission, stated that the Tribes' "ability to catch salmon to supply food for our funerals and ceremonies is being constrained because of low returns."[19] For some tribes, ceremonial fisheries have been lost, while others must purchase salmon to perform ceremonies.[20]

Salmon are also an important part of Washington State's economy, accounting for more than one billion dollars annually in the state's sport fishing and tourism industries.[21] The desire to increase salmon numbers, therefore, is not solely the Tribes'. As Part I will discuss, state efforts to revive salmon numbers thus far have focused mainly on harvesting restrictions, hatchery development, and hydropower operations[22]—efforts that have failed to adequately recover salmon runs.[23] Without an increased focus on habitat protection and restoration, state efforts to increase salmon populations will fail to achieve long-term success.[24] In Puget Sound, already 80 percent of salmon habitat has been

16. Brief for Pacific Coast Federation of Fishermen's Associations, Alaska Trollers Association, Institute for Fisheries Resources, Fly Fishers International, Northwest Sportfishing Industry Association, Northwest Guides and Anglers Association, Association of Northwest Steelheaders, and the Conservation Angler as *Amici Curiae* at 21, *Washington v. United States*, 138 S. Ct. 1832 (2018) (No. 17-239) [hereinafter Brief for Pacific Coast Federation of Fishermen's Associations].

17. *United States v. Washington*, 853 F.3d at 966.

18. Anna V. Smith, *A Northwest Tribal Sovereignty Battle, Centered of Culverts*, HIGH COUNTRY NEWS (Oct. 17, 2017), https://www.hcn.org/articles/tribal-affairs-what-a-case-about-culverts-could-mean-for-tribal-treaty-rights-in-the-northwest.

19. Mark Yuasa, *Tribal Fisheries Will See Cutbacks on Salmon Seasons Due to Expected Poor Salmon Forecasts*, SEATTLE TIMES (Apr. 12, 2017), https://www.seattletimes.com/sports/tribal-fisheries-will-see-cutbacks-on-salmon-seasons-ahead-of-expected-poor-salmon-forecasts/.

20. NORTHWEST INDIAN FISHERIES COMMISSION, TREATY RIGHTS AT RISK: ONGOING HABITAT LOSS, THE DECLINE OF THE SALMON RESOURCE, AND RECOMMENDATIONS FOR CHANGE 6, 14 (2011).

21. Darryl Fears, *As Salmon Vanish in the Dry Pacific Northwest, So Does Native Heritage*, WASH. POST (July 30, 2015), https://www.washingtonpost.com/national/health-science/as-salmon-vanish-in-the-dry-pacific-northwest-so-does-native-heritage/2015/07/30/2ae9f7a6-2f14-11e5-8f36-18d1d501920d_story.html?utm_term=.489ebae625ab.

22. WASH. ST. RECREATION AND CONSERVATION OFF., GOVERNOR'S SALMON RECOVERY OFF., RECOVERY PLAN PROGRESS IN PUGET SOUND, https://stateofsalmon.wa.gov/puget-sound/recovery-plan-progress/ (last visited Dec. 2, 2018) [hereinafter RECOVERY PLAN PROGRESS].

23. WASH. ST. RECREATION AND CONSERVATION OFF., GOVERNOR'S SALMON RECOVERY OFF., 2016 STATE OF SALMON IN WATERSHEDS: GOVERNOR'S UPDATE 6 (2016) [hereinafter 2016 STATE OF SALMON IN WATERSHEDS: GOVERNOR'S UPDATE].

24. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN 66 (2007), https://www.westcoast.fisheries.noaa.gov/publications/recovery_planning/salmon_steelhead/domains/puget_sound/chinook/pugetsoundchinookrecoveryplan_wo_exec_summary.pdf. [hereinafter NMFS, *Puget Sound Salmon Recovery Plan*].

destroyed,[25] and the area's rapid population growth continues to result in greater habitat loss than restoration.[26] Although Washington State's most recent plans for recovering salmon include habitat restoration projects, funding for such initiatives lags far behind the projects' needs.[27]

One major obstacle inhibiting salmon recovery in western Washington is culverts. Culverts are structures that allow water—and salmon—to flow under roads that cross over streams.[28] Although culverts may be built to allow sufficient passage for salmon, a large number of Washington's culverts were built without consideration for fish passage.[29] Removing a culvert provides instant benefits for salmon populations because salmon quickly recolonize the re-exposed upstream area and return to spawn there as adults.[30] As will be discussed in greater detail in Part I, state, federal, and tribal agencies all see culvert removal as a cost-effective way to increase salmon numbers.[31]

Washington State recognized the issues state-owned barrier culverts posed for salmon in the 1990s,[32] but ultimately did not sufficiently fund projects to quickly correct the problem. The bulk of corrections needed to be made by the Washington Department of Transportation (WSDOT), which owned 978 of the barrier culverts under state highways in the western Washington area at issue in *United States v. Washington*.[33] The WSDOT had been working with the Washington Department of Fish and Wildlife (WDFW) since 1991 to fix culverts blocking salmon habitat.[34] In 2013, however, only 282 of the total 1,537 barrier culverts in Washington's highway system had been corrected.[35] According to the WSDOT, state funding for culvert removal was insufficient.[36] The pace at which the WSDOT was correcting barrier culverts meant that it would take more than one hundred years to fully fix the culvert issue in western Washington.[37] The remaining one hundred barrier culverts located under roads on state trust lands

25. George Van Cleve, *Saving the Puget Sound Wild Salmon Fishery*, 2 SEATTLE J. ENVTL. L. 85, 87 (2012).

26. 2016 STATE OF SALMON IN WATERSHEDS: GOVERNOR'S UPDATE, *supra* note 23, at 6.

27. *Id.* at 17.

28. United States v. Washington, 20 F. Supp. 3d 986, 1023 (W.D. Wash. 2013).

29. WASH. ST. DEPT. OF TRANSP., ACCELERATING FISH BARRIER CORRECTION: NEW REQUIREMENTS FOR WSDOT CULVERTS (Sept. 2014) [hereinafter ACCELERATING FISH BARRIER CORRECTION].

30. Brief for Pacific Coast Federation of Fishermen's Associations, *supra* note 16, at 34.

31. *See infra* Part II.

32. In 1997, the Washington State Legislature established a Fish Passage Task Force. Amanda Reilly, *Highways, Salmon Habitat Collide in Tribal Treaty Case*, E&E NEWS (Apr. 17, 2018), https://www.eenews.net/stories/1060079295/print.

33. *Id.*

34. ACCELERATING FISH BARRIER CORRECTION, *supra* note 29.

35. *Id.*

36. *Id.*

37. *United States v. Washington*, 20 F. Supp. 3d at 1015–16.

and wildlife areas in western Washington needed to be addressed by the state's wildlife, natural resource, and state park agencies.[38]

In 2001, the Tribes and the United States sued Washington to force the state to adequately fund faster removal of state-owned culverts blocking fish from reaching large stretches of their stream habitat throughout western Washington.[39] The U.S. District Court for the Western District of Washington in *United States v. Washington* declared that Washington State's fish-blocking culverts violated tribal treaty rights, as set forth in the Stevens Treaties, and required the state to correct barrier culverts according to a timeline set by the court.[40] On appeal, the Ninth Circuit agreed with the district court and stated that "the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish."[41] As will be discussed in Part II, since barrier culverts "have a substantial adverse effect on salmon," Washington State was violating the Tribes' fishing rights by failing to remove them.[42] The U.S. Supreme Court affirmed the Ninth Circuit decision as an equally divided court, with no explanation.[43]

United States v. Washington is an important victory in forcing barrier-culvert removal—a salient salmon recovery step—and in establishing that a state government can be liable for significantly depleting salmon habitat. But the Ninth Circuit holding affirmed by the Supreme Court is narrow since it is specific to culverts. This will likely prevent state and federal agencies from seriously altering other policies depleting salmon habitat without future court decisions holding that these other habitat-depleting policies amount to a treaty violation. Additionally, every tribal lawsuit that requires a court to interpret the Stevens Treaties puts the ground gained in *United States v. Washington* at risk because a different set of judges may interpret the Tribes' treaty rights more stringently than in the past. As Part III discusses in greater detail, the U.S. Supreme Court generally rules against tribal interests, making any case likely to be appealed all the way up through the federal courts particularly risky. Consequently, the Tribes may be reluctant to quickly bring a lawsuit against other habitat-depleting policies using *United States v. Washington*'s culvert-specific holding, especially if the action addressed is more politically contentious than culvert removal.

This Note overviews the interconnected issues of salmon decimation and the Tribes' fishing rights and explores the implications behind an important court

38. Reilly, *supra* note 32; *United States v. Washington*, 20 F. Supp. 3d at 1005. WDFW and the Washington Department of Natural Resources (DNR) had more adequately addressed barrier culverts than the WSDOT. For instance, from 2009 to 2012, DNR fixed 126 barrier culverts in western Washington, with funds coming from income derived from timber sales, state funding for road repair, and Federal Emergency Management Agency funds. WDFW only had fourteen culverts remaining to fix in 2013. *United States v. Washington*, 20 F. Supp. 3d at 1016–17.

39. United States v. Washington, 20 F. Supp. 3d 828, 890 (W.D. Wash. 2007).

40. *United States v. Washington*, 20 F. Supp. 3d at 1023.

41. *United States v. Washington*, 853 F.3d at 965.

42. *Id.* at 975, 979.

43. Washington v. United States, 138 S. Ct. 1832, 1833 (2018).

decision striking at the heart of these dilemmas. In Part I, I present a brief background on salmon lifecycles and the insufficient attempts by the government to reverse the massive depletion of salmon in western Washington. This background underscores why forcing greater governmental action on salmon habitat protection is crucial to salmon recovery and why addressing barrier culverts is highly helpful to salmon replenishment. Next, Part II discusses the Tribes' history of litigation to secure the salmon they were originally promised when the Tribes ceded their land to the Territory of Washington in the mid-1800s. Part II also covers how the Ninth Circuit determined in *United States v. Washington* that barrier culverts violate the Tribes' treaty rights and why the court's analysis leaves the holding's implications an open question. Part III then deliberates the challenges the Tribes will face in addressing federal actions that significantly deplete salmon habitat. Finally, Part IV considers what policies beyond barrier culverts the Tribes could pursue next based on *United States v. Washington*'s holding and political considerations.

