BORROWING INSTEAD OF TAKING: HOW THE SEEMINGLY OPPOSITE THREADS OF INDIAN TREATY RIGHTS AND PROPERTY RIGHTS ACTIVISM COULD INTERTWINE TO RESTORE SALMON TO THE RIVERS

BY
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This Article examines the nature of the right to fish that Indian tribes reserved in treaties with the United States Government, concluding that the exercise *of the treaty right to fish is a compensable Fifth Amendment property right. The Author discusses how hydroelectric dams have greatly contributed to the dwindling salmon runs, demonstrates the federal government's nexus to hydroelectric development and operation, and argues that the federal government owes Indian tribes just compensation for unconstitutionally preventing the tribes from fully exercising their property right to fish. The Author concludes this Article with a discussion of the difficulties in obtaining compensation and recommends possible remedies.*

I. INTRODUCTION

> In 1805, two white explorers on their way down the Columbia River passed by nearly 200,000 sockeye headed back to their spawning beds at Redfish Lake. By 1990, [those explorers] would multiply a million times over and the sockeye would become two. Today the tribes mourn the loss of our companions in nature who helped nurture our bodies, our minds and our spirit.[1]

Indian people rely on salmon for both subsistence and ceremonial use.[2] Over one hundred years ago, tribes in the Columbia River Basin signed what are now known as the Stevens Treaties.[3] In these treaties,

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1 Ted Strong, *A Single Plan, Not a Single Authority*, WANA CHINOOK TYMOO, Issues Two and Three 1995, at 2 (editorial by the Executive Director of CRITFC).

2 Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 664-66 (1979), *modified sub nom.* Washington v. United States, 444 U.S. 816 (1979).

3 The treaties all contain similar language. The tribes with fishing rights discussed in this Article include the Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, and Confederated

tribes exchanged vast areas of land for express provisions guaranteeing their tribal fishing:[4] "[T]he right of taking fish at all usual and accustomed places in common with citizens of the Territory."[5] The United States Supreme Court found that "the Indians were vitally interested in protecting their traditional fisheries and 'were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right.'"[6] As one court recognized,

> "[r]eligious rites were intended to insure the continual return of the salmon. . . . [S]easonal and geographic variations in the runs of the different species determined the movements of the largely nomadic tribes . . . [who] developed food-preservation techniques that enabled them to store fish . . . and to transport it over great distances."[7]

Tribes needed the fish not only for ceremonial and subsistence purposes, but also for trade with white settlers and for employment.[8] Non-Indians relied on Indian fishing because Indians caught most of the fish needed for food consumption and for export.[9] Now, however, Indians are no longer able to support even themselves through fishing. Instead, they must rely on their tribal enterprises and the federal government for the support of various economic and social programs.[10]

Tribes and Bands of the Yakama Indian Nation. These four tribal organizations come together under the Columbia River Inter-Tribal Fish Commission, which the tribes created in 1977 to formulate a broad general fisheries program designated to promote the conservation practices of its members. Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 788 & n.269 (1995).

[4] Gary D. Meyers, United States v. Washington (Phase II) *Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 OR. L. REV. 771, 776 (1988).

[5] Treaty with the Nez Perces, June 11, 1855, U.S.-Nez Perce Indians, art. III, para. 2, 12 Stat. 957, 958; *see also Commercial Passenger Fishing Vessel*, 443 U.S. at 674 (quoting similar language from the Treaty with Nisquallys (Treaty of Medicine Creek), Dec. 26, 1854, U.S.-Nisqually Indians, art. III, 10 Stat. 1132, 1133). These treaty rights have been confirmed by numerous federal court decisions. *See, e.g.*, United States v. Winans, 198 U.S. 371 (1905) (reinstating an action to enjoin obstruction of the Yakama Indians' treaty fishing rights on the Columbia River); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977) (declaring the necessity for specific congressional authority before a dam that would infringe treaty fishing rights could be constructed); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969), *aff'd*, United States v. Oregon, 529 F.2d 570 (9th Cir. 1976) (finding the State of Oregon limited in its ability to regulate Indians' fishing when the right to fish was secured by treaty).

[6] Meyers, *supra* note 4, at 776 (citing *Commercial Passenger Fishing Vessel*, 443 U.S. at 667).

[7] *Commercial Passenger Fishing Vessel*, 443 U.S. at 665-66.

[8] *Id.* at 665 nn.6-7.

[9] *Id.* at 665 n.7, 666 n.8.

[10] Laura Berg, *Tribes Release Salmon Restoration Plan*, WANA CHINOOK TYMOO, Issues Two and Three 1995, at 14 (indicating great salmon decline and restricted harvest by Indians). Through existing treaties and the federal trust responsibility, tribes get money from the federal government for support through the Bureau of Indian Affairs, and the federal government operates fish hatcheries to supplement existing stocks damaged because of hydroelectric dam construction and operation.

Fish losses in the rivers can be attributed mainly to the construction and operation of hydroelectric dams.[11] Fish experts attribute low fish populations and around ninety to ninety-five percent of fish mortalities to these dams.[12] At least twenty-seven dams clog the arteries of the mainstem Columbia River and the Snake River.[13] These dams were put into operation between 1901 and 1983, with most dams being constructed between 1932 and 1969.[14]

The fish, as well as treaty and non-treaty fishermen, often receive less priority than do inexpensive power concerns and the direct service industries who rely on the inexpensive power. As Ted Strong, Executive Director of Columbia River Inter-Tribal Fish Commission, explains, "the whining of turbines and tug boat engines get drowned out by the whining of peoples whose financial interests and motives make them blind and deaf to purposes higher than money."[15] The bottom line is that Indians are no longer able to catch the fish that they secured by treaty. Less than one million salmon now return to the Columbia River Basin, which is a fraction of what returns once were,[16] and in some areas, no fish return.[17] The tribal churches and long houses on the reservations and in territory ceded to the United States "rely on salmon for their religious services,"[18] but spring chinook salmon do not even return in great enough numbers for

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11 U.S. COMPTROLLER GENERAL, IMPACTS AND IMPLICATIONS OF THE NORTHWEST POWER BILL 20 (1979) (Rep. No. EMD-79-105) [hereinafter IMPACTS AND IMPLICATIONS]; Ellie Winninghoff, *Where Have All the Salmon Gone?*, FORBES, Nov. 21, 1994, at 104.

12 *E.g.*, Winninghoff, *supra* note 11, at 104 (quoting Oregon Department of Fish and Wildlife fish expert Douglas DeHart); *see also* Howard L. Raymond, *Effects of Hydroelectric Development and Fisheries Enhancement on Spring and Summer Chinook Salmon and Steelhead in the Columbia River Basin*, 8 N. AM. J. FISHERIES MGMT. 1, 16 (Winter 1988) (indicating that 15% of fish loss can be attributed to each dam for adult fish passage problems).

13 Map, *Mainstem Columbia and Snake River Dams*, WANA CHINOOK TYMOO, Issues Two and Three 1995, at 24 [hereinafter *Mainstem Dams*] (listing dams on the Columbia River and Snake River on a map of the Columbia River Basin). Over half of these dams lie within the Tribes' ceded area and all affect treaty fishing above Bonneville Dam. *Id.*; *see also* Michael C. Blumm, *Hydropower v. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources For a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211, 223 (1981) (stating that there are thirty federal dams in the Columbia Basin that make up the Federal Columbia River Power System).

14 Mainstem Dams, *supra* note 13, at 24.

15 Strong, *supra* note 1, at 2-3.

16 Berg, *supra* note 10, at 14; *see infra* text accompanying notes 44-48 (explaining numerical estimates of historic runs versus current runs).

17 One example is the fall chinook salmon that used to return in numbers upwards of 18,000 fish above the Hells Canyon Dam Complex in Idaho. A series of fish kills and mishaps at the dam complex contributed to the decline in the returning fall chinook such that no fish returned to spawn after 1973. Brief for the Nez Perce Tribe at 26, Nez Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994) (No. CIV91-0517-S-EIL) [hereinafter Nez Perce Brief].

18 1 COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, WY-KAN-USH-MI WA-KISH-WIT (SPIRIT OF THE SALMON): THE COLUMBIA RIVER ANADROMOUS FISH RESTORATION PLAN OF THE NEZ PERCE, UMATILLA, WARM SPRINGS, AND YAKAMA TRIBES 2-4 (1995) [hereinafter TRIBAL RESTORATION PLAN].

tribes to use in traditional ceremonies for the First Salmon Feasts.[19] Tribes have lost estimated billions of dollars in revenues from commercial fisheries and they fear the collapse of their cultures.[20] Additionally, "[t]ribal people still maintain a dietary preference for salmon and its role in ceremonial life remains preeminent. Salmon is important and necessary for physical health and for spiritual well-being."[21] Modern society has therefore made many Columbia River tribes much less self-sufficient and has created a terrific threat to the tribes' cultural identities.

The United States should find it in everyone's best interests to stop the salmon's decline so that overall economic impacts of decimated fisheries can be alleviated and so that Indians can work toward self-sufficiency. Scientists generally agree that saving salmon is "economically important and ecologically critical,"[22] yet the controversies surrounding the salmon's survival[23] may prevent salmon from ever being fully restored or from being restored to a sustainable extent where the tribes can fully enjoy their treaty rights.[24]

Because the federal government has contributed to and caused fish declines by operating and constructing federal hydroelectric projects and by licensing non-federal projects, and because the government guaranteed—by treaty—the Indians' rights to fish, the government may be liable to Indians through the Fifth Amendment property clause. Though the federal government has not expressly abrogated the right to fish, which it should not do, the federal government's actions to eliminate fish and inaction to restore fish have contributed to the destruction of the social and economic foundation of the treaty fishing right. No United States Supreme Court cases are directly on point for this problem, but applicable principles from federal Indian law, due process property cases, and takings law indicate that Indians could be compensated under the Fifth Amendment for the lost ability to exercise their rights to catch fish. The purpose of this Article is not necessarily to advocate that tribes bring Fifth Amendment claims at the risk of extinguishing treaty rights, but is instead to explore the issue in the context of private property rights activism to demonstrate an incentive for protecting tribal rights and natural resources as guaranteed by treaty. Indians sought to always have fish available to them, and made sacrifices in that pursuit. Takings law may persuade the federal government to be more serious about ensuring that Indians are able to fully and meaningfully exercise their treaty rights.