I. THE NEED TO SHIFT GOVERNMENT RESOURCES TOWARDS SALMON HABITAT INITIATIVES

The shocking decline in salmon since the Tribes signed the Stevens Treaties ceding their land can hardly be overstated. For example, the chinook salmon population has dropped to 10 percent of its historic numbers, providing only tens of thousands of salmon where hundreds of thousands used to be found in Puget Sound each year.[44] Four species of salmon remain listed under the Endangered Species Act (ESA) in western Washington.[45] The overall trend of salmon harvest numbers in western Washington has been "one of sharp decline," with reductions of 74 percent for coho salmon from 1950–1955 to 2011–2016 catches.[46]

Protecting and restoring salmon habitat is a major component in bringing the salmon populations slightly more towards their old counts. Fully comprehending why habitat protection is so important—and the target of the Tribes' lawsuit in *United States v. Washington*—requires a familiarity with a few issues: the complexity of salmon lifecycles, how the development of western Washington has impacted salmon habitat, and why recovery efforts have failed thus far. Salmon require uncontaminated, cool water, cover from predators, and an adequate food supply throughout both freshwater rivers and the estuaries and coastlines of the Pacific Ocean.[47] Since salmon migrate through and rely on a variety of habitats, many of which are adjacent to areas of human population growth, salmon habitat protection implicates a diverse set of industries.

44. Duke's Seafood and Chowder, *Disappearance of Wild Salmon Hurts Local Economy*, SEATTLE TIMES (Nov. 20, 2017), https://www.seattletimes.com/sponsored/disappearance-of-wild-salmon-hurts-local-economy/.

45. TREATY RIGHTS AT RISK, *supra* note 20, at 6.

46. Brief for Pacific Coast Federation of Fishermen's Associations, *supra* note 16, at 21.

47. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 3.

Washington State's efforts to address the impacts these industries have on salmon have failed to provide enough funding and regulatory safeguards to adequately protect and restore salmon habitat. Forcing the state to sufficiently fund efficient barrier-culvert removal is a solid starting point in shifting more resources towards habitat restoration and protection efforts.

A. The Salmon Lifecycle and the Decimation of Critical Salmon Habitat

An understanding of where salmon reside throughout their lifecycle is key to evaluating the salmon habitat protection needed to increase salmon runs. Salmon are anadromous fish: they start as eggs in freshwater, then as juveniles make their way to the ocean, and eventually return to the same sheltered, riverine environments where they first hatched to reproduce.[48] Salmon eggs require clean freshwater with sufficient oxygen.[49] Then, after hatching, alevins[50] require loose gravel to safely feed from their yolk sacs which remain attached for some time after they hatch.[51] After maturing to the fry stage where the fish become capable of feeding themselves, riparian vegetation is critical for attracting insects for food, providing cover from predators, and ensuring river-water temperatures remain cool.[52] Both wetlands and decaying logjams also provide shelter during this stage.[53] These initial years are the most precarious years for young salmon, with 80 to 90 percent lost to predation, and many others dying from disease or starvation.[54]

The juvenile salmon that survive their tumultuous beginnings then migrate to the sea, overcoming any dams or other obstacles along the way.[55] For every dam that young salmon must pass on the way to the ocean, 15 percent die trying to pass through.[56] As the juvenile salmon approach the ocean, they transition from freshwater to saltwater capabilities in estuaries.[57] For some salmon species, this transition takes only a few days, while for other species, the transition requires them to live and feed in estuaries for up to a year.[58] Salmon also rely on

48. MICHAEL C. BLUMM, SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON 31 (2002).

49. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 37.

50. Alevins are newly hatched salmon still attached to the yolk sac. *Alevin*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/alevin (last visited July 5, 2019).

51. *Id.*

52. *Id.*

53. *Id.*

54. BLUMM, *supra* note 48, at 34–35.

55. *Id.* at 35.

56. The amount of water allowed to spill over the dam, the availability of protective screens, and other dam management features impact the death rate. *Id.* at 35.

57. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 37.

58. *Id.*

nearshore marsh plants, eelgrass beds, and logjams to protect them as they migrate to the sea.[59]

Once at sea, factors such as the water temperature, number of large predators, and availability of food for the salmon all influence salmon survival rates.[60] Many salmon in Puget Sound face disease and toxic chemicals; as a result, they are more vulnerable to predators eating them.[61] After spending one to five years in the ocean maturing, the fish again undergo a physiological change back to freshwater capabilities, requiring nearshore and estuary habitats as they adjust.[62] Lastly, as the salmon head upstream to spawn, they require adequate stream flows, open passages, cool water temperatures, deep pools, and sufficient cover from predators.[63]

Unfortunately, humans have severely altered the stream habitat used by salmon in their freshwater stages throughout western Washington, to the detriment of salmon populations. Vegetation along streams upon which salmon depend for food, protection, and temperature regulation has been slowly removed by two major industries: agriculture and logging.[64] In the early 1900s, lowland forested areas were cleared for agriculture.[65] Logging, another major industry of western Washington, also removed riparian forests that had been the "backbone of the watersheds," reducing streambank stability and removing vegetation key to salmon survival.[66] Additionally, stream water quality and quantity has been severely depleted by agricultural water withdrawals, harmful logging practices,[67] pesticides, urban runoff, and wastewater treatment.[68] The construction of dams and barrier culverts in rivers and streams also impedes salmon migration.[69]

Moreover, humans have dramatically altered the estuary, wetland, and coastal areas essential to salmon survival. In western Washington, most urban and industrial land use is concentrated near the mouths of rivers and along

59. *Id.*

60. Nw. River Partners, *Many Factors Impact Salmon*, https://nwriverpartners.org/factors-that-impact-salmon (last visited Feb. 2, 2019).

61. Christopher Dunagan, *Opening the Black Box: What's Killing Puget Sound's Salmon and Steelhead?*, ENCYCLOPEDIA OF PUGET SOUND (June 25, 2018), https://www.eopugetsound.org/magazine/ssec2018/marine-survival-1.

62. *Id.*

63. *Id.*

64. NW. INDIAN FISHERIES COMM., 2016 STATE OF OUR WATERSHEDS: A REPORT BY THE TREATY TRIBES OF WESTERN WASHINGTON 8, https://geo.nwifc.org/SOW/SOW2016_Report/SOW2016.pdf. [hereinafter 2016 STATE OF OUR WATERSHEDS].

65. *Id.* at 10.

66. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 66.

67. Large-scale clear-cutting, logging with inadequate buffer areas from streams, and poorly maintained forest roads significantly alter stream habitat. 2016 STATE OF OUR WATERSHEDS, *supra* note 64, at 8.

68. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 69, 70; 2016 STATE OF OUR WATERSHEDS, *supra* note 64, at 8.

69. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 69, 70; 2016 STATE OF OUR WATERSHEDS, *supra* note 64, at 8.

estuarine shorelines—both areas critically important to salmon.[70] Both agricultural and urban industries' need for flood control has led to the diking, draining, and filling of wetland areas and tidal marshes that juvenile salmon use in transitioning to saltwater capabilities.[71] Shoreline armoring to protect development along the coast has also depleted the vegetation and insects salmon need for survival in nearshore areas.[72]

B. Governmental Response to the Salmon Crisis

When Washington was initially faced with diminished salmon runs, it turned to a familiar friend cherished throughout American history: industrial solutions. While industry has offered promising solutions for many of our nation's problems, it has fallen short for salmon. The hopeful industrial solution for salmon decline was fish hatcheries, which artificially breed, hatch, and rear salmon.[73] Since hatcheries produce more young salmon migrating to the sea than wild, adult salmon, they were predicted to consequently increase salmon populations.[74] Yet, hatcheries ultimately failed to produce the expected salmon population increases.[75] As Jim Lichatowich, a Pacific salmon researcher, noted in his recent book evaluating the failure of salmon recovery: "The failure to correct the problems causing the salmon decline . . . before investing in supplementation programs [like hatcheries] produces embarrassing outcomes."[76] Washington State's attempt to fix salmon loss with this industrial solution consequently left habitat degradation unaddressed.[77]

With hatchery plans falling short and continuing habitat degradation, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service listed sixteen different salmon and steelhead stocks under the ESA throughout the 1990s in Washington State.[78] Yet, the ESA has failed to provide an adequate salmon recovery solution. As the head of the Idaho Department of Fish and Game noted about the ESA: "What we have is a prevention of extinction policy, rather than a policy that achieves real recovery."[79] Thus, for example, despite the significant impact dams have on salmon, discussions of dam removal or increased water spillover dams to improve water flow for juvenile salmon

70. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 72.

71. *Id.*

72. 2016 STATE OF OUR WATERSHEDS, *supra* note 64, at 8.

73. JIM LICHATOWICH, SALMON, PEOPLE, AND PLACE: A BIOLOGIST'S SEARCH FOR SALMON RECOVERY 110 (2013).

74. *Id.*

75. *Id.* at 109–10.

76. *Id.* at 111.

77. *Id.* at 109.

78. Wash. St. Recreation and Conservation Off., *Salmon Species Listed Under the Federal Endangered Species Act* (July 2009), https://www.rco.wa.gov/salmon_recovery/listed_species.shtml.

79. Ben Goldfarb, *The Great Salmon Compromise*, HIGH COUNTRY NEWS (Dec. 8, 2014), https://www.hcn.org/issues/46.21/the-great-salmon-compromise.

migrating to the sea—both efforts that would help recover, not just hold onto, a species—are deprioritized in ESA consultations.[80] The ESA allows biological opinions evaluating federal actions impacting salmon to address scientific uncertainties by often focusing on "the politically palatable, instead of the biologically necessary." As a result, federal agencies fail to take the actions needed to significantly improve salmon populations.[81]

Both Washington State and federal plans to recover salmon listed as threatened or endangered under the ESA focus on addressing four major threats to the health of listed fish populations: hatcheries, hydropower, habitat, and harvest.[82] Although hatcheries still play a role in producing salmon for harvest, hatcheries also pose a threat to wild populations.[83] Namely, hatchery fish spread disease, compete with wild salmon for food and habitat, and contribute to a loss of genetic diversity.[84] The WDFW must therefore create and implement hatchery genetic management plans to ensure that hatcheries pose "the least amount of biological risk to associated naturally spawning populations."[85] In addition, agencies work to address the major negative impacts hydropower projects have on salmon by improving fish passage at dams, mitigating dam-created habitat loss and degradation, and implementing less disruptive water release schedules.[86] Moreover, each watershed delineates habitat restoration projects, such as improving riparian or estuary habitats or fixing fish passage barriers.[87] Lastly, harvest levels are regulated to ensure federally listed populations are not further threatened or endangered.[88]

80. *Id.*

81. BLUMM, *supra* note 48, at 217.

82. Wash. St. Recreation and Conservation Off., Governor's Salmon Recovery Off., *How We Measure*, https://stateofsalmon.wa.gov/about-this-report/how-we-measure/ (last visited Dec. 2, 2018); NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 439.

83. Wash. St. Recreation and Conservation Off., *supra* note 82.

84. BLUMM, *supra* note 48, at 109.

85. Wash. St. Recreation and Conservation Off., *supra* note 82.

86. GOVERNOR'S SALMON RECOVERY OFF. AND JOINT NATURAL RESOURCES CABINET, STATEWIDE STRATEGY TO RECOVER SALMON (1999), https://www.digitalarchives.wa.gov/governorlocke/gsro/strategy/summary/elements.htm#hydropower [hereinafter STATEWIDE STRATEGY TO RECOVER SALMON].

87. Wash. St. Recreation and Conservation Off., *supra* note 82.

88. STATEWIDE STRATEGY TO RECOVER SALMON, *supra* note 86.

Although Washington State's recovery plan includes habitat restoration projects, the state is mainly implementing only its harvest, hatchery, and hydropower recovery plans. As Figure 1 below demonstrates, the percentage of habitat recovery plan actions initiated is significantly below the percentage of harvest, hatchery, and hydropower actions started.

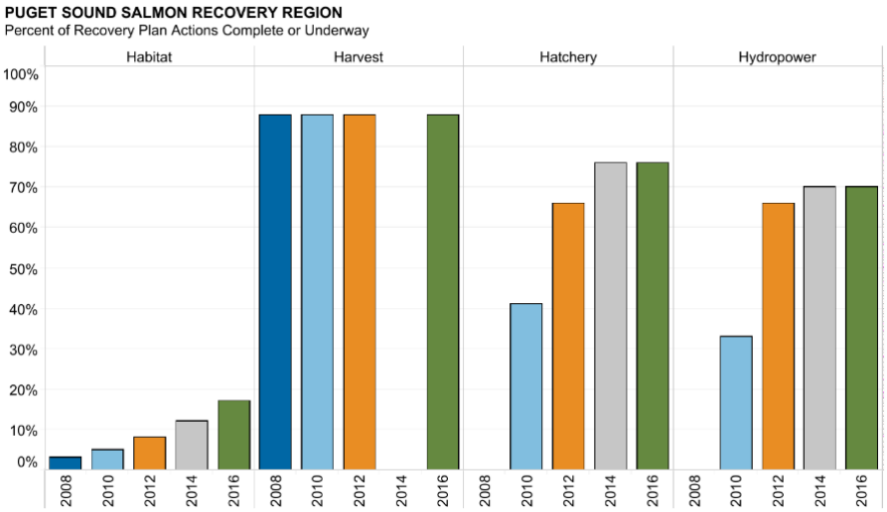

Figure 1: Puget Sound Salmon Recovery Actions[89]

Addressing this gap in recovery plan execution is critical to ensuring overall recovery initiatives are successful. According to the National Oceanic and Atmospheric Administration's (NOAA) Puget Sound Technical Recovery Team, "protecting existing habitat . . . is the most important action needed in the short-term to increase the certainty of achieving [recovery] plan outcomes."[90] Puget Sound is currently losing habitat faster than it is restored in the face of immense regional population growth, which stunts overall recovery benefits.[91] Although piecemeal habitat restoration projects help, long-term salmon recovery requires "restoration of fundamental ecosystem functions in watersheds and estuaries," a goal not achieved by slowly implementing small habitat projects.[92]

The political pressure to focus salmon recovery resources on overseeing hatcheries and regulating harvest levels remains an obstacle to meaningful habitat protection. Two recent comments by high-level government officials illustrate many habitat protection opponents' enduring refusal to regard habitat

89. RECOVERY PLAN PROGRESS, *supra* note 22.

90. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 354.

91. 2016 STATE OF SALMON IN WATERSHEDS: GOVERNOR'S UPDATE, *supra* note 23, at 6.

92. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 66.

restoration as an equally necessary policy to increase salmon populations. At a recent U.S. House of Representatives hearing in Washington State, Doc Hastings, a former U.S. Representative for Washington, criticized adjusting dam operations to improve stream flow for salmon when salmon numbers could instead be enhanced by further limiting salmon fishing.[93] For Hastings, the solution was not addressing the cause of the problem—depleted salmon habitat—but addressing the symptom—reduced fish numbers requiring further fishing restrictions. Second, in Judge Diarmuid O'Scannlain's dissenting opinion from the Ninth Circuit's denial to rehear arguments on culvert removal, a footnote highlighted that producing hatchery fish would be cheaper than removing culverts to create the habitat needed to produce the same amount of fish.[94] Yet, as the hatchery discussion at the beginning of this Part made clear, relying on hatcheries as the sole solution to salmon decline is not enough.[95]

To make progress towards true salmon recovery, Washington needs to devote more money to habitat initiatives. In 2016, only 17 percent of Washington's habitat recovery plan[96] actions had been started or completed.[97] According to the director of WDFW, comprehensive watershed recovery analysis lagged because the Department "just ha[s not] had the money and the personnel to get it done."[98] WDFW's budget has been cut by 40 percent in the past decade, along with the Department of Ecology's funding for implementing watershed management plans and tracking stream flows.[99] From 2007, when the state set new recovery plans, to 2016, only 15 percent of the total annual need for Puget Sound salmon recovery had been allocated.[100]

93. *The Federal Columbia River Power System: The Economic Lifeblood & Way of Life for the Pacific Northwest Before the H. Comm. on Natural Resources*, 115th Cong. (2018) (testimony of Doc Hastings).

94. United States v. Washington, 864 F.3d 1017, 1029 n.12 (9th Cir. 2017) (O'Scannlain, J., dissenting) ("It seems highly likely that if the panel opinion had engaged in such cost-benefit analysis, there would be more cost-effective ways to remedy the alleged Treaties violation. For example, a 1997 state report estimated that if the State replaced the culverts maintained by the Washington State Department of Transportation (which controls a majority of culverts), it would result in an annual increase of 200,000 salmon . . . It might be cheaper to stock an additional 200,000 salmon into Washington's streams each year.").

95. LICHATOWICH, *supra* note 74, at 109–10.

96. Puget Sound Partnership, *Salmon Recovery in Puget Sound*, http://www.psp.wa.gov/salmon-recovery-overview.php (last visited Dec. 2, 2018).

97. RECOVERY PLAN PROGRESS, *supra* note 22.

98. Brief for Pacific Coast Federation of Fishermen's Associations, *supra* note 16, at 42.

99. 2016 STATE OF SALMON IN WATERSHEDS: GOVERNOR'S UPDATE, *supra* note 23, at 17.

100. Governor's Salmon Recovery Office, *State of Salmon in Watersheds 2016, Puget Sound: Key Takeaways*, https://stateofsalmon.wa.gov/puget-sound/regional-overview/ (last visited Dec. 2, 2018).

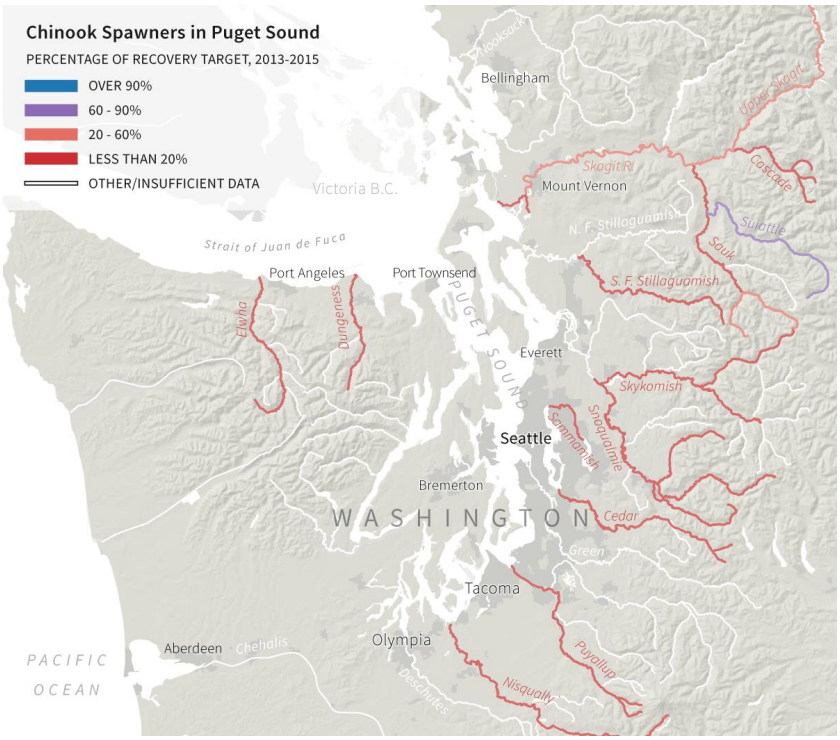

Figure 2: Chinook Spawners in Puget Sound [101]

In addition to sufficiently funding agency recovery initiatives, Washington needs to focus on utilizing its land management laws to protect salmon habitat. Washington has "some of the most aggressive land management tools in the Nation," such as the Shoreline Management Act[102] and the Growth Management Act,[103] that can help protect sensitive salmon habitat in the face of considerable human population growth in western Washington.[104] But these land management regimes currently leave land use decisions with local governments motivated by property tax revenue to allow development in important salmon habitat.[105] Although Washington State has the authority under these statutes to reject

101. Felicity Barringer, *In the Pacific Northwest, Native Fishing Rights Take on a Role as Environmental Protector*, NATIVE NATIONS & THE WEST BLOG (June 11, 2018), https://west.stanford.edu/news/blogs/and-the-west-blog/2016/pacific-northwest-native-fishing-rights-take-role-environmental-protector.