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[19] Berg, *supra* note 10, at 14 (noting that for the past two years, "ceremonial fishing had to be closed before longhouse crews could catch enough spring chinook for the First Salmon Feasts"); *see also Thin Salmon Run Darkens Tribal Feast, Spirit*, OREGONIAN, Apr. 7, 1995, at B1.

[20] Berg, *supra* note 10, at 15.

[21] TRIBAL RESTORATION PLAN, *supra* note 18, at 2-1.

[22] Videotape: The Role for Captive Breeding and Artificial Propagation (presentation by Dr. Soule given in Newport, Oregon on October 13, 1995) (on file with CRITFC).

[23] Controversy over saving fish is quite high because of the complexity of the issues and the number of government agencies and bodies involved. *Id.*

[24] Current government plans will not restore listed fish species to a level for delisting under the Endangered Species Act by even the year 2023. Berg, *supra* note 10, at 15.

Section II of this Article explains that the treaty right to take fish is a compensable Fifth Amendment property right and questions whether the *exercise* of that Fifth Amendment property right is included in the right itself. Section III explores the constitutional nature of exercising the treaty right to fish by looking into treaty rights and cases explaining those rights, and the ways to define the property and problems at issue. Section IV applies Fifth Amendment takings analysis to conclude that the government owes tribes compensation for unconstitutionally preventing the tribes from fully exercising their property right to fish, and Section V explores the problems associated with that compensation. Section VI concludes that tribes have a claim against the federal government for taking property without just compensation, which, from a policy standpoint, should induce the government to make stronger efforts to restore the salmon to the rivers.

II. THE TRIBES' FIFTH AMENDMENT RIGHT TO TAKE FISH

Treaty rights to take fish are property rights protected by the Fifth Amendment to the United States Constitution.[25] The Fifth Amendment provides, in part, "nor shall private property be taken for public use, without just compensation."[26] The United States Supreme Court first construed treaty rights as property rights in *Menominee Tribe of Indians v. United States*.[27] In *Menominee*, the Tribe sued the United States for damages for lost treaty hunting and fishing rights on reservation.[28] The issue in the case turned on whether Congress, by passing the Menominee Termination Act of 1954,[29] abrogated tribal treaty rights.[30] The Court held that Congress had not abrogated the Tribe's rights.[31] The importance of the *Menominee* case lies in the Court's analysis of Congress' role in abrogating treaty rights and the consequences of such abrogation.

Only Congress has the power to abrogate treaty rights,[32] but abrogation requires compensation.[33] In *Menominee*, the majority explained, "[w]e find it difficult to believe that Congress . . . would subject the United States to a claim for compensation by destroying property rights conferred

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[25] Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968); *see also* Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510, 1512 (W.D. Wash. 1988) (citing *Menominee* for construing treaty rights as Fifth Amendment property rights); United States v. Adair, 723 F.2d 1394, 1412 (9th Cir. 1983) (finding that tribal water rights reserved by treaty were not terminated).

[26] U.S. CONST. amend. V. One immediate distinction is between Indian rights to "take" fish and unconstitutional "takings" when the government makes use of another's property for public purposes without compensating that person or entity.

[27] 391 U.S. 404, 412 (1968).

[28] *Id.* at 407.

[29] 25 U.S.C. §§ 891-902 (repealed 1973).

[30] *Menominee*, 391 U.S. at 407.

[31] *Id.* at 407, 412.

[32] Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1512 (W.D. Wash. 1988) (holding "that the treaty right is a property right which may not be abrogated without specific and express Congressional authority").

[33] *Menominee*, 391 U.S. at 412-13.

by treaty."[34] The dissent also linked treaty rights to property rights and compensation: "The 1954 Termination Act, by subjecting the Menominees without exception to state law, took away those rights. The Menominees are entitled to compensation."[35] Both the majority and the dissent therefore agreed that paying compensation for lost treaty rights is justified when Congress abrogates those rights.

The problem that arises in the Columbia River Basin, though, does not involve explicit abrogation of the treaties.[36] Congress has not expressly legislated an outright termination of treaty fishing rights. However, government action through dam licensing, construction, and operation, including turbine mortalities and related in-stream flow problems, interferes with treaty and also non-treaty fishing abilities. "Turbine mortalities" refers to the deaths dams cause when smolts, which are young salmon migrating downstream, unsuccessfully try to negotiate through a dam's turbines in order to continue their downstream migration.[37] Spilling water over the dams, installing fish screens to divert smolts from making their way into the turbines, and loading the smolts onto barges or trucks to avoid the turbines have been traditional attempts to reduce turbine mortalities. The success of such methods, however, is debatable.[38] Dams cause in-stream flow problems that result from "seasonal flow manipulations to maximize hydropower production."[39] The slackwater pools that develop behind dams create other problems, such as slowed smolt migration and related predation by other fish, birds, and mammals. The pools also increase water temperatures, which often kills adult migrating salmon, and the slower velocities confuse migrating adults trying to locate their natal streams.[40] Dams are also known to cause mass deaths of fish in spontaneous accidents called fish kills.[41] These serious problems for fish survival directly affect everyone's ability to catch fish.

One specific example of government interference with treaty fishing through dam construction and operation is the situation involving the Hells Canyon Hydroelectric Dam Complex.[42] Dam construction and im-

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[34] *Id.* at 413 (footnote omitted).

[35] *Id.* at 417 (Stewart and Black, JJ., dissenting).

[36] Likewise, Congress has not implicitly abrogated the treaty rights because the three part test set out by the United States Supreme Court in *United States v. Dion*, 476 U.S. 734 (1986) is not met. The test requires 1) clear evidence, 2) Congressional consideration of laws and actions taken with treaty rights, and 3) the congressional choice to remedy the conflict by abrogating treaty rights. *Id.* at 739-40. The test focuses on clear congressional intent to abrogate, which does not exist in the treaty fishing context.

[37] *See generally* Blumm, *supra* note 13, at 218-20 (discussing turbine mortalities and the barrier that dams pose to migrating fish).

[38] *Id.*

[39] *Id.* at 220.

[40] U.S. FISH & WILDLIFE SERVICE-PACIFIC REGION, THE PACIFIC SALMON LIFE CYCLE (1994).

[41] McNary Dam suffered one of these accidents in 1994. Robin Kundis Craig, *Of Fish, Federal Dams, and State Protections: A State's Options Against the Federal Government Dam-Related Fish Kills on the Columbia River*, 26 ENVTL. L. 355, 358-59 (1996).

[42] The complex consists of three dams on the Snake River, which are in Oregon but near the Idaho border: Brownlee Dam, Hells Canyon Dam, and Oxbow Dam. For information on the fish kills at this dam complex, see Nez Perce Brief, *supra* note 17, at 12-25.

proper operation killed thousands of fish, causing upwards of eighteen thousand returning salmon to dwindle to zero and completely eliminating the Nez Perce Tribe's ability to exercise their treaty rights to fish at the usual and accustomed grounds above the dam complex.[43]

In other areas of the Columbia River Basin, many runs are listed as endangered or threatened under the Endangered Species Act,[44] and only a fraction of the historic salmon runs remain.[45] These historic salmon runs have been estimated at between 12 million and 16 million fish,[46] while recent studies show less than 900,000 fish returning to spawn in the entire Columbia River Basin.[47] Estimates of historic returns above Bonneville Dam, which is where tribes have their fisheries, dropped from an annual average of 7.4 to 12.5 million to 600,000, with over half of those being produced in hatcheries.[48]

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[43] *Id.* at 26 ("All of the anadromous fish which once spawned above the Hells Canyon dams are now extinct.").

[44] 16 U.S.C. §§ 1531-1543 (1994). Fall, spring, and summer chinook salmon in the mainstem of the Snake River and some sub-basins were listed as threatened in September, 1993. 50 C.F.R. § 17.11 (1996). Sockeye in the Snake River were listed as endangered in 1991-92. *Id.* On February 26, 1998, the National Marine Fisheries Service (NMFS) announced its proposal to list thirteen salmon populations along the West Coast, ranging from sockeye in a small lake in the Olympic Peninsula, to spring chinook in urban Puget Sound, to fall chinook in the Snake River. 63 Fed. Reg. 11,482 (Mar. 9, 1998); *see also*, National Marine Fisheries Service, Proposals to Protect 13 Salmon, Steelhead Populations on West Coast (visited June 13, 1998) <http://www.nwr.noaa.gov/1press/022698_1.htm>. The proposal would list two chinook sub-populations as endangered and five as threatened. 63 Fed. Reg. 11,482 (Mar. 9, 1998). A final listing is expected sometime in 1999. National Marine Fisheries Service, Proposals to Protect 13 Salmon, Steelhead Populations on West Coast (Feb. 26, 1998) (visited June 13, 1998) <http://www.nwr.noaa.gov/1press/022698_1.htm>. NMFS also recently listed two subpopulations of steelhead in California, Oregon and Washington as threatened and had listed other steelhead sub-populations as threatened or endangered in August, 1997. National Marine Fisheries Service, Federal Endangered Species Act Listing for Two West Coast Steelhead Populations; California, Oregon Plans Will Protect Three Others (visited June 13, 1998) <http://www.nwr.noaa.gov/1press/031398_1.htm>. The range of listed anadromous fish species in the Pacific Northwest is therefore extensive.

[45] PACIFIC NORTHWEST REGIONAL COMMISSION, COLUMBIA BASIN SALMON AND STEELHEAD ANALYSIS 12 (1976). Indians had established fisheries when explorers first came through the region, and historic commercial fisheries caught 30-40 million pounds of salmon per year between 1866 and 1940. *Id.* at 1. Commercial fisheries were bringing in less than 3.5 million pounds by 1979. Peter C. Monson, United States v. Washington (Phase II): *The Indian Fishing Conflict Moves Upstream*, 12 ENVTL. L. 469, 474 (1982). Indian fishermen are also unable now to catch enough fish for basic ceremonies. Berg, *supra* note 10, at 14.

[46] NORTHWEST POWER PLANNING COUNCIL, COMPILATION OF INFORMATION ON SALMON AND STEELHEAD LOSSES IN THE COLUMBIA RIVER BASIN 51 tbl.5 (1985) [hereinafter NPPC COMPILATION] (listing estimates of run sizes).