102. WASH. REV. CODE § 90.58 (2018).

103. WASH. REV. CODE § 36.70A (2018).

104. 2016 STATE OF OUR WATERSHEDS, *supra* note 64, at 16. Puget Sound's population growth is expected to increase by 23 percent by 2030. Van Cleve, *supra* note 25, at 88.

105. Van Cleve, *supra* note 25, at 90.

inadequate local development plans,[106] the state has not yet utilized this ability to force adequate salmon habitat protection.[107]

C. The Benefits of Addressing Barrier Culverts

The Tribes spent twenty years deciding which factual situation was ideal for extending their treaty rights to salmon habitat protection.[108] Eventually, the Tribes settled on a suit forcing Washington State to finance expedited removal of its fish-blocking culverts. As discussed in this Note's introduction, culverts allow a stream to flow under a road, and can come in many forms, from concrete boxes to metal pipes.[109] The structure of the culvert can make it a barrier to salmon passage if the pipe is too small or impeded, the culvert is located too high above the streambed, or the water depth at the bottom of the culvert is too shallow for sufficient fish passage, among other factors.[110] The barrier culverts result in less viable stream habitat for fish, increasing competition in habitat that is available.[111] Even if fish can pass through the culvert, this demanding effort "physically beat[s] [them] up" and "lower[s] their fitness" and, consequently, depresses their ability to successfully migrate to the ocean.[112]

Federal, state, and tribal salmon recovery reports all highlight fish-barrier-culvert removal as an important step to salmon recovery in western Washington. In the Northwest Indian Fisheries Commission's report, barrier culverts are identified as an urgent issue throughout the Puget Sound Watershed.[113] NOAA also emphasizes the importance of culvert removal throughout its report. For example, NOAA states that the loss of rearing habitat in the Snohomish River Basin is "the primary factor affecting population performance" and that culverts

106. *See, e.g.*, "[t]he department of ecology, in cooperation with other state agencies and coastal local governments, shall prepare and adopt ocean use guidelines and policies to be used in reviewing, and where appropriate, amending, shoreline master programs of local governments with coastal waters or coastal shorelines within their boundaries." WASH. REV. CODE § 90.58.195 (2018). The state can also appeal local Growth Management Act plans to the Growth Management Hearings Board. *See* WASH. REV. CODE § 36.70A.280 (2018).

107. Van Cleve, *supra* note 25, at 89–90. Another major issue is the institutional framework managing salmon recovery. A variety of agencies impact salmon habitat. LICHATOWICH, *supra* note 73, at 77. But instead of a coordinated approach among those agencies to address salmon recovery, often a biologist in one agency is reprimanded for "poking [his] nose" in another agency's domain. *Id.* This prevents a more ecosystem approach to salmon recovery. *Id.* at 79. I do not discuss this issue at length in this Note since this issue is more challenging to address via a lawsuit, but the main implication is considered in this Note.

108. Reilly, *supra* note 32.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. 2016 STATE OF OUR WATERSHEDS, *supra* note 64, at 12. *See also* Brief for Hon. Daniel J. Evans as Amicus Curiae, *Washington v. United States*, 138 S. Ct. at 9–10 (2018) (No. 17-269) (noting that inadequate or failing culverts are a significant limiting factor for salmon recovery in almost every watershed analyzed by federal, state, local, and tribal entities).

often block this critical habitat.[114] At the state level, the WSDOT and WDFW asserted in a 1997 statement to the legislature that barrier culverts were "one of the most recurrent and correctable obstacles to healthy salmonid stocks in Washington."[115] Fisheries biologists have also noted that "correction of human-made fish passage barriers is one of the most cost effective methods of salmonid enhancement and restoration."[116]

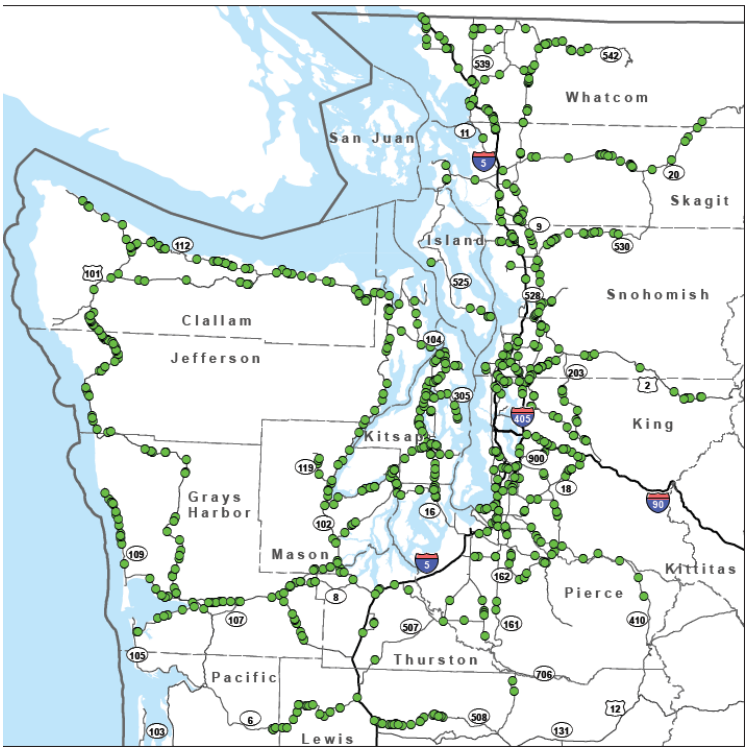

Figure 3: The WSDOT Culverts Blocking Significant Salmon Habitat[117]

For many rivers, however, state culvert removal still leaves fish passage impeded by local, private, and federal culverts. Will removal of state culverts still have a significant impact on salmon without removal of nonstate barrier culverts? The evidence presented to the Ninth Circuit says yes. Where streams contain both state and nonstate culverts, almost 90 percent of the nonstate

114. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 223.

115. *United States v. Washington*, 853 F.3d at 972; *see also* DAMON ROMERO & SUSAN CIEREBIEJ, WASHINGTON STATE PARKS FISH PASSAGE INVENTORY WITHIN WATER RESOURCE INVENTORY AREAS (WRIA) 1–23 (Aug. 2012), https://wdfw.wa.gov/publications/01506/.

116. Brief for Pacific Coast Federation of Fishermen's Associations, *supra* note 16, at 45.

117. ACCELERATING FISH BARRIER CORRECTION, *supra* note 29.

culverts are upstream of state culverts.[118] And for those nonstate culverts that are downstream, 69 percent of them allow partial salmon passage.[119] Even without removing nonstate culverts, the WDFW and WSDOT estimate that removing state-owned culverts will increase the number of mature salmon by at least 200,000.[120]

County and private culverts are also continuously being removed, rendering the removal of downstream state culverts an important step in habitat recovery. For instance, the private-land forest industry has opened up over 4,000 miles of additional fish habitat through barrier removal.[121] Tribes have also obtained funding to support the removal of private landowner culverts because Tribes see culvert removal as "the biggest bang for your buck" compared to other restoration initiatives.[122] The holding in *United States v. Washington* should also help pressure removal of county and private culverts blocking salmon habitat. Federally owned barrier culverts remain an obstacle in western Washington though, making Part II's discussion on federal culverts important.

Overall, pushing Washington to begin to prioritize implementation of its salmon habitat goals is a vital step to meaningful salmon recovery. *United States v. Washington*'s ability to continue to force greater prioritization of habitat protection and restoration will be explored in the following Parts.

II. THE EXTENSION OF THE STEVENS TREATIES' FISHING RIGHTS TO HABITAT PROTECTION

Evaluating the future implications of *United States v. Washington* for other habitat-depleting policies requires an understanding of the Tribes' treaty rights and how the Ninth Circuit concluded Washington State's culverts violated those rights. Subpart A overviews how the Tribes have used their treaty rights since the early 1900s to fight for sufficient salmon. Then, subpart B discusses how the Tribes' treaty rights extend to salmon habitat protection. This second subpart details both the Tribes' 1970s attempt to obtain a court holding declaring a broad salmon habitat right, and the most recent litigation focusing specifically on the right to not have salmon habitat significantly depleted by barrier culverts.

A. Litigation Throughout the 1900s to Secure Treaty-Promised Salmon

In 1854 and 1855, the Tribes ceded to the United States lands west of the Cascade Mountains: the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas—almost all their territory.[123] In exchange, the United States

118. *United States v. Washington*, 853 F.3d at 973.
119. *Id.*
120. *Id.* at 972.
121. Brief for Pacific Coast Federation of Fishermen's Associations, *supra* note 16, at 27.
122. *Id.*; Brief for Tribal Respondents, *supra* note 4, at 27.
123. *United States v. Washington*, 853 F.3d at 954.

assured the Tribes certain rights in what became known as the Stevens Treaties.[124] Included in these protected rights was the Tribes' "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory."[125] This "fishing clause" was present in essentially identical language in each of the Stevens Treaties.[126]

While at the time of treaty signing salmon were plentiful, as Washington's population grew, salmon runs dramatically diminished. By 1905, the U.S. Department of the Interior was already noting that large-scale, non-Indian fishery development was "seriously depleting the natural larders of our Indians and cutting down their main reliance for support and subsistence."[127] To address this treaty violation, the Tribes needed the United States to join them in, or bring on the Tribes' behalf, a lawsuit; the Tribes cannot sue Washington State on their own since states have sovereign immunity.[128] The first action to protect the Tribes' fishing rights was a challenge to a private fishing wheel[129] catching salmon by the ton at the Tribes' "usual and accustomed" fishing site.[130] The Supreme Court in 1905 held that Washington could not license a device that resulted in "exclusive possession" of a fishing site protected by a Stevens Treaty by leaving no fish available to Indian fishermen above the wheel.[131]

Subsequent tribal litigation against Washington State addressed state fishing regulations that diminished or prohibited the Tribes from exercising their rights to fish off-reservation at their "usual and accustomed grounds."[132] State regulations that discriminate against the Tribes, such as by preventing fishing equipment predominantly used by Tribes, are not allowed.[133] In addition, the state can only regulate tribal harvesting if it shows that the regulation is necessary

124. *United States v. Washington*, 853 F.3d at 954.

125. *Id.*; *see also* Medicine Creek Treaty of 1854, *supra* note 14, at Art. 3.

126. *United States v. Washington*, 853 F.3d at 954.

127. *Id.* (citing Annual Reports of the Department of the Interior, 1905: Indian Affairs (Washington, D.C., 1906, Part I, 362)).

128. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. CONST. amend. XI. The United States, however, can bring suits against Washington since the Eleventh Amendment does not apply to the federal government. *See id.* The United States can agree to bring a lawsuit on a tribe's behalf due to the federal government's trust relationship with tribes. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (2017) (the United States owes certain fiduciary duties to tribes to protect tribal sovereignty and property).

129. A fishing wheel is a revolving wheel with baskets attached to catch large quantities of salmon as it rotates due to the current of the stream. David Goran, *Fish Wheels: They Were So Effective and Therefore Banned in the United States Because They Threatened the Salmon Population*, VINTAGE NEWS (Sept. 17, 2016), https://www.thevintagenews.com/2016/09/17/fish-wheels-effective-therefore-banned-united-states-threatened-salmon-population/.

130. *United States v. Washington*, 853 F.3d at 955.

131. United States v. Winans, 198 U.S. 371, 382 (1905).

132. *See, e.g.*, Tulee v. Washington, 315 U.S. 681, 683 (1942) (holding that Washington State could not exact a license fee on Indians with treaty rights to fish salmon in the State).

133. Dep't of Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973) (noting that Washington's ban of net fishing, which only Indians used to fish, while allowing recreational fishing was impermissible discrimination against Indians).

for the state's reasonable conservation objectives.[134] Despite these restrictions upon state regulatory power, Washington continued to enforce restrictions on tribal fishing off-reservation until the Tribes were only receiving 6 percent of the salmon catch in Puget Sound from 1958 to 1967.[135]

Eventually the United States sued Washington on behalf of the Tribes to obtain an interpretation of the Stevens Treaties that would require Washington State to protect a share of the salmon runs for the Tribes.[136] In the end, the U.S. Supreme Court held that the Stevens Treaties' fishing clause secured a tribal right to an amount of salmon "necessary to provide the Indians with a livelihood—that is to say, a moderate living," with a maximum take of up to 50 percent of the total harvestable fish.[137] For the court, the "right of taking fish" in the Stevens Treaties meant more than "the 'equal opportunity' [alongside state citizens] . . . to catch fish"; the fishing clause meant that both Washington and the Tribes have a right to a "fair share" of the fish.[138] Yet, despite the courtroom victories, the Tribes continued to harvest insufficient quantities of salmon that failed to come close to satisfying a moderate standard of living due to salmon population decline.[139] A major obstacle to sufficient salmon remained: salmon habitat depletion.

B. Litigating for a Salmon Habitat Protection Right

This subpart discusses the two major decisions on whether the Stevens Treaties implicitly secure a salmon habitat protection right to ensure that the Tribes have salmon to harvest. The decision that serves as the basis for this Note, the 2017 *United States v. Washington* Ninth Circuit decision on culverts, is analyzed in more detail. In the end, I will show that the 2017 Ninth Circuit decision's reasoning fails to provide a clear understanding of what governmental policies beyond Washington State's failure to remove barrier culverts amount to treaty violations. Consequently, securing further salmon habitat protection to ensure the Tribes have enough salmon for a moderate living will require future, high-risk lawsuits.

1. 1983 United States v. Washington

The most recent *United States v. Washington* case was not the first time that courts have considered the impact significant habitat depletion has on the Tribes'

134. Guy Charlton, *The Law of Native American Hunting, Fishing and Gathering Outside of Reservation Boundaries in the United States and Canada*, 39 CAN.-U.S. L.J. 69, 112 (2015); *Tulee*, 315 U.S. at 684–85.

135. *United States v. Washington*, 853 F.3d at 957.

136. Washington v. Wash. St. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 669 (1979).

137. *Id.* at 686. Successive litigation affirmed the inclusion of hatchery fish in the sum of total harvestable fish. United States v. Washington, 759 F.2d 1353, 1360 (9th Cir. 1985).

138. *Wash. St. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 682, 684–85.

139. *United States v. Washington*, 853 F.3d at 961.

treaty rights.[140] In 1980, the U.S. District Court for the Western District of Washington had held that the Stevens Treaties' fishing clause included an implicit right to ensure fishery habitat was "protected from man-made despoliation."[141] This implicit right meant Washington had a governmental duty to "refrain from degrading the fish habitat to an extent that would deprive the [T]ribes of their moderate living needs."[142]

On appeal, however, the Ninth Circuit vacated the portion of the 1980 district court holding regarding habitat protection.[143] In 1983, the Ninth Circuit held that the district court's declaratory judgment regarding habitat protection was "contrary to the exercise of sound judicial discretion" because it announced too broad a legal rule to guide third parties.[144] Without further guidance, state and private actors could not understand when they were harming fish habitat to an extent that would violate tribal treaty rights.[145] Since the declaratory judgment on salmon habitat was not useful in settling the legal issue of the extent of the Stevens Treaties' rights, it was improper.[146] While the Ninth Circuit did not deny the potential for a treaty violation from significant depletion of salmon habitat, it stated that a judge needed to base this analysis on the "concrete facts" of the particular case.[147]

2. 2017 United States v. Washington

After years of considering which "concrete facts" would most likely result in a court interpretation protecting salmon habitat, in 2001 the Tribes and United States brought a suit against Washington State directly targeting barrier culverts.[148] In 2007, the district court eventually held that barrier culverts significantly depleting salmon numbers violated the Tribes' treaty rights.[149] After a lengthy trial to determine the appropriate remedy for the treaty violation, in 2013, the court fashioned an appropriate injunction.[150] The district court's

140. *See* United States v. Washington, 506 F. Supp. 187, 208 (W.D. Wash. 1980).
141. *Id.* at 203.
142. *Id.* at 208.
143. *United States v. Washington*, 759 F.2d at 1355.
144. *Id.* at 1357.
145. *Id.*
146. *Id.*
147. *Id.*
148. *United States v. Washington*, 20 F. Supp. 3d at 890.
149. *Id.* at 899 ("The Court hereby declares that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest. The Court further declares that the State of Washington currently owns and operates culverts that violate this duty.").
150. *United States v. Washington*, 20 F. Supp. 3d at 984–85. In its remedy, the district court divided high-priority culverts that blocked 200 linear meters or more of upstream habitat from low-priority culverts that blocked under 200 linear meters of upstream habitat. *Id.* at 1024. High-priority culverts had to be removed within seventeen years, while low-priority culverts did not require correction until the "end of the culvert's useful life" or upon initiation of an independent construction project. *Id.* Additionally, the

injunction was challenged by Washington State, but upheld on appeal by the Ninth Circuit and the U.S. Supreme Court as an equitable remedy.[151]

In the Ninth Circuit's 2017 culvert decision, the court relied on standard canons of treaty interpretation and case law on tribal water rights to uphold an implicit habitat protection right in the Stevens Treaties' fishing clause.[152] When interpreting a treaty, a court must construe the treaty liberally in favor of Indians, resolving all ambiguities in favor of tribes.[153] Any broad language in a treaty must be interpreted by looking to the treaty's larger context, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[154] Treaty language is also to be interpreted as "the Indians themselves would have understood."[155]

The Ninth Circuit consequently examined the history surrounding the negotiation and signing of the Stevens Treaties to evaluate whether the fishing clause implicitly included a right to salmon habitat protection. The court construed the Treaties in favor of the Tribes and rejected Washington's "one-sided view" that the Treaties' principal purpose was opening the Northwest for settlement.[156] Quoting the infamous line—"[t]his paper secures your fish"—declared by Governor Stevens during treaty negotiations, the court highlighted that the Tribes believed the Treaties did not guarantee "such a cynical and disingenuous promise" as a fishing location without enough fish to sustain a moderate living.[157]

The court further supported this interpretation by comparing the implicit right to habitat protection to the implicit tribal right to water on reservations. In *Winters v. United States*, the U.S. Supreme Court held that when the United States created the Fort Belknap Indian Reservation, it impliedly reserved water rights for the reservation.[158] Since the arid reservation land could not be productively used without accompanying water rights, the Court held that the land grant must have also included reserved water rights.[159] Thus, defendant irrigators and ranchers had to ensure that their water diversions just up-stream of the reservation did not deprive the Tribe of the water needed to utilize their land.[160] The Ninth Circuit's habitat protection analysis in *United States v. Washington* relied on a similar reasoning: "Just as the land on the Belknap

state was allowed to correct high-cost culverts "accounting for up to ten percent of the total blocked upstream habitat" on the low-priority culvert timeline. *Id.*

151. *Id.* at 977; Washington v. United States, 138 S. Ct. 1832, 1833 (2018).

152. *United States v. Washington*, 853 F.3d at 962–64.

153. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 128, at § 2.02(1).

154. Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943).

155. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

156. *United States v. Washington*, 853 F.3d at 962–64.

157. *Id.* at 964.

158. 207 U.S. 564, 576 (1908). *See also* United States v. Adair, 723 F.2d 1394, 1411 (9th Cir. 1983) (holding the right to continuous water flow necessary to securing the treaty rights ensuring hunting and fishing).

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

160. *Id.* Prior History at *1.

Reservation [in *Winters*] would have been worthless without water to irrigate the arid land, . . . the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish."[161]

Next, the Ninth Circuit considered whether the evidence supported the Tribes' assertion that Washington's barrier culverts violated the Stevens Treaties in meaningfully reducing the number of fish available for harvest by blocking fish from reaching vital habitat. In deciding that the culverts were violating treaty rights by significantly diminishing fish populations, the court highlighted the plethora of data showing the significant salmon population benefits of removing barrier culverts,[162] data readily available due to Washington's prior efforts analyzing and removing many of its barrier culverts.[163] The court also detailed that culvert removal was considered one of the most cost-effective ways to increase salmonid stocks quickly with minimal impacts on land use or landowners.[164] In addition, the court noted that common law principles and state law prevent individuals from blocking fish passage in a river.[165] Based on all of this evidence, the Ninth Circuit held that Washington State's barrier culverts were violating the Stevens Treaties by significantly reducing the salmon available for harvesting.[166]

Unfortunately, the court's holding on Washington's barrier culverts failed to include a concrete analysis of which factors were most important in determining the culverts violated the Stevens Treaties' fishing clause. When was an action's impact on salmon significant enough to violate the treaties? Was the WSDOT and WDFW's prioritization of culvert removal important in the court's analysis? These questions are left unanswered since the court's decision merely lists various considerations with little discussion of each factor's importance in the analysis. Another habitat-depleting policy with sufficient scientific data to demonstrate a substantial, discrete harm to salmon populations appears to also

161. 853 F.3d at 965 (referencing *Winters*, 207 U.S. 564).