[47] OREGON DEP'T OF FISH AND WILDLIFE & WASHINGTON DEP'T OF FISH AND WILDLIFE, STATUS REPORT: COLUMBIA RIVER FISH RUNS AND FISHERIES 1938-94, at 95 tbl.1 (1995) [hereinafter STATUS REPORT]. Spring chinook returned in numbers upwards of two million around 1880, but declined between 1921 and 1973 and have not since recovered. *Id.* at 25. Summer chinook, which are extremely hefty fish, were caught by fishermen at about two million fish per year, but have not been targeted for catch since 1965. *Id.* at 26. Fall chinook began their population decline coincident with hydropower development, and owe their current status to hatchery production. *Id.* at 27.

[48] TRIBAL RESTORATION PLAN, *supra* note 18, at 3-1.

Although overfishing, logging, grazing, mining, irrigation, and other causes have contributed to the salmon's decline,[49] government dams and government licensed dams have caused and continue to cause the most damage to fish populations.[50] At least one commentator agrees that "[h]ydropower development, most of it federally financed and all of it federally approved, has been a major culprit in destroying anadromous fish habitat."[51] Therefore, while Indians still possess a *right* to fish, government action does not allow treaty tribes to actually *exercise* the right to fish because too few salmon return to treaty fishing grounds.

One recent example involves a federal request that tribes further reduce their fall harvest in order to address dwindling runs of steelhead listed under the Endangered Species Act.[52] The tribes had already voluntarily cut back their harvest over the last five years in an effort to increase steelhead escapement to the spawning grounds.[53] Nevertheless, the National Marine Fisheries Service requested that tribes further cut back their fall fishery to what would amount to only a minute fraction of what the treaties require.[54] At the same time, the National Marine Fisheries Service's Supplemental Biological Opinion for steelhead fails to make any significant changes in the Federal Columbia River Power System to address mortalities caused by the hydroelectric dams.[55] The tribes, who heavily rely on their fall season fishery for food throughout the rest of the year and for necessary monetary income, are therefore being asked to further limit the exercise of their treaty rights to catch fish while the federal gov-

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[49] IMPACTS AND IMPLICATIONS, *supra* note 11, at app. IV.2; NPPC COMPILATION, *supra* note 46, at 81-90 (summarizing fishing impacts), 122-28 (summarizing logging impacts), 130-36 (summarizing mining impacts), 137-40 (summarizing grazing impacts), 141-45 (summarizing agricultural impacts), 145-63 (summarizing irrigation impacts), and 164-72 (summarizing pollution and urbanization-related impacts).

[50] Winninghoff, *supra* note 11, at 104; NPPC COMPILATION, *supra* note 46, at 120.

[51] DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 897 (3d ed. 1993); *see also* Blumm, *supra* note 13, at 213; Michael C. Blumm & Andy Simrin, *The Unraveling of the Parity Promise: Hydropower, Salmon, and Endangered Species in the Columbia Basin*, 21 ENVTL. L. 657, 702 (1991).

[52] Letter from William Stelle Jr., Regional Administrator, National Marine Fisheries Service, to Sam Penny, Chair, Nez Perce Tribe (Apr. 6, 1998) (on file with author).

[53] *Id.* In fact, from 1977 to 1982, the tribes voluntarily relinquished all direct commercial steelhead harvest in return for promises of rebuilt runs. Five Year Plan For Managing Fisheries on Stocks Originating From the Columbia River and its Tributaries Above Bonneville Dam, Exhibit A at 9 (1977); *see also* OREGON DEPARTMENT OF FISH AND WILDLIFE & WASHINGTON DEPARTMENT OF FISHERIES, COLUMBIA RIVER FISH RUNS AND FISHERIES 1960-85, at 25 (1986).

[54] Letter from William Stelle Jr., *supra* note 52. CRITFC biologists estimate that the National Marine Fisheries Service's request could close the tribes' last remaining Tribal commercial fishery. COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, SUMMARY OF 1998 FALL SEASON MODELLING ASSIGNMENTS (Apr. 16, 1998) (showing that a five percent restriction on steelhead limits tribes to a two percent share of harvestable chinook and allows no commercial season on steelhead) (on file with author).

[55] *See generally*, NATIONAL MARINE FISHERIES SERVICE ET AL., SUPPLEMENTAL BIOLOGICAL OPINION: OPERATION OF THE FEDERAL COLUMBIA RIVER POWER SYSTEM INCLUDING SMOLT MONITORING PROGRAM AND THE JUVENILE FISH TRANSPORTATION PROGRAM, DURING 1998 AND FUTURE YEARS (1998).

ernment fails to take adequate measures at hydroelectric projects that would rebuild fish populations to sustainable harvestable levels. As fewer fish return to traditional fishing grounds, tribes are not able to catch enough fish for subsistence and ceremonial use, let alone commercial income.[56] The treaty right is therefore not as "valuable" in terms of number of fish available as it was when acquired; and for some tribes, where salmon no longer return at all, the right, while still extant, is worthless.

Government action of this sort is akin to a regulatory taking because government regulation of hydroelectric dams is responsible for devaluing the treaty right.[57] The first step in affirming such a conclusion is to decide whether the Fifth Amendment property right is the treaty right itself and whether it includes *exercising* the treaty right. Then, if the *exercise* of the property right is of a constitutional nature which would give rise to a takings claim in violation of the Fifth Amendment, the next step is to determine whether a taking has indeed occurred. The following sections explore these inquiries.

III. THE CONSTITUTIONAL NATURE OF EXERCISING THE TREATY RIGHT TO FISH

The key to viewing the treaty fishing right as constitutionally protected property is to understand that the property is the treaty right itself,[58] which necessarily includes the exercise or use of the property.[59] Because exercise of a fishing right requires fish for the catching, the elimination of the fish eliminates the ability to put the property right to use and to enjoy the benefits of the ownership. Analogizing the treaty right to an easement,[60] to land,[61] and to non-treaty fishing situations[62] provides support for characterizing the ability to exercise treaty rights as being of a constitutional nature. The tribes' lost ability to exercise their treaty rights could therefore give rise to a takings claim under the Fifth Amendment property clause.

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56 The fall fishery is the last commercially viable fishery left for the tribes. They voluntarily closed their summer chinook fishery in 1964, TRIBAL RESTORATION PLAN, *supra* note 18 tbl. 2.1 at 2-8, and their spring chinook fishery in 1977, *id.* at 2-10. Their last targeted sockeye fishery was in 1988. OREGON DEPARTMENT OF FISH AND WILDLIFE AND WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, STATUS REPORT: COLUMBIA RIVER FISH RUNS AND FISHERIES 1983-94, at 68 (1995). Meanwhile, dam-related mortalities on all of these stocks has continued.

57 A regulatory taking involves situations where government regulation denies "all economically beneficial or productive use" of property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). Though an argument could be made that fish destruction is an outright taking, the argument for compensation is weak because no one has a property right in the wild fish themselves. Hughes v. Oklahoma, 441 U.S. 322, 334-36 (1979). A regulatory taking is the proper analysis for fish destruction takings analysis because hydroelectric dams are constructed, operated and licensed pursuant to federal regulatory agencies under Congress. *See* Getches, *supra* note 51, at 897.

58 *See infra* Part III.A.

59 *See infra* Part III.B.

60 *See infra* Part III.C.1.

61 *See infra* Part III.C.2.

62 *See infra* Part III.D.

A. The Constitutional Nature of the Property Focuses on the Property Right to Catch Fish Rather Than on Property Rights in Fish

Though the *Menominee* court construed loss of treaty fishing as a compensable property right, the exact question of "what is the property?" is not explicitly clear in the case law. One could arguably construe the property as either the treaty right itself or as the fish, but a fundamental difference exists between these two constructions. Compensation for the lost treaty right would involve a lost ability to exercise the right such that a value would need to be placed on the right itself in order to know what and how much the compensation should be.

Compensation for lost fish, on the other hand, would depend on establishing an ownership right in the fish, the approximate number of fish lost, and the value of each of those fish. There is thereby a distinction between owning the fish and exercising the right to take the fish. Though arguments about property rights in the fish themselves may be made, the correct focus for Fifth Amendment purposes is on the treaty right to take fish.[63] In *Menominee*, the Supreme Court could not have meant the fish to be the property because precedent dictates that no one owns wild fish.[64] Therefore, if one were to consider the property as the fish, the Court's interpretation that the loss of the property triggers Fifth Amendment compensation would be senseless. For the purposes of *Menominee*, therefore, the Court must have regarded the treaty right itself as the property.

Focusing on the treaty right as the property, rather than on the fish, also corresponds with the treaties themselves. Because "the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted,"[65] the tribes retained as consideration, in exchange for ceding their lands, the ability to exercise the right to catch fish.[66] This right is not a mere usufructuary right because it was obtained

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[63] One court that directly considered the different ways to approach the nature of the property right is the district court of Idaho. In *Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791 (D. Idaho 1994), the Tribe sought damages for destruction of their treaty fishing right because the fish runs were completely decimated. The district court focused on the concept that "the tribes do not own the fish," *id.* at 795, despite no arguments by the Tribes about fish ownership. Consistent with the Tribe's argument and inconsistent with its own construction of the property right, the court did admit that the Tribes own "an opportunity to exploit [the fish runs]." *Id.* at 796. In order to be consistent with the Supreme Court's implied treatment of the right as the property, the district court should have focused on the ownership of the treaty right as the property—not the fish. The Nez Perce Tribe appealed to the Ninth Circuit, but is currently working out a $16.5 million settlement to its claim with Idaho Power such that no definitive answer will come from the higher court. *Idaho Power Agrees to Pay $16.5 Million to Nez Perce Tribe*, OREGONIAN, Mar. 17, 1996, at D2.

[64] Hughes v. Oklahoma, 441 U.S. 322, 334-36 (1979).