162. *United States v. Washington*, 853 F.3d at 972–74. In its decision, the court noted a culvert removal study that found that salmon spawned in the newly accessible habitat in the years immediately following culvert removal. *Id.* at 973. The court also highlighted that a tribal environmental policy manager testified that the benefit of culvert removal was more immediate than planting trees that take ten to twenty years to grow. *Id.*

163. ACCELERATING FISH BARRIER CORRECTION, *supra* note 29.

164. The court noted testimony that culvert removal was the "biggest bang for your buck" according to a tribal expert. *United States v. Washington*, 853 F.3d at 972–74. The court also highlighted testimony that culvert removal had "minimal impacts on adjacent land use" and was more cost effective than other restoration activities. *Id.*

165. The United States adopted English law that prevented "obstruction of the passage of fish." *E.g.*, JOSEPH K. ANGELL, TREATISE ON THE LAW OF WATERCOURSES 82–83 (5th ed., 1854). Mills and private dams along rivers had to allow for fish passage. *See, e.g.*, Stoughton v. Baker, 4 Mass. 522, 529 (1808). The Territory of Washington required dams or other obstructions be constructed "to allow salmon to pass freely up and down such rivers and streams." Act of Aug. 14, 1848, § 12, 9 Stat. 323, 328. *See generally* Brief for Law Professors as Amici Curiae in Support of Respondents, *Washington v. United States*, 138 S. Ct. 1832 (2018) (No. 17-269) (discussing protections from obstructions that impede fish passage).

166. *United States v. Washington*, 853 F.3d at 972.

be a treaty violation based on this holding. But perhaps not. The court's emphasis that its ruling applied only to culverts ultimately leaves this issue in confusion.

The Ninth Circuit's lack of guidance for other habitat-depleting policies in its culvert decision is due in large part to the prior 1983 *United States v. Washington* opinion vacating a general salmon habitat right. In a decision denying a rehearing of the culvert case, the Ninth Circuit affirmed that its 2017 opinion was not issuing an "improper advisory opinion"[167] like the district court's broad 1980 declaration that the Stevens Treaties required salmon habitat protection. The Ninth Circuit rehearing denial highlighted that "cases with different facts might come out differently," and that the 2017 culvert opinion was cabined to the "careful, detailed description of the facts presented."[168] While a general habitat protection duty imposed upon Washington State would have been too broad to guide parties, the court could have better defined some aspects of what factors likely amount to a violation of this implicit habitat right in the Stevens Treaties. Such a decision would have helped clarify the extent of the Tribes' treaty rights. For example, the opinion could have clarified the importance of impacts on private parties, like landowners or farmers, in deciding whether a treaty violation occurred. Although this seems like a remedy phase consideration, the culvert case opinion mentions generally that culvert removal has limited impacts on private land use in its discussion of culverts amounting to a treaty violation.[169]

For the Tribes' right to habitat protection to be meaningful in the future, the Tribes (and others impacting salmon habitat) need to understand when an activity constitutes a treaty violation. Without a more concrete rule, the Tribes are unable to force government agencies or private individuals to protect salmon habitat vital to increasing salmon population numbers. Since these entities know a future court may distinguish another habitat-depleting policy from culverts, they will not feel pressured to work with Tribes on habitat restoration projects or regulations based on this court decision alone. As a result, the Tribes will need to bring a case for each policy they believe violates their treaty rights. Since there are a lot of ambiguities as to which policies negatively impacting salmon habitat amount to a violation of the Stevens Treaties, it is not clear which policy might be best addressed next. The final two Parts of this Note discuss the risks and obstacles associated with any ensuing litigation to protect salmon habitat based on the 2017 *United States v. Washington* holding. These Parts also discuss the policies that might be worth challenging should the Tribes decide to bear these risks.

167. *United States v. Washington*, 864 F.3d at 1021.
168. *Id.* (denying rehearing en banc).
169. *United States v. Washington*, 853 F.3d at 972–74.

III. SETTING THE STAGE FOR ADDRESSING FEDERAL HABITAT-DEPLETING ACTIONS: ADMINISTRATIVE PROCEDURE ACT CHALLENGES AND LITIGATION RISK

An analysis of *United States v. Washington*'s implications for the federal government reaffirms that the case will predominantly be a win for culvert removal in the near future given the risks of litigating other habitat-depleting actions. A lawsuit addressing federally owned barrier culverts in western Washington would be difficult to bring but would likely succeed. This Part first explores how a lawsuit to remove federal barrier culverts would proceed. Then it analyzes the risks associated with the Tribes' bringing a lawsuit against federal barrier culverts and other federal actions that significantly harm salmon habitat.

Although the Ninth Circuit noted in *United States v. Washington* that "the United States has also violated the Treaties in building and maintaining its own barrier culverts" in western Washington, the Tribes' ability to sue the United States to force culvert removal is no simple endeavor.[170] The first obstacle Tribes will face is the United States' sovereign immunity.[171] To pursue a claim against the agencies responsible for federal barrier culverts, the Tribes would need to bring the claim under the Administrative Procedure Act (APA), which waives sovereign immunity for nonmonetary claims.[172]

Yet bringing a lawsuit under the APA requires the challenged agency action, here the failure to remove barrier culverts, to meet the definition of an "agency action" under the APA. The APA restricts court review to "final agency action[s],"[173] which include not only an agency's affirmative actions, like the issuance of a rule or permit, but also an agency's "failure to act."[174] An agency's failure to act is reviewed under APA Section 706(1), which states that courts may

170. *Id.* at 969. The Ninth Circuit rejected Washington State's attempts to also hold the United States liable for federal barrier culverts. *Id.* at 972–74. The major issue with Washington's arguments for federal culvert removal was that Washington lacked standing to assert federal treaty right violations: only the Tribes or the United States on the Tribes' behalf may assert treaty violation claims. *Id.*

171. For nonmonetary relief against federal agencies, "any 'common law' Indian law claim must still invoke the waiver of sovereign immunity under Section 702." Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation, 2005 U.S. Dist. LEXIS 36035, *35 (N.D. Cal. 2005).

172. 5 U.S.C.S. § 702 (2018).

173. As of the writing of this Note, there is a Ninth Circuit conflict regarding whether the APA's sovereign immunity waiver applies to more than judicial review of an "agency action" as defined by the APA. While *Gallo Cattle Co. v. United State Department of Agriculture*, 159 F.3d 1194, 1195 (9th Cir. 1998) held that a challenged action must be an "agency action" as defined under the APA, *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525–26 (9th Cir. 1989), held that Section 702's waiver of sovereign immunity is not limited to "agency actions." *See also* Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation, 792 F.2d 782, 793 (9th Cir. 1986) ("[a]bolition of sovereign immunity in § 702 is not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . . . No words of § 702 and no words of the legislative history provides any restriction to suits 'under' the APA.") (citing K. Davis, *Administrative Law Treatise* § 23:19 at 195 (2d ed., 1983)). *Gros Ventre Tribe v. United States* noted this conflict but resolved the case on other grounds. 469 F.3d 801, 809 (9th Cir. 2006).

174. 5 U.S.C.S. § 551(13) (2018).

"compel agency action unlawfully withheld."[175] An agency violates APA Section 706 if it "fail[s] to take a discrete agency action that it is required to take."[176] The Tribes, therefore, must have a source of law requiring the federal agencies to remove barrier culverts.

Although the United States owes the Tribes a fiduciary duty due to the general trust relationship between the United States and Tribes,[177] this alone is not enough to sustain a cause of action against the federal agencies responsible for the culverts because a general fiduciary duty does not define specific actions an agency must take.[178] For example, in *United States v. Mitchell*, an allotment act requiring the United States to hold land in trust for the Quinault and Quileute Tribes did not authorize a cause of action for monetary damages for U.S. mismanagement of trust land forests.[179] The allotment act created only a "'limited trust relationship' that did not impose a judicially enforceable trust duty."[180]

In addition, agency compliance with generally applicable statutes and regulations, such as the ESA or other environmental laws impacting salmon, has been determined to fulfill the agency's trust obligation unless a specific provision in a treaty, executive order, or statute requires additional, specific actions.[181] To illustrate, in *Gros Ventre Tribe v. United States*, the Gros Ventre Tribe, Assiniboine Tribe, and Fort Belknap Indian Community Council argued that the federal government had violated its specific and general trust obligations to protect tribal water rights by authorizing a gold mine just upriver from the tribes' reservation.[182] The tribes alleged that the mining operation diminished both the quantity and quality of the tribes' water.[183] The Ninth Circuit nevertheless held that the tribes' treaty only recognized "a general or limited trust obligation to protect the Indians against depredations on Reservation lands," an obligation

175. 5 U.S.C.S. § 706(1) (2018).

176. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004). The failure to act can be a challenging threshold to meet. For example, the Secretary of the Interior was required under the Indian Agricultural Act to comply with tribal environmental laws when the agency acted. El Paso Natural Gas Co. v. United States, 750 F.3d 863, 890 (D.C. Cir. 2014). As a result, the Navajo Nation argued that the Secretary violated his duties under the Indian Agricultural Act when he failed to remove hazardous waste in violation of the Navajo Clean Water Act. *Id*. Yet, the court held that the Tribe did not point to a discrete duty the agency had to clean up hazardous waste. *Id.* at 888. The court noted that the Indian Agricultural Act only required that when the agency acts, it must comply with tribal law. *Id.* at 891. Although the hazardous waste violated tribal environmental laws, the court held that the Secretary did not have "an affirmative duty" to clean up the waste. *Id.*

177. *See* Seminole Nation v. United States, 316 U.S. 286, 295 (1942); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

178. *El Paso Natural Gas Co.*, 750 F.3d at 892.

179. 445 U.S. 535, 538 (1980).

180. *Id.* at 542.

181. *Gros Ventre Tribe v. United States*, 469 F.3d at 810.

182. *Id.* at 803.

183. *Id.* at 806.

measured by general environmental statutes.[184] The court in *Pacific Coast Federation of Fishermen's Associations v. U.S. Bureau of Reclamation* also held that the Yurok Tribe needed to show a "statute or other source of positive law defining the federal government's obligations" to enforce a fiduciary obligation on the Bureau of Reclamation's dam operations.[185] Therefore, to have a successful case for federal culvert removal, the Tribes of western Washington need a substantive source of law—such as a statute, regulation, or treaty—that establishes that federal agencies have a duty to remove barrier culverts.[186]

The source of law for federal barrier-culvert removal is the Stevens Treaties' fishing clause.[187] *United States v. Washington* only held that *Washington State's barrier culverts* violated the Stevens Treaties' fishing clause though.[188] The level of harm federal barrier culverts have on salmon was not the subject of the litigation. Absent an interpretation that the federal government's barrier culverts also violate the Stevens Treaties' fishing clause, the Tribes do not have a specific source of law to force the federal agencies to remove *federal* barrier culverts. As highlighted at the beginning of this Part, however, the Ninth Circuit did note, in dicta, that the case's habitat right was not specific to Washington culverts, but also applied to federal culverts.[189] The federal government thus arguably has a duty to remove its culverts, and an agency may not waive that treaty-imposed duty without congressional approval.[190]

The U.S. District Court for the Western District of Washington's decision in *No Oilport! v. Carter*,[191] which also relied on the Stevens Treaties' fishing clause, lends support to the assertion that a tribal lawsuit to remove federal barrier culverts would likely be successful. There, multiple western Washington tribes challenged the Secretary of the Interior's decision to grant a right-of-way permit for an oil pipeline crossing several rivers.[192] Pipeline construction would have potentially caused increased sedimentation, degrading fish habitat by destroying spawning grounds.[193] The court held that the Stevens Treaties "place substantial duties upon the United States" and ordered a hearing to determine whether the pipeline construction would degrade fish habitat and reduce salmon runs in violation of the United States' trust responsibility.[194] In making this decision, the court relied upon the soon thereafter vacated 1980 *United States v.*

184. *Id.* at 812. *See also* N. Slope Borough v. Andrus, 642 F.2d 589, 612 (1980) (holding that agency compliance with federal environmental laws in approving offshore oil drilling was sufficient to meet trust requirements with Native Alaskans).

185. *Pac. Coast Fed'n.*, 2005 U.S. Dist. LEXIS 36035 at *34, 40.

186. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 128, at § 5.05(1)(a).

187. Medicine Creek Treaty of 1854, *supra* note 14, at Art. 3.

188. *United States v. Washington*, 853 F.3d at 979.

189. *Id.* at 969 (stating "the United States has also violated the Treaties in building and maintaining its own barrier culverts").

190. *Id.* at 967.

191. 520 F. Supp. 334, 371–73 (W.D. Wash. 1981).

192. *Id.* at 342, 372.

193. *Id.* at 372.

194. *Id.* at 372–73.

Washington district court decision—discussed in Part II.B.a., above—holding that the Stevens Treaties' fishing clause implicitly guaranteed the Tribes a general salmon habitat protection right.[195] Though *No Oilport!* stopped an agency action while the culvert removal claim would force an agency to act, the case nonetheless illustrates that the federal government has a specific duty to protect salmon habitat in certain instances once that duty is interpreted into the Stevens Treaties' fishing clause.

While *United States v. Washington* supports a viable lawsuit for federal culvert removal, such a lawsuit is risky given the current makeup of the U.S. Supreme Court. Although Justice John Paul Stevens, who actively voted against tribal interests, has left the bench, his replacement, Justice Brett Kavanaugh, has little experience with Indian law.[196] Kavanaugh wrote one administrative decision rejecting tribal claims to impose conditions on the dam operator of the Klamath River dam.[197] His one pure Indian law case, *Vann v. Department of Interior*, did not reveal antitribal leanings, but he did not write in support of tribal interests either.[198] Justice Kavanaugh's potential interpretation of treaty rights remains uncertain. Moreover, over the last three decades, the Court has ruled against tribal members and nations 72 percent of the time.[199] Any lawsuit the Tribes' bring, therefore, carries the considerable risk that the Court may reduce the Tribes' treaty rights by narrowly interpreting the Stevens Treaties' fishing clause.

Bringing a claim against other federal actions significantly depleting salmon habitat based on *United States v. Washington* will be even riskier. As the APA analysis above makes clear, the lack of a definitive treaty right halting all significantly harmful habitat-depleting actions greatly increases litigation risks. In challenging a federal action that a court has yet to hold a violation of the fishing clause, the Tribes' risk is two-fold: not only could the litigation lead to a holding that the Tribes' treaty rights do not impose a governmental duty to stop this specific habitat-depleting action, but the suit could also render a decision narrowly interpreting the fishing clause to not support habitat protection at all.

Under a more environmentally and tribal-favorable administration, the *United States v. Washington* holding may help protect salmon habitat even without litigation. For example, federal agencies can utilize this holding to justify

195. *Id.* at 371–72 (citing *United States v. Washington*, 506 F. Supp. at 187).

196. Anna V. Smith, *The Next Supreme Court Pick Could Shape Indian Law For Decades*, HIGH COUNTRY NEWS (Aug. 8, 2018), https://www.hcn.org/issues/50.15/tribal-affairs-the-next-supreme-court-pick-could-shape-indian-law-for-decades.

197. Matthew L.M. Fletcher, *Judge Kavanaugh's Indian Law Record [updated]*, MICH. ST. U.C. OF L.: INDIGENOUS L. & POL'Y CENTER BLOG (July 10, 2018), https://turtletalk.wordpress.com/2018/07/10/judge-kavanaughs-indian-law-record/.

198. *Id.* He also wrote an amicus brief for an antiminority rights coalition that argued that Hawaiians cannot be separate sovereigns like Indian tribes and thus be exempt from the Equal Protection Clause in some circumstances. *Id.*

199. Smith, *supra* note 196.

actions that protect salmon beyond environmental statutory requirements.[200] The Environmental Protection Agency did just this when rejecting state water quality standards insufficiently protecting tribal subsistence fishing rights in Washington under the Obama administration.[201] Without a favorable administration though, the federal government will likely not be pressured by this case to adjust its salmon-habitat-depleting actions beyond culverts, as discussed in Part II. Pressure will have to be brought through an APA lawsuit relying on a culvert-specific holding that risks a negative treaty interpretation by the U.S. Supreme Court.

IV. THE VIABILITY OF POTENTIAL FUTURE LAWSUITS AGAINST POLICIES KNOWN TO SIGNIFICANTLY DEPLETE SALMON HABITAT

Many habitat-damaging actions in Washington continue to significantly deplete salmon runs. Loss of estuarine and marine habitats due to residential and industrial development, poor quality riparian forests from timber production and development, and loss of habitat access due to human-made stream barriers are all listed as major issues the government must address to improve salmon runs.[202] In this Part, I analyze the viability of lawsuits against federal dams and shoreline armoring. I chose to focus on these two salmon habitat-damaging activities after weighing the following factors: 1) which major habitat-depleting activities are discussed in both tribal and NOAA's salmon recovery reports as an issue throughout western Washington; 2) article comments on where *United States v. Washington*'s holding might lead next[203]; and 3) the salmon habitats Washington is already facing significant public pressure to fix and that would not require a major overhaul of state laws. Ultimately, I find that the uncertainty of *United States v. Washington*'s extension will likely halt tribes from bringing more politically charged lawsuits, like federal dam removal—at least under the present political situation and U.S. Supreme Court makeup. In contrast, a suit against Washington State's shoreline armoring practices, which diminish marine salmon habitat quality, might be a more viable option.

200. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 128, at § 5.05[3][c].

201. EPA, Revision of Certain Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85, 417 (Nov. 28, 2016) (codified at 40 C.F.R. 131).

202. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 223.

203. Don Jenkins, *Washington Culvert Case Seen as Western Water Issue*, CAP. PRESS (Aug. 18, 2017), https://www.capitalpress.com/state/washington/washington-culvert-case-seen-as-western-water-issue/article_c9b37c56-914f-5b18-83b3-1b84cd707b73.html (noting the Washington Attorney General's comments that the Ninth Circuit's order "could be applied to removing dams" in media commentary on the culvert case); Mike Pease & Christina White, *Conduit to Tribal and Environmental Justice? Unpacking Washington v. United States*, 45 ECOLOGY L. CURRENTS 202 (2019) (arguing that this decision "could have broader impacts for the legality of dams precluding safe fish passage"); Paul VanDevelder, *Supreme Court to States: Live Up to Your Treaty Obligations*, HIGH COUNTRY NEWS (June 28, 2018), https://www.hcn.org/articles/opinion-supreme-court-to-states-live-up-to-your-treaty-obligations ("[n]ow, the question no state wants to ask is how will future courts divine the difference between the culverts that stop fish from reaching their breeding beds, and all the dams that do the same thing?").

A. Federal Dams

Although suing the federal government to remove major dams appears to be a solid extension of *United States v. Washington*'s holding, ultimately, the risk of congressional or judicial reduction of tribal treaty rights is likely too great for the Tribes to pursue this action from such a culvert-specific holding.

On its face, dams seem similar to culverts in that there is ample scientific data supporting the significant salmon population benefits from dam removal. The NOAA salmon recovery plan highlights that dams "have been cited as a major factor affecting bull trout in the Olympic Peninsula and Puget Sound management units."[204] Dams are also known to reduce salmon genetic viability, damage downstream fish habitat, and reduce spring river flows salmon rely on to reach the ocean efficiently.[205] In particular, breaching the four Snake River dams would have an 80 to 100 percent probability of recovering endangered fall chinook salmon.[206] And, similar to culverts, a dam removal claim will have some historical support in arguing that tribal treaty rights require dam removal. Washington State law, which the Ninth Circuit noted prevents culverts from obstructing fish passage in streams, also references dams.[207]

But dams differ from culverts in one very important aspect: while culverts lack a constituency profiting from their existence, a strong constituency profits from and relies upon dams' electricity and irrigation benefits. The U.S. Army Corps of Engineers estimates that the cost of removing the lower Snake River dams is around $134 million in terms of lost irrigation.[208] While it may be more economically viable overall to remove the dams,[209] certain parties have a strong stake in keeping the dams. An example of the political power supporting the dams is illustrated in Congress's recent response to a district court order requiring increased water-spills over the Snake River dams.[210] A special U.S. House of Representatives hearing was held in Pasco, Washington to evaluate the

204. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 78.