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

[66] As one court explained, if the right to catch fish did not include hatchery fish such that very few wild fish could be caught, "the Indians' treaty secured right to an adequate supply of fish—the right they traded millions of acres of valuable land and resources—would be placed in jeopardy . . . the paramount purpose of the treaties would be subverted." United States v. Washington (Phase II), 506 F. Supp. 187, 198-99 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 759 F.2d 1353 (9th Cir. 1985).

as property in exchange for ceding lands to the United States[67] and is not akin to a revocable permit, such as a grazing permit that allows private use of federal, public property.[68] The tribes could not retain or reserve ownership of the fish because the situation is such that no one owns the fish.[69] Therefore, if one were to find that the tribes' consideration for ceding their lands was the fish rather than the ability to catch fish, then the consideration would have been meaningless. One court has stated that "[because] wild animals such as fish are the property of no one until reduced to possession . . . the *res* is the property right consisting of the *opportunity to take* the fish."[70] In order for the treaties to be meaningful, the tribes' consideration in the treaties must therefore be the property right to catch fish; what the tribes retained is the right to fish at their usual and accustomed fishing grounds. Therefore, the nature of the property focuses not on the wild fish, but on the *treaty right* to the fish.

B. The Property Right Is a Right to Catch Fish

Indian treaty rights hold special meaning when interpreted by courts of law. Treaties "confer enforceable special benefits on signatory Indian tribes,"[71] and justification for these special benefits rests on the "constitutionally recognized status of Indians."[72] Tribes believed that they secured their access to fish and the protection of their food source forever.[73] Furthermore, the actual ability to catch fish and the federal government's obligation to protect the Indians' food source forever are both part of the compensation given to Indians for ceding millions of acres of land to the United States:[74] "[I]t is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish."[75] Having no fish in the rivers hardly compensates the treaty tribes for what they gave up in the treaties.

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[67] *See* H. Barry Holt, *Can Indians Hunt in National Parks? Determinable Indian Treaty Rights and* United States v. Hicks, 16 ENVTL. L. 207, 230-40 (1986) (discussing the extent of the property right that Indians reserved in treaties).

[68] Acton v. United States, 401 F.2d 896, 899 (9th Cir. 1968) ("Grazing permits create no interest or estate in public lands, only a privilege which may be withdrawn. No property rights accrue to the licensee upon revocation which are compensable in condemnation.").

[69] The tribes *reserved* the *right* to fish. United States v. Winans, 198 U.S. 371, 381 (1905); Monson, *supra* note 45, at 477; *see also* Hughes v. Oklahoma, 441 U.S. 322, 334-36 (1979) (stating that wild animals such as fish are owned by no one until they are reduced to possession).

[70] United States v. Crookshanks, 441 F. Supp. 268, 270 (D. Or. 1977).

[71] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979), *modified sub nom.*, Washington v. United States, 444 U.S. 816 (1979) (citing Tulee v. Washington, 315 U.S. 681 (1942)).

[72] *Id.*

[73] Brief of Amicus Curiae Confederated Tribes of the Umatilla Indian Reservation at 5-6, Nez Perce Tribe v. Idaho Power Company (9th Cir. 1995) (No. 94-36237) (citing Sohappy v. Smith, 302 F. Supp. 899, 906 (D. Or. 1969)).

[74] *Commercial Passenger Fishing Vessel*, 443 U.S. at 676-77; Meyers, *supra* note 4, at 774.

[75] *Commercial Passenger Fishing Vessel*, 443 U.S. at 676.

Special canons of construction apply to the interpretation of Indian treaties and to understanding Indian land and title questions. First, courts are to construe treaties liberally to favor the Indian tribes.[76] Courts also construe treaty language "not according to the technical meaning of its words . . . but in the sense in which they would naturally be understood by the Indians."[77] Ambiguous terms are to be construed in favor of the tribes.[78] In addition, courts recognize that the United States must not take advantage of Indians[79] and that treaty tribes "share[ ] a vital and unifying dependence on anadromous fish,"[80] relying on the United States to protect their rights to fish.[81] Favorable interpretation of treaty rights therefore proscribes that the tribes expected their treaty rights to forever provide them with the fish they need for ceremonial, commercial, and subsistence needs.

In *Washington v. Washington State Commercial Passenger Fishing Vessel*,[82] the United States Supreme Court recognized the link between treaty rights and the tribes' continuing expectations for fish.[83] *Passenger Fishing Vessel* interpreted treaty rights to provide treaty tribes with a right to harvest a portion of the fish passing through usual and accustomed sites— a right to more than a mere opportunity to compete with non-treaty fishermen.[84] The Indians' harvestable portion is roughly fifty percent of the fish.[85] Harvesting fish, of course, depends on fish being in the river to harvest. Likewise, the Court asserted that "[b]ecause the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a 'reservation' of that right as merely the chance . . . occasionally to dip their nets into the territorial waters."[86] Because the Court construed the treaty right as a right to *catch* fish, guaranteed by access to usual and accustomed fishing sites,[87] fish are necessary in order for the right to be meaningful. As one lower court observed, the "most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[88] The property thereby includes exercising the ability to catch fish,

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76 Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

77 Jones v. Meehan, 175 U.S. 1, 11 (1899); *see also Commercial Passenger Fishing Vessel*, 443 U.S. at 676 (citing the *Meehan* Court and reiterating the rule that treaties should be interpreted broadly in favor of the Indians); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (also citing the *Meehan* Court and relying on the same rule of interpretation).

78 McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

79 *See, e.g., Commercial Passenger Fishing Vessel*, 443 U.S. at 676.

80 *Id.* at 664.

81 *Id.* at 665-66 & n.7, 667; *see also id.* at 676 (explaining that "the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent").

82 443 U.S. 658 (1979).

83 *Id.* at 685-86.

84 *Id.* at 684-85.

85 *Id.* at 685-86.

86 *Id.* at 678-79.

87 *Id.* at 675.

88 United States v. Washington (Phase II), 506 F. Supp. 187, 203 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 759 F.2d 1353 (9th Cir. 1985).

which depends on the availability of the fish in the rivers. In other words, the tribes' property is a treaty right that includes the exercise of that right.

C. Avenues for Considering the Nature of the Property as Constitutionally Protected

Before applying takings analysis to treaty fishing, the question that must first be answered is whether the exercise of the treaty right is of a constitutional nature so as to give rise to a takings claim under the Fifth Amendment. Treaty fishing rights do not appear to fit neatly into existing constitutional types of property. However, understanding that the treaty right to catch fish is recognized title rather than aboriginal title and analogizing the treaty rights to either an easement or to land indicate that the Indians' exercise of the property right to fish is indeed of a constitutional nature, and should be protected by the Fifth Amendment.

1. Recognized Title and Treaty Rights to Catch Fish

Under the special constraints of Indian law, recognized title is compensable under the Fifth Amendment when taken, but aboriginal title is not.[89] Aboriginal title refers to Indian title to land and is based on Indian claims to land occupied after white settlement.[90] Aboriginal title is a mere possessory interest and is not regarded as ownership.[91] Recognized title, on the other hand, refers to rights recognized by Congress, such as rights reserved by treaty,[92] and can include treaty hunting, fishing, and gathering rights.[93] Because the tribes have recognized title in the treaty right to take fish, government interference with such title should be compensable under the Fifth Amendment. Courts have not specifically determined whether recognized title extends to the exercise of the treaty right so as to include the inability to catch fish. However, such an extension naturally follows because the exercise of the treaty rights is necessarily included in order for the treaty rights to remain meaningful.

Courts have not been afraid to find that the use of property is significantly tied to that property as to be a part of the property for compensation purposes. In *United States v. Shoshone Tribe of Indians*,[94] the issue was whether the land reservation and treaty included ownership of timber and minerals such that the timber and minerals could be harvested.[95] The

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89 Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-89 (1955) (finding that the Indians merely held aboriginal title and thus were not entitled to compensation for timber taken by the U.S. government).

90 *Id.* at 279.

91 *Id.*

92 *Id.* at 277-78.

93 *Id*; *see also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 404-06 (1968) (finding that the Indians' treaty rights included hunting and fishing even though the treaty itself was not explicit); Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510-11 (W.D. Wash. 1988) (finding that fishing rights guaranteed by treaty are a compensable property right). The idea is that the treaty rights contain compensable interests.

94 304 U.S. 111 (1938).

95 *Id.* at 113.

Court examined the treaty and construed its intent rather broadly to find that the minerals and timber are "constituent elements of the land itself" as related to the Tribe's property interest in the land,[96] and that the Tribe's right to the timber and minerals is no less protected than fee simple absolute title.[97] Thus, government appropriation of the timber and minerals required compensation under the Fifth Amendment.[98]

Just as the Court found the harvest of timber and minerals to be an integral part of the Shoshone Tribe's recognized title, the harvest of fish is an integral part of the recognized title owned by treaty fishing tribes. Catching fish is a constituent element of the treaty right to take fish. Following the logic in *Shoshone Tribe*, therefore, the exercise of the treaty fishing right should be compensable once taken. Analogies to easements and land further clarify that a government-caused inability to exercise treaty fishing rights is constitutionally compensable as a taking.

2. *Exercising the Indians' Property Rights to Fish: Same as an Easement*

Though a court has not done so, protecting treaty fishing rights by analogizing them to an easement is not a new suggestion. For example, one commentator, Gary D. Meyers, believes that "[t]he rights reserved in various treaties by the tribes meet all of the formal requirements for creation of an appurtenant servitude."[99] The servitude of which Meyers writes is a *profit à prendre*, which is essentially an easement that allows the easement owner to remove a product or products from the servient estate.[100] The right to take fish out of water owned by another, like that which the Indians do under their treaty rights, is just such an easement.[101] Meyers explains that the "right to fish is appurtenant to the estates [usual and accustomed sites] retained by the grantors [tribes] because these rights touch and concern the retained land or benefit the purposes for which the reservations were established."[102] Additionally, Meyers notes that the Supreme Court, in *Passenger Fishing Vessel*, treats the "language securing to the tribes the right to take fish [a]s synonymous with reserving previously exercised rights."[103] Considering these arguments, Meyers' suggestion that treaty fishing rights are no different than easements is plausible for Fifth Amendment analysis.

At least one court has applied the easement analogy to similar rights, those being non-treaty hunting rights, which lends support to Meyers' application of the easement analogy to treaty fishing. In *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*,[104] the Wisconsin Supreme Court

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96 *Id.* at 116.
97 *Id.* at 117.
98 *Id.* at 118.
99 Meyers, *supra* note 4, at 787.
100 *Id.* at 783.
101 *Id.* (citing Isherwood v. Salene, 61 Or. 572, 574 (1912)).
102 Meyers, *supra* note 4, at 787.
103 *Id.* at 788.
104 516 N.W.2d 410 (Wis. 1994).

examined whether the Club's hunting rights on land owned by the Figliuzzis constituted an easement.[105] The court noted that hunting rights on another's land are regarded as a *profit à prendre*, which courts do not generally distinguish from easements.[106] Because the Figliuzzis' proposal for developing their land would essentially destroy the Club's easement, the court prohibited the development.[107] Treaty fishing rights, for all essential purposes, do not differ from the non-treaty hunting rights in *Figliuzzi*. Like the non-treaty hunters, treaty fishermen have the right to remove a product from property, namely the river, that does not directly belong to them. Treaty fishing rights, under the doctrine of *profit à prendre*, could therefore be considered the same as an easement.

Courts do not allow unreasonable interference with the use of an easement.[108] Furthermore, easement holders are entitled to compensation under the Fifth Amendment when the easement is extinguished by the government.[109] If one considers treaty fishing rights to be an easement under Meyers' *profit à prendre* analysis or under that of the Wisconsin Supreme Court in *Figliuzzi*, the issue of whether the federal government unreasonably interfered with or extinguished the tribes' easement would be reviewable under the Fifth Amendment. Viewing the treaty fishing right as an easement therefore demonstrates that the right to catch fish is property that is constitutionally protected.

3. Exercising the Indians' Property Rights to Fish: Same as Land

Another way to look at the exercise of the treaty fishing right as being constitutionally protected property is to view the right no differently than land. In *Passenger Fishing Vessel*, for example, the Supreme Court likened treaty fishing to cultivating crops.[110] Additionally, the treaty right to take fish may be conveyed,[111] just as land is capable of conveyance. Viewing the exercise of treaty fishing rights no differently from land ultimately involves the *use* of the property because the property is the right itself and

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105 *Id.* at 412.

106 *Id.*

107 *Id.* at 417-18.

108 *See, e.g.*, Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners, 737 F. Supp. 903, 909 (E.D. Va. 1990), *aff'd*, 991 F.2d 1169 (4th Cir. 1993) (finding that installation of cable on an easement was impermissible notwithstanding the existence of a blanket utility easement in the master deed); Mid-America Pipeline Co. v. Lario Enterprises, Inc., 942 F.2d 1519, 1530 (10th Cir. 1991) (finding construction of a racetrack over a pipeline and its easement was a material interference with that easement).

109 *See, e.g.*, United States v. Gossler, 60 F. Supp. 971, 975 (D. Or. 1945) (finding condemnation destroyed a compensable interest in land); United States v. 10.0 Acres, 533 F.2d 1092, 1095 (9th Cir. 1976) (finding the loss of an exclusive easement in a road was a compensable loss of a property right). Extinguishing the right or easement would not necessarily require complete elimination in order to rise to the level of a taking; diminishment that makes the right valueless is potentially a taking. *See infra* Part IV.A.1.

110 Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 663 (1979), *modified*, Washington v. United States, 444 U.S. 816 (1979).

111 Meyers, *supra* note 4, at 787 (citing Bingham v. Salene, 14 P. 523, 524 (Or. 1887)). Exactly who may convey the right and to whom it may be conveyed is not yet determined.

the use is catching fish. When a landowner retains land but is prevented from using it, the Fifth Amendment prohibition of uncompensated government takings allows a claim.[112] Likewise, if Indians retain the treaty right but are prevented from putting it to use because the fisheries have been decimated, the inability to use the property should also give rise to a takings claim under the Fifth Amendment. Viewing the treaty right as analogous to land therefore characterizes the right as being constitutionally protected property. Due process property and takings cases further support this conclusion.

a. Government Interference With Property Use: United States v. Causby

Governmental interference with property use is one part of the analysis. In *United States v. Causby*,[113] the United States Supreme Court examined whether the United States, by flying aircraft over a residential home and chicken farm, committed a taking compensable under the Fifth Amendment.[114] The Court focused on the *use* of the property.[115] The Causbys had to forgo their chicken farming business because the government flew aircraft low enough to almost brush the trees in their yard. The planes also brightly lit up the property and generated excessive noise, thereby causing chicken mortalities and reducing chicken production.[116] The Court considered the low flights to be easements over the property.[117] The Court declared, "[t]he result was the destruction of the *use* of the property as a commercial chicken farm."[118] Though the Court could not decide on the facts whether the easement was permanent, and thus whether a taking had occurred, the Court's analysis was that a deprivation of the property's use resulting from the government's destruction of the "beneficial ownership" is a taking.[119]

Indian treaty fishing, when tribes cannot catch adequate amounts of fish to meet their needs because of declining salmon runs, is similar to the Causbys' lost use of their chicken farm. Just as the government deprived the Causbys of the use of their property by destroying the beneficial ownership of property, tribes cannot make use of their property because hydroelectric dams have essentially destroyed the beneficial ownership of treaty fishing rights. Without fish, the treaty right is meaningless.[120] Fur-

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[112] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (finding that a statute which prohibits a landowner from building on the property may be a taking); United States v. Causby, 328 U.S. 256 (1946) (finding that low flying planes which prevented use of the land as a chicken farm may be an easement).

[113] 328 U.S. 256 (1946).

[114] *Id.* at 258-59.

[115] *Id.* at 259.

[116] *Id.*

[117] *Id.* at 261-62.

[118] *Id.* at 259 (emphasis added).

[119] *Id.* at 262.

[120] Videotape: *Chinook Trilogy: My Strength Is From the Fish* (CRITFC 1994) (on file with the Paul L. Boley Law Library, Northwestern School of Law of Lewis & Clark College, ISBN 1-885790-00-7) (explaining the opinion of tribal members that a treaty right to fish is

thermore, dams tend to be rather permanent, even though they *may* be removed, making the dam's interference with treaty rights more or less permanent. Therefore, the interference with the Indians' property is similar to the "exercise of complete dominion" in *Causby*.[121] Under *Causby*, the government's direct interference with property, where the owner cannot fully enjoy and exploit the property, is an invasion akin to "conventional entry" or physical occupation of the property.[122] Whether the government has made use of the tribes' property for the government's benefit may arguably be answered in the positive: the government has made a choice to infringe on everyone's ability to catch fish in exchange for the ability to provide power to the region. Nevertheless, the tribes' use is impaired.

Griggs v. County of Allegheny,[123] a due process property case, follows *Causby* to hold that government invasion or interference with the use of property is a taking.[124] In *Griggs*, the property owner lost the use of his home because of the noise and vibrations from low flying aircraft on their way to the county airport.[125] The issue focused on "whether respondent has taken an air easement over petitioner's property for which it must pay just compensation as required by the Fourteenth Amendment."[126] Citing *Causby*, the Court found the county liable to the property owner for taking his property.[127] Like in *Causby* and *Griggs*, where "[a]n invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself'" to effectuate a taking,[128] government invasion of the fish resource necessary for meaningful treaty rights affects the Indians' use of their property. Under the *Causby* and *Griggs* analogies, therefore, treaty rights could be considered constitutionally protected property.

One case that distinguishes *Causby*'s application is *Penn Central Transportation Company v. City of New York*.[129] The government interference took the form of a city law for protecting landmarks, which prohibited the plaintiff from building onto the Grand Central Station Terminal.[130] The Court declared, "[t]he situation is not remotely like that in *Causby* . . . . This is no more an appropriation of property by government for its own uses than is a zoning law . . . ."[131] The distinction focused on the use of the property. The Court found that "the [landmark] law does

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meaningless to the tribal members if there remain no fish to be caught) [hereinafter *Chinook Trilogy*].

121 *Causby*, 328 U.S. at 262. Hatchery supplementation does not alleviate the government's interference, but instead could be considered part of the Fifth Amendment compensation. *See infra* Section V.

122 *Causby*, 328 U.S. at 264-65.

123 369 U.S. 84 (1962).

124 *Id.* at 88, 91.

125 *Id.* at 87.

126 *Id.* at 84-85.

127 *Id.* at 89-90.

128 *Id.* at 89 (citing *Causby*, 328 U.S. at 265).

129 438 U.S. 104 (1978).

130 *Id.* at 107-09.

131 *Id.* at 135.

not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel,"[132] and Penn Central would still be allowed to "use the remainder of the parcel in a gainful fashion."[133] Government interference with treaty fishing rights, however, does interfere with the primary use of the right: catching fish. As *Penn Central* focuses on the lost use of property as being paramount to finding a taking, *Penn Central* in no way limits the applicability of the *Causby* and *Griggs* analysis to Indian treaty fishing. Because property owners have the right to exploit the benefits of ownership and make use of their property,[134] Indians should also have the right to exploit the use of their property right to fish by catching fish in the rivers.

One potential hurdle to applying *Causby* to treaty fishing rights involves the character of the government invasion or interference. The invasion must be direct rather than "merely consequential."[135] The government's argument could be that it never directly aimed or intended to kill fish or, for that matter, to destroy treaty rights. Nevertheless, the government probably never directly sought to destroy the Causbys' chicken business, yet the Court in *Causby* found that the low flying aircraft did cause direct and immediate interference.[136] Likewise, dams directly interfere with treaty fishing by destroying downstream migrant fish,[137] inundating usual and accustomed fishing sites,[138] and by creating numerous impediments to fish migration and survival and thus to everyone's ability to catch fish.[139] Other arguments concerning the application of federal laws to dam projects could also be made to contradict an argument that reduced fish populations are merely a consequence of providing power to power users. Therefore, the government interference may be construed as direct interference such that the *Causby* analysis still applies to treaty fishing.

In conclusion, a treaty fishing right is constitutionally protected property under the constructs of *Causby*. The government has destroyed the

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132 *Id.* at 136.

133 *Id.* at 135.

134 United States v. Causby, 328 U.S. 256, 262 (1946).

135 *Id.* at 265-66 (citing Portsmouth Harbor Land and Hotel Co. v. United States, 260 U.S. 327 (1922)).

136 *Causby*, 328 U.S. at 266-67.

137 IMPACTS AND IMPLICATIONS, *supra* note 11, at app. IV.1 (explaining turbine mortality) and app. IV.3 (explaining problems with spill over dams and the danger of nitrogen supersaturation).

138 Damming a river necessarily causes a backup of water (reservoir) that floods the land upriver from the dam. Indians' usual and accustomed fishing sites are sometimes inundated by such flooding. One infamous example is the Indian fishery at Celilo Falls in Oregon, which was a prime fishing area on the Columbia River before being flooded by the Dalles Dam. PACIFIC NORTHWEST REGIONAL COMMISSION, *supra* note 45, at 23-24. The government paid money to the Indian fishermen at Celilo for the lost sites. *Id.* at 24.

139 IMPACTS AND IMPLICATIONS, *supra* note 11, at app. IV.1 to IV.2 (noting adult salmon migration problems in moving past the dams and reduced in-stream flow rates allowing "losses to predators and to a disinclination to migrate seaward."); *see supra* text accompanying notes 37-40 (describing impediments to fish migration caused by dams).

beneficial ownership[140] of the treaty right by eliminating or reducing catchable fish such that Indians cannot fully exploit the use of their property. Government interference with use leads to a Fifth Amendment analysis for deciding whether the government is liable to the tribes for unlawfully taking their property without paying just compensation.

b. Bundle of Sticks: Andrus v. Allard *and* Christy v. Hodel

Another concept for analyzing treaty rights as constitutionally protected property is the "bundle of sticks" analogy from property law. The "bundle of sticks" essentially means that each strand in the bundle represents one of the property rights that make up the property.[141] Two cases, *Andrus v. Allard*[142] and *Christy v. Hodel*,[143] provide good examples of the "bundle of sticks" concept and how it applies to the Fifth Amendment property clause. In *Andrus*, the appellees, who commercially traded Indian artifacts,[144] challenged regulations promulgated under the Migratory Bird Treaty Act[145] and the Bald Eagle Protection Act[146] that prohibited trade in feathers of protected birds.[147] Appellees claimed that the regulations would prohibit them from selling or profiting from the artifacts that they possessed prior to the existence of the regulations.[148] The appellees believed that application of the regulations to their property constituted a taking in violation of the Fifth Amendment.[149] In *Christy*, a livestock owner shot and killed a grizzly bear that had killed many of his sheep.[150] The Department of the Interior fined the owner for killing the grizzly bear in contravention of the Endangered Species Act (ESA).[151] The livestock owner thereafter filed a lawsuit to claim that "application of the ESA and the regulations to him . . . deprived him of his property and liberty without just compensation."[152] In both cases, the courts examined the claimants' bundle of sticks and held that no governmental taking occurred.[153]

The courts' discussions of the bundle of sticks in these cases indicates that diminished Indian treaty fishing can be construed as constitutionally protected property that may subject the government to a takings claim. In *Andrus*, the Supreme Court explained that some adjustments to

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140 The extent of the harm to the beneficial use depends on the factual situation, meaning how many fish return to which rivers and how many fish pass what usual and accustomed sites. Furthermore, a line needs to be drawn to establish how much damage can happen before the beneficial use has been destroyed. *See infra* Part IV.A.1.

141 Andrus v. Allard, 444 U.S. 51 (1979).

142 *Id.*

143 857 F.2d 1324 (9th Cir. 1988).

144 *Andrus*, 444 U.S. at 54.

145 16 U.S.C. §§ 703-712 (1994).

146 16 U.S.C. §§ 668-668d (1994).

147 *Andrus*, 444 U.S. at 53-55.

148 *Id.* at 54-55.

149 *Id.* at 55.

150 Christy v. Hodel, 857 F.2d 1324, 1326 (9th Cir. 1988).

151 *Id.* at 1327.

152 *Id.*

153 *Andrus*, 444 U.S. at 65-68; *Christy*, 857 F.2d at 1334-35.

property rights for the public good do not trigger Fifth Amendment compensation,[154] and that denying one property right does not always mean that a taking has occurred.[155] The Court explained, "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[156] Likewise, the court in *Christy* explained, "[t]he [ESA] regulations leave the plaintiffs in full possession of the complete 'bundle' of property rights to their sheep."[157] When just one stick is destroyed, the property may still be put to other uses, meaning that other sticks in the bundle remain intact. As in *Andrus*, the Court found it "crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds."[158] With treaty fishing, no other such opportunities exist. The whole purpose of the right is to catch fish at the usual and accustomed fishing sites. Without the fish for catching, in order to exercise the right, nothing else may be done to still enjoy the property: it cannot be assigned, built upon, leased, camped on, or anything else typically done with property. Likewise, no economic benefit can be gained when fish cannot be caught. Eliminating harvestable fish does not eliminate just one stick in the bundle, but eliminates the cultural, subsistence and economic benefits that make up the entire bundle. As the bundle of sticks analogy demonstrates, the inability to exercise treaty fishing rights could give rise to a takings claim under the Fifth Amendment.[159]

Therefore, viewing the exercise of the treaty fishing right as hypothetically land, whether through government interference with the use of property or through government destruction of the bundle of property rights, demonstrates that the exercise of the right is constitutionally protected property.

D. Fifth Amendment Non-Treaty Fishing

Takings cases that involve non-treaty fishing provide additional support for such a conclusion. One informative case is *Burns Harbor Fish Company v. Ralston*.[160] In *Burns Harbor*, the Indiana Department of Natural Resources banned the use of gill nets on Lake Michigan for six weeks.[161] The Indiana legislature then made the ban permanent and terminated all non-treaty commercial fishing licenses that allowed gill net fishing.[162] The fishermen claimed that the statutory ban constituted a taking

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154 *Andrus*, 444 U.S. at 65.

155 *Id.*

156 *Id.* at 65-66.

157 *Christy*, 857 F.2d at 1334.

158 *Andrus*, 444 U.S. at 66.

159 *See id.* at 65-68.

160 800 F. Supp. 722 (S.D. Ind. 1992).

161 *Id.* at 724. The Indiana Department of Resources found that commercial fishermen who used gill nets to catch perch were also catching chinook salmon and trout. *Id.* For information about gill net fishing, see ROBERT J. BROWNING, FISHERIES OF THE NORTH PACIFIC: HISTORY, SPECIES, GEAR & PROCESSES 181-93 (1980).

162 *Burns Harbor*, 800 F. Supp. at 724.

of property without just compensation.[163] The court held that the commercial fishermen's loss was not a taking[164] for two reasons: 1) the fishermen had other options for using their gill nets,[165] and 2) the fishermen never had an unrestricted right to use the gill nets.[166] As to the first reason, the court explained that the fishermen could sell their nets, find another use for them, or fish with them outside of Indiana.[167] As to the second reason, the court explained, "[p]laintiff has never had an unrestricted right to use gill nets to fish within Indiana waters."[168] The court's language therefore relates back to the bundle of sticks analogy: the commercial fishermen still had many sticks left in their bundle and the ability to continually use gill nets was never one of the sticks in their bundle to begin with. Unlike the commercial fishermen in *Burns Harbor*, the Columbia River treaty tribes have no sticks left in their bundle once the fish are gone, and the ability to put the treaty rights to use comprises the entire bundle. Had the commercial fishermen been in the same situation as the tribes—lacking any further sticks in their bundle of property rights—the *Burns Harbor* court could have found that the revocation of the right to use the property gives rise to a claim for the unlawful taking of property.

Caution signs arise under the *Burns Harbor* language. The court explains that because the government retained the ability to restrict the use of gill nets from the time the government granted the permit, such a restriction would not constitute a taking.[169] The language could be extended to tribes by alleging that because tribal fishing may be restricted,[170] diminished fishing opportunities that result from decimated fish resources would not be a taking. The analogy should not stretch so far, however. First, an outright abrogation of the treaty right is compensable under the Fifth Amendment,[171] but an outright restriction of one type of commercial fishing gear is not afforded the same protection. Second, the government never granted the right to fish; the tribes reserved the right to fish. In addition, courts give treaty rights greater protection and Congress must "exercise its [regulatory] power over Indian affairs consistently with . . . the Fifth Amendment."[172] Therefore, the analogy under *Burns Harbor* still in-

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163 *Id.* at 725.

164 *Id.* at 729.

165 *Id.* at 726.

166 *Id.* at 727.

167 *Id.* at 726.

168 *Id.* at 727.

169 *Id.*

170 States and federal agencies such as the National Marine Fisheries Service (NMFS) often regulate treaty fishing as well as non-Indian fishing. *See* STATUS REPORT, *supra* note 47, at 59-61. Among other regulatory functions, states may close fisheries, stipulate when a fishery begins and ends, manage harvest limits, and negotiate with NMFS about treaty Indian fishing. *Id.* at 59-60.

171 Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968).

172 Getches, *supra* note 51, at 388 (citing Delaware Bus. Comm. v. Weeks, 430 U.S. 73 (1977)).

dicates that when the government damages the bundle of sticks, a takings claim arises under the Fifth Amendment.

A second informative non-treaty fishing case is *Bigelow v. Michigan Department of Natural Resources*.[173] In *Bigelow*, state-licensed commercial fishermen "were allowed to retain their licenses but . . . were not allowed to harvest any fish."[174] The commercial fishermen still had their fishing licenses but were not allowed to catch any fish, just as tribes still have the treaty right to catch fish but cannot catch any fish. The *Bigelow* court declared that the "[fishing] licenses were rendered meaningless" when the commercial fishermen lost the ability to harvest fish.[175] Likewise, the Indian treaty fishing right is meaningless because the tribes lost their ability to exercise the right to catch fish.[176]

The *Bigelow* court diverges from treaty fishing in its discussion of the parties' actual property rights and in its holding. Nevertheless, the court's analysis still demonstrates that a meaningless treaty fishing right could be compensable property under the Fifth Amendment. The *Bigelow* court held that no taking had occurred because the fishermen never had a property right to harvest fish in the waters that were subject to the fishing ban.[177] The court explained, "[s]ince plaintiffs, as state citizens, did not have the right to fish in the subject waters, the state could not have taken that right, with or without just compensation. . . . Plaintiffs had no legal property right in their commercial fishing licenses in these circumstances."[178] What the court explains is that if the plaintiffs *did* have a property right, and that right was rendered meaningless, the court could find a taking of property without just compensation.[179] The missing link for the fishermen is the legal property right. The tribes, however, do have the legal property right to catch fish pursuant to their treaties.[180] The commercial fishermen's bundle of sticks does not include the property right to harvest fish, but the tribes' bundle does include the exercise of the treaty right to catch fish. Because tribes have the right to catch fish, and because the right becomes meaningless when fish no longer return to the rivers in harvestable numbers, an analysis under *Bigelow* indicates that the tribes' situation could give rise to a takings claim and could lead to compensation.

Both *Burns Harbor* and *Bigelow* focus on the property right to catch fish. In both cases, the commercial fishermen, having state issued licenses, lack the required property right. Treaty tribes, however, do possess the property right to catch fish, and that right is significantly wrapped into the

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173 727 F. Supp. 346 (W.D. Mich. 1989), *vacated on other grounds*, 970 F.2d 154 (6th Cir. 1992).

174 *Id.* at 348.

175 *Id.* at 352.

176 *Chinook Trilogy*, *supra* note 120; *see supra* text accompanying notes 63-66, 73-75 (explaining the importance of the actual exercise of the treaty right).

177 *Bigelow*, 727 F. Supp. at 352-53.

178 *Id.* at 353.

179 *See id.* at 352-53.

180 *See supra* Part III.A-III.B.

meaning of treaty fishing. Under the analysis of these cases, the exercise of treaty fishing rights is constitutionally protected property.

E. Summary of the Constitutional Nature of Treaty Rights

The biggest shift in analyzing treaty fishing under the Fifth Amendment property clause is the focus on the treaty right as the property and on treaty characteristics that are analogous to property interests compensable under the Fifth Amendment. Tribes do not claim ownership of fish, just as they claim no ownership of anything in nature.[181] What the tribes do own is the treaty right, which, for the purposes of Fifth Amendment analysis, is constitutionally protected property. The exercise of the treaty right, or what could also be stated as the use of the beneficial ownership of the property, is the ability to catch fish. Catching fish is inseparable from the treaty right.

Easement and land analogies to treaty fishing demonstrate that arguments may be made that the property is of a constitutional nature, meaning that government interference or extinguishment of the *profit à prendre*, government interference with the use of the treaty right, or government elimination of the bundle of rights that make up treaty fishing can give rise to a takings claim. Furthermore, courts have been willing to apply traditional takings analysis to non-treaty fishing situations, so extending the analysis to treaty fishing is not too difficult a next step. Tribes cannot catch the fish necessary to fulfill their basic needs, needs thought secured by the treaty right to fish. As fish no longer return in harvestable numbers for the tribes, the tribes cannot exercise their treaty fishing rights, so they cannot make much, if any, use of their property. By applying the bundle of sticks,[182] easement extinguishment,[183] or eliminated use[184] analogies to treaty fishing, a court could find that a claim does exist for an unlawful taking. Furthermore, because the tribes have recognized title in the treaty right, restrictions which burden that title should give rise to a takings claim. Whether the government is liable for paying compensation for an unlawful taking of property would be the next question to answer.

IV. TAKINGS IN CONTRAVENTION OF THE FIFTH AMENDMENT

The Fifth Amendment to the United States Constitution provides that the government may not take private property for public use without paying just compensation.[185] Among other situations, the Supreme Court has applied the Fifth Amendment property clause to protect private landown-

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[181] *Chinook Trilogy*, *supra* note 120.

[182] *See supra* Part III.C.3.b.

[183] *See supra* Part III.C.2.

[184] *See supra* Part III.C.3.a.

[185] U.S. CONST. amend. V. Despite the language in the Fifth Amendment about "public use," the Supreme Court no longer requires the appropriation of property to be specifically for the public. OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 691 (Kermit L. Hall et al., eds., Oxford University Press 1992).

ers from physical invasion by the government,[186] physical occupation by the government,[187] and regulatory takings where government regulation reduces property value or interferes with property uses or interests.[188] The Fifth Amendment thus applies to government action toward private property, depending on the severity of the action and the property involved.

In the treaty fishing context, regulatory takings cases are the most logically applicable for determining whether or not the government is liable for an unlawful taking of property. Statutes and regulations operate on hydroelectric projects and fish protection measures,[189] and tribes participate in the regulation and management of the fish resource.[190] Because government action or inaction under statutes and regulations impacts fish populations and thus treaty fishing, and because federally operated or licensed dams account for the lion's share of the fish losses in the river and thus interfere with tribal property interest in catching fish,[191] courts' analysis in government regulation cases should also apply to treaty fishing. When a regulation "goes too far,"[192] or fails to provide "justice and fairness,"[193] then a court will generally find an unlawful taking. Most of all, though, whether a taking has or has not occurred depends on the facts of

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186 OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 185, at 691 (citing United States v. Causby, 328 U.S. 256 (1946)).

187 *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

188 George C. Coggins, *Public Natural Resources Law* § 3.04[3] (1990), *reprinted in* GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 229 (1993); *see also* Nollan v. California Coastal Comm., 483 U.S. 825 (1987) (finding a taking when the easement imposed by a regulatory agency lacked a nexus to the agency's authority).

189 Examples of such federal statues that involve both hydro-power and fish are the Federal Power Act, 16 U.S.C. §§ 791a-828c (1994) (requiring fishways at private, not federal, power projects), the Mitchell Act, 16 U.S.C. §§ 755-757 (1994) (authorizing mitigation for hydro-project fish losses), and the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. §§ 839-839h (1994) (requiring programs at dams for fish protection, and mitigation for dam-related fish losses).

190 The tribes' role in regulating the fish resource arises under the continuing litigation in *United States v. Oregon*, 699 F. Supp. 1456 (D. Or. 1988), which created the Columbia River Fish Management Plan (CRFMP). The CRFMP specifically provides for tribal involvement. CRFMP at 3 (as amended by the court Oct. 7, 1988) (on file with author). Under the CRFMP, tribes are comanagers of the fishery resource and are entitled to specified numbers of juvenile fish for release into streams where adults will return through treaty fishing areas. *Id.* Another area of tribal involvement includes the Pacific Salmon Treaty. Fisheries: Pacific Salmon, Jan. 28, 1985, U.S.-Canada, T.I.A.S. No. 11091. Another example is the Pacific Fisheries Management Council created by the Magnuson Fisheries Conservation Act, 16 U.S.C. § 1801 (1994).

191 Federally operated dams along the mainstem of the Columbia River and the Snake River include Bonneville, The Dalles, John Day, McNary, Ice Harbor, Lower Monumental, Little Goose, and Lower Granite. U.S. ARMY ENGINEER DIVISION, ARMY CORPS OF ENG'RS, MAP OF COLUMBIA-NORTH PACIFIC REGION WATER AND LAND RESOURCES, COLUMBIA RIVER AND TRIBUTARIES REVIEW STUDY NP-12-1 (Oct. 1979) (on file with author).

192 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (stating that regulations reaching a certain extent will be a taking).

193 Penn Central Transp. Co. v. New York, 438 U.S. 104, 124 (1978).

each case.[194] Whether a takings claim could be substantiated in the treaty fishing context therefore largely depends on the facts.

A. Government Regulation and Takings

Two types of government regulation are considered a taking: 1) "regulations that compel the property owner to suffer physical 'invasion' of his property,"[195] and 2) regulations that deny "all economically beneficial or productive use of land."[196] Though arguments certainly can be constructed to liken decimated fisheries to physical invasion, a more interesting analysis can be made under the "beneficial use" category of takings cases.

One case that involves the government's denial of beneficial or productive use of land is *Lucas v. South Carolina Coastal Council*.[197] Though *Lucas* focuses on the beneficial use of "land,"[198] substituting the word "property" for "land" makes the application to treaty fishing more understandable, especially given the constitutional nature of the exercise of the treaty rights and the idea that river-based rights are not different from land-based rights in a property sense. In *Lucas*, the property owner bought beach-front lots on which he intended to build single-family houses.[199] The South Carolina Coastal Council thereafter enacted a regulation restricting construction along portions of the beach in order to protect against erosion.[200] Lucas therefore could not build the houses as planned and thereby claimed a taking in violation of the Fifth Amendment.[201] The Supreme Court's analysis led the majority to conclude that the state denied Lucas the beneficial use of all of his land, and that if Lucas had the right to build the houses at the time he acquired title to the property, the state must pay him just compensation for the taking.[202] For simplicity, *Lucas* may be broken into two parts: 1) whether the property owner was denied all beneficial use of the property at issue, and 2) if so, then the taking is compensable unless the use was not part of the property owner's title when acquired.

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194 *Id.* (citing United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (finding that, depending on the circumstances, if the government fails to pay for losses caused by a restriction, that restriction will be invalid)).

195 *Lucas*, 505 U.S. at 1015.

196 *Id.*; *see also* Yee v. City of Escondido, 503 U.S. 519, 522-23 (1992) (separating takings cases into these two different categories).

197 *Lucas*, 505 U.S. at 1003. Whether *Lucas* applies to public land issues, including treaty fishing, has not been completely resolved because the property interests are somewhat different from fee title. However, the *Lucas* analysis could easily apply to treaty fishing because of the analogies between treaty fishing and easements on land and because treaty rights conveyed recognized title.

198 *Id.* at 1015 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) and Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987)).

199 *Id.* at 1008.

200 *Id.* at 1008-09.

201 *Id.* at 1009.

202 *Id.* at 1019, 1025, 1030-32.

Two problems with extending *Lucas* to treaty fishing are, first, that treaty fishing rights are based on federal law rather than on state law as applied in *Lucas*, and second, that treaties would not likely be "subject to state nuisance law," which formed the principal basis for the majority's "exception" in the second part of the test for when compensation would not be required.[203] Nevertheless, the framework is still compatible with the treaty fishing rights and is instructive on how a regulatory takings claim can be analyzed for lost treaty rights. Application of the *Lucas* two part test to the treaty fishing context implies that tribes should be due compensation for the lost ability to exercise their treaty right to catch fish.

1. Have Tribes Been Denied All Beneficial and Productive Use of Their Treaty Right to Catch Fish?

Under *Lucas*, a government-induced loss is compensable when the property owner suffers *total* deprivation of all beneficial use of the property.[204] One problem, as *Lucas* points out, is the "'property interest' against which the loss of value is to be measured."[205] Does the loss of value have to be total for the entire property or just for the segment the owner desired to use? *Lucas* does not exactly answer this question, but provides that the answer "may lie in how the owner's reasonable expectations have been shaped" by the applicable property law.[206] Because the lower court found Lucas' property to be valueless,[207] the Supreme Court proceeded on that assumption. However, the dissent pointed out that perhaps Lucas' property was not totally valueless because Lucas had many sticks left in his bundle and therefore had other options for using his property.[208] Despite the muddled test for what constitutes "totally valueless," the court leaves the standard open to the owner's reasonable expectations.[209]

Applying *Lucas* to treaty fishing also provides no immediate, clear answers. Without fish in the rivers, tribes cannot exercise the treaty right and have no other possible uses for the right besides catching fish. The right is therefore meaningless without fish. Whether meaningless and valueless are the same is an unanswered question. However, if the owner's reasonable expectations should be factored into the problem, tribes did expect to secure their fish resource forever.[210] The tribes' expectations

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203 COGGINS ET AL., *supra* note 188, at 249.

204 *Lucas*, 505 U.S. at 1014-15.

205 *Id.* at 1016 n.7.

206 *Id.* at 1017.

207 *Id.* at 1022.

208 *Id.* at 1043 (Blackmun, J., dissenting).

209 *Id.* at 1016 n.7.

210 One explanation provides:

> The Northwest tribes were primarily fishing societies . . . . They practiced religious rites to ensure the return of anadromous fish. When Governor Stevens undertook to negotiate the release of Indian land claims . . . he realized the Indians would be far more willing to give up their land if they knew their fisheries would be secure.
>
> . . . The following words were typical of the guarantees the Governor made: ". . . *This paper* [the treaty] *secures your fish.*"

about what the treaty right means to them demonstrate how valueless a treaty right is if it cannot be exercised. The scope of the property, which is another problem raised in *Lucas*, also presents another difficult question: Should the treaty fishing right be viewed as part of a broader property right for valuation purposes? The answer should probably be that the scope should focus only on the treaty right to fish in order to remain consistent with the Indians' expectations to catch fish forever. Additionally, retaining the ability to fish was a major factor in persuading the Indians to sign the treaties.[211] At this stage of the analysis, therefore, treaty rights that cannot presently be exercised should be considered valueless.

The main problem with applying the *Lucas* "beneficial use" standard to treaty rights is deciding when the deprivation of use is total and who is responsible. How does one sort out government-induced decreases in fish population from decreases caused by nature, and should it matter? How much of a decrease must take place before the deprivation of use can be considered total? Should ocean fishing and fish loss outside of the mainstem of the Columbia River be factored into the total loss? Do unborn fish in fish hatcheries count? When exactly does the taking occur if the decrease in fish populations has taken place over time and naturally fluctuates? Though no answers are immediately apparent, science, tribal interests, and the uniqueness of Indian Law are likely to sort out the answers. For now, in order to fulfill the tribes' needs for fish, the most sensible answer may be that total deprivation of use occurs when tribes can no longer harvest enough fish to fulfill ceremonial and subsistence needs, which is based on the tribes' reasonable expectations for their property. Other complications may factor into the determination about how much compensation and what form of compensation is due for a taking of the treaty right.

One factor that could help to clear up the "beneficial use" standard is economic use. According to *Lucas*, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses . . . that is, to leave his property economically idle, he has suffered a taking."[212] Tribal treaty fishing rights are essentially economically idle property. Without fish, transferring their interests would not be economically beneficial, or even possible. Furthermore, tribes have not had a commercial fishery for spring or summer chinook salmon, the most useful and meaningful fisheries to the Indians, for upwards of twenty years or longer, depending on the salmon run.[213] Because tribes have had to sacrifice the economically ben-

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Allen H. Sanders, *The Northwest Power Act and Reserved Tribal Rights*, 58 WASH. L. REV. 357, 362-63 (1983) (emphasis in original).

211 *Id.*

212 *Lucas*, 505 U.S. at 1019 (emphasis in original).

213 Telephone Interview with James W. Weber, Policy Assistant, Columbia River Inter-Tribal Fish Comm'n (CRITFC), Portland, Or. (Feb. 1, 1996). The last commercial harvest for spring chinook was in 1977, and the last commercial harvest for summer chinook was around 1964-65. *Id.*; *see also* TRIBAL RESTORATION PLAN, *supra* note 18, at 2-8, 2-10. The length of time raises questions about the scope of a remedy under takings analyses because a six year statute of limitations could prohibit a claim, depending on whether or not an ongoing

eficial use of their treaty fishing rights, the balance tips in favor of finding total deprivation of use.

In summary, Indian treaty fishing rights are valueless without fish for the catching, and tribes have lost the beneficial use of the treaty fishing rights because fish do not return in great enough numbers for even the tribal ceremonies. Furthermore, the treaty right to fish is economically idle. If one were to add "justice and fairness" to the equation, given the federal government's duty to protect the trust resources of the tribes,[214] the conclusion pursuant to the first part of *Lucas* is that tribes have been denied all beneficial and productive use of their treaty fishing rights.

2. *Was the Use of the Treaty Right a Part of the Property when Acquired?*

According to *Lucas*, when the government deprives property of all of its beneficial use, compensation is due to the owner unless "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of [the owner's] title to begin with."[215] This inquiry examines whether the use was one of the sticks in the bundle of property rights at the time the owner acquired the property.[216] Examples where a use is not in the bundle of sticks include filling a lakebed or failing to remove nuclear power plant structures from a fault line.[217] The uses not included in the bundle are usually those that are unlawful.[218] If the use is not in the bundle to begin with, then courts do not require compensation.

Applying this limitation to Indian treaty fishing indicates that compensation should be due to the tribes who have lost the beneficial use of their treaty fishing rights. Catching fish was certainly part of the title in the treaty right from the time when Governor Stevens negotiated the treaties.[219] The tribes believed they secured the ability to catch fish forever,[220]

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action tolls the statute. Due to the nature of fisheries and fish management, one could argue that the taking is ongoing and should not be pinpointed at a date when commercial fisheries ceased. Tribes could technically make claims for damages back to at least the date when dams were installed and created immediate declines in salmon runs.

214 The trust responsibility is "a fiduciary obligation under federal Indian law . . . to protect the tribes' property, treaty rights, and way of life. . . . [F]ulfilling this trust responsibility may require environmental protection." Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 735 (1995).

215 *Lucas*, 505 U.S. at 1027. This portion of the Court's opinion focuses on nuisance as the exception to the compensation rule: a state regulation preventing a nuisance is not compensable. The exception also relates to background principles that prevent a property owner from acquiring certain "sticks" when acquiring the "bundle of sticks" associated with the property. *Id.*

216 *Id.*

217 *Id.* at 1029-30.

218 *Id.* at 1030.

219 *See supra* text accompanying notes 63-66 (explaining that the right to catch fish is a property right).

220 Sohappy v. Smith, 302 F. Supp. 899, 906 (D. Or. 1969).

and courts also construe the treaty right as giving Indians the right to *catch* fish.[221] Though the Supreme Court indicated that tribes do not have the right to pursue the last living fish into their nets,[222] the right remains one of catching fish and having the ability to catch fish. Additionally, the tribes have no uses for the treaty fishing right once the ability to catch fish is gone; no economic gain or other purpose can be found for the treaty fishing right.[223] Because catching fish was a part of the property when acquired, that is at the time Governor Stevens negotiated the treaties, and because no other uses exist for the property without the fish, the *Lucas* limitation does not apply to treaty fishing. Therefore, compensation should be due to the treaty fishing tribes.

B. Summary of Unlawful Takings as Applied to Treaty Fishing

The Fifth Amendment requires compensation to be paid to a property owner whenever the government takes private property for public use.[224] The *Lucas* case suggests that a "taking" occurs when the government deprives the owner of all "economically beneficial or productive use,"[225] so long as the use was a right belonging to the owner when he acquired the property.[226] Examining the reasonable expectations of the treaty fishing tribes and the nature of what the Indians believed they contracted for when they negotiated and signed their treaties reveals a taking in contravention of the Fifth Amendment. What this means for the federal government is that treaty tribes are due "just compensation" for the lost ability to exercise their treaty right to catch fish. Because decimated fisheries have diminished the value of the tribes' property, the government must provide some manner of compensation to the tribes.

V. COMPENSATION

Compensation would most logically need to come from the federal government and the best avenue for this would probably be through a

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221 *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 678-79 (1979), *modified sub. nom.*, Washington v. United States, 444 U.S. 816 (1979).

222 Department of Game of Washington v. Puyallup Tribe, 414 U.S. 44, 49 (1973). Justice Douglas warned, "the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." *Id.* This statement relates to a state's ability to regulate fishing when it is necessary for conservation, which means "perpetuation or improvement of the size and reliability of the fish runs." *Sohappy*, 302 F. Supp. at 908. These warnings do not mean that treaty fishing rights should be abrogated when populations are low, but rather, that states may invoke conservation cutbacks in the number of fish that tribes may take in a season without abrogating the treaty. Furthermore, conservation measures are not takings because they are not necessarily in the nature of nuisance on which the *Lucas* exception focuses.

223 *See supra* Part III.C.3.b (discussing the concept that no residual rights remain within the right to fish once all of the fish are gone).

224 U.S. CONST. amend. V.

225 Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

226 *Id.* at 1015, 1027.

lawsuit in federal court against an officer of the United States.[227] The party to be compensated would be the tribe rather than individual tribal members. The tribe is the one with the constitutional property, meaning that the tribe has the treaty right for the benefit of the tribal members. Individuals could attempt claims based on lost personal opportunities and pursuant to the fact that tribes authorize the fishing seasons. However, one court has found that individual tribal members did not have separate compensable property rights in treaty fishing.[228] The takings claim is therefore probably best made by the tribes, who would then receive the compensation on behalf of its members.

The main problem is with determining what compensation is due to the tribes. The compensation traditionally awarded in a takings case is the fair market value (FMV) of the lost property.[229] However, how would a court decide the FMV of the treaty right to catch fish? In *Kimball v. Callahan*,[230] the court had to determine the amount in controversy over an Indian tribe's claim to hunt and fish free from government regulation.[231] The court explained that "the amount in controversy is measured by determining the value to each plaintiff of the game and fish he would take if completely free of regulation, less the value of the limited amounts of game and fish he could take if regulated by the state."[232] Such a valuation, as applied to treaty fishing, measures the compensation in terms of the lost revenues in fish. One court measured the value just in that way, by looking at the difference between the retail value of the amount of salmon to which the tribes were entitled and the value of the salmon the tribes re-

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227 The United States has sovereign immunity