205. *Id.* at 78; BLUMM, *supra* note 48, at 35.

206. Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355, 417 (2001). Recent studies also support the argument that lower Snake River dam removal would provide a greater overall economic benefit than keeping the dams in place. Jim Waddell, a former U.S. Army Corp of Engineers employee, noted that hydropower benefits had been overestimated and that heavily subsidized benefits to barges could be replaced by rail. He found that breaching the Snake River dams would be worth at least $158 million a year. Goldfarb, *supra* note 79.

207. *United States v. Washington*, 853 F.3d at 973 (noting that "Washington State law requires that a 'dam or other obstruction across or in a stream' be constructed in such as manner as to provide a 'durable and efficient fishway' allowing passage of salmon"). Some dams could be construed as allowing fish passage by having trucks transporting fish around the dam.

208. William K. Jaeger & Raymond Mikesell, *Increasing Streamflow to Sustain Salmon and Other Native Fish in the Pacific Northwest*, 20 CONTEMP. ECON. POL'Y 366, 367 (2002).

209. Goldfarb, *supra* note 79.

210. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803 (9th Cir. 2018) (affirming district court order requiring increased spills of Snake River dams to comply with the ESA).

need for congressional enactments to protect the economy dependent on the dam.[211] Judges will be wary of upholding a remedy like dam removal that results in such major economic consequences. Taking on federal dams in court will also mean confronting major political obstacles outside of court as well.

If there is one tribe that would be willing to take on the political risks of advocating for dam removal under their treaty fishing rights, it would be the Nez Perce Tribe, an Idaho tribe with a treaty containing a fishing clause identical to that in the Stevens Treaties.[212] The Nez Perce have rigorously fought for dam removal in the lower Snake River and refused to sign compromising agreements that limit signature tribes from bringing future dam litigation even though other tribes in the Columbia Basin agreed to sign.[213] The tribe's location on the river makes removal of the Lower Snake dams their best option for increased fish.[214]

Even if the Ninth Circuit found dams similar enough to culverts to hold that they violate a tribe's treaty rights, the court could use its equitable power in the remedy stage to stop dam removal if removal places unduly harsh results on those dependent on the dam.[215] Further, the U.S. Supreme Court may take up the issue as it did with culverts. As discussed in Part III, a U.S. Supreme Court decision is fraught with the potential for a narrowing interpretation of the fishing clause. Additionally, Congress could intervene and alter tribal fishing rights.[216] Given that Congress has already shown sympathy for those dependent on the Snake River dams,[217] this risk is likely too great. But under a future political scenario with greater sympathy towards tribal rights and dam removal, this litigation may become less perilous.

B. Shoreline Armoring

If the salmon harvests continue to decline, and the Tribes determine the risk to their treaty rights is necessary, a suit against Washington State's shoreline armoring policies would be a viable follow-up case to culvert removal. As highlighted earlier, the unaltered shoreline is critical for salmon migrating to the sea, with logjams, marsh plants, and eelgrass beds providing protection from

211. Oversight Hearing, *supra* note 93.

212. Article 3 of the Nez Perce Treaty grants the tribe the "right of taking fish at all usual and accustomed places in common with citizens of the territory." Nez Perce Treaty (1855), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5108216.pdf.

213. The agreements gave almost $1 billion over a decade to tribal and state fish projects. In exchange, the tribes were required to stop fighting the adequacy of the Bonneville Dam's biological opinion and not advocate for dam breaching or increased spill over dams in the future. Goldfarb, *supra* note 79.

214. The Nez Perce have access to better fish habitat given their location near national forests and wilderness areas. Thus, unlike for many other tribes downriver, dams are the largest issue tribes needed to address to improve salmon abundance. *Id.*

215. Wood, *supra* note 206, at 404.

216. *United States v. Washington*, 853 F.3d at 967.

217. Oversight Hearing, *supra* note 93.

predators and ample food supply.[218] Unfortunately, throughout the western Washington coast, structures made of materials like reinforced concrete[219] have been installed to halt coastal erosion's impact on property.[220] With shoreline protection comes a decrease in plant and animal species in nearshore areas.[221] Although Washington State passed the Shoreline Management Act to address shoreline alterations' impact on marine ecosystems,[222] shoreline armoring continues to be a major issue for salmon.[223]

Shoreline armoring has many similarities to barrier culverts; as a result, an argument based on *United States v. Washington* that armoring violates the Tribes' treaty rights may be successful. Just as the WSDOT and WDFW have analyzed the benefits of culvert removal,[224] Washington's Department of Ecology has already begun evaluating shoreline armoring's impact on salmon.[225] In a project funded by the Environmental Protection Agency through a cooperative agreement with the WDFW, researchers are studying the best way to protect and restore Puget Sound's shoreline.[226] Also, similar to governmental statements emphasizing the need to address barrier culverts,[227] both state and federal agencies view removal of shoreline armoring as a high priority.[228] Washington State's Department of Ecology has noted that "hundreds of miles of uninterrupted stretches of armored shoreline . . . have a major impact" on fish.[229] There is also a solution to armoring that will allow the state to protect shoreline development while removing harmful armoring, much like the WSDOT can use a new culvert design to allow roads to cross streams while also allowing salmon passage.[230] NOAA notes that the use of soft materials and native vegetation for shoreline stability rather than rock protects both the bank and nearshore habitat for young fish.[231]

218. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 37.

219. Amy Rodriguez, *The Best Materials for Seawalls*, SCIENCING (Apr. 25, 2017), https://sciencing.com/materials-seawalls-8673099.html.

220. St. of Wash. Dep't of Ecology, *Marine Shoreline Armoring and Puget Sound*, Feb. 5, 2010, https://fortress.wa.gov/ecy/publications/documents/1006003.pdf.

221. *Id.* at 3.

222. *Id.* at 4; WASH. REV. CODE § 90.58 (2018).

223. NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 73.

224. Brief for Pacific Coast Federation of Fishermen's Associations, *supra* note 16, at 45.

225. St. of Wash. Dep't of Ecology, *supra* note 220, at 6.

226. Christopher Dunagan, *Studies Point to Gap in Permits for Shoreline Armoring*, PUGET SOUND INSTITUTE, U. OF WASH. (Aug. 29, 2016), https://www.eopugetsound.org/magazine/armoring-permits.

227. Reilly, *supra* note 32; NAT'L MARINE FISHERIES SERV., PUGET SOUND SALMON RECOVERY PLAN, *supra* note 24, at 223.

228. St. of Wash. Dep't of Ecology, *supra* note 220, at 7.

229. *Id.* at 7.

230. Maria Dolan, *Seattle Seawall no Longer a Shore Thing*, SEATTLE MAGAZINE (Dec. 2016), https://www.seattlemag.com/seattle-seawalls-no-longer-shore-thing.

231. NAT'L OCEANIC & ATMOSPHERIC ADMIN., NEARSHORE HABITAT: HOW BANK ARMORING AND OVERWATER STRUCTURES SHAPE THE HEALTH OF PACIFIC SALMON AND STEELHEAD (2012), https://www.westcoast.fisheries.noaa.gov/publications/habitat/fact_sheets/nearshore_habitat.pdf.

Shoreline armoring still has some important distinctions from barrier culverts that leave room for a court to distinguish armoring from culverts and not require the state to alter its armoring practices. First, shoreline armoring has a stronger political constituency backing it than publicly owned culverts because armoring is often put into place to protect private land. Many individuals with million- and multi-million-dollar homes close to the water oppose reducing man-made armoring.[232] Second, the studies supporting barrier-culvert removal identified a predicted numerical increase in salmon from barrier-culvert removal.[233] Whether the Tribes can produce concrete data showing significant, increased salmon numbers from a certain amount of armoring removal may be important. The Ninth Circuit in *United States v. Washington* failed to indicate what numerical increase in salmon is needed to be considered significant enough for a treaty violation.[234]

A claim to force state funding for armoring removal may be similar enough to the culvert removal claim to be worth the risk for the Tribes. Even if a court is reluctant to force funding for armoring removal after the culvert holding, a court might still redress the harm by focusing on permitting requirements and permitting enforcement. Washington has failed to adequately protect shoreline ecosystems from man-made armoring due to insufficient funding and oversight of shoreline policies. A recent study revealed that much of Washington's shoreline armoring was not properly permitted under the state's Shoreline Management Act.[235] In King County, Washington's most populous county,[236] only 38 percent of shoreline armoring was properly permitted between 2012 and 2013.[237] The lack of required permitting is due to two causes: landowner unawareness of the issue and funding cuts in state enforcement positions.[238] In addition, as discussed in Part I, Washington State does not utilize its ability to oversee the adequacy of local shoreline plans that guide who may receive permits.[239] The State needs to take a more active role in ensuring local planning adequately considers and protects nearshore salmon habitat. The Tribes could bring suit to force the State to address these permitting deficiencies.

232. Dolan, *supra* note 230.

233. *United States v. Washington*, 853 F.3d at 972.

234. *See generally* 853 F.3d 972–75 (discussing why Washington's barrier culverts have a substantial adverse effect on salmon without defining a threshold for significance).

235. Dunagan, *supra* note 226.

236. Washington Counties by Population, Washington Demographics, https://www.washington-demographics.com/counties_by_population (last visited Feb. 6, 2019).

237. *Id.*

238. *Id.*

239. Van Cleve, *supra* note 25, at 89–90. The Shoreline Management Act has local jurisdictions manage land development, subject to state authority to object to the local government's plans. Although the state can refuse to approve shoreline master programs, the state has only ever refused to approve programs once. *Id.*

CONCLUSION

Despite *United States v. Washington*'s uncertain implications, the holding is still monumental in its affirmation that federal and state governments may not ignore the promises they made over a century ago by narrowly construing their treaty obligations. This holding will also result in more salmon for the Tribes, with the possibility to further increase salmon populations by holding the federal government accountable for its culverts. And it provides the Tribes with a tool, albeit a dull one, to address other habitat-depleting policies in the future if they so decide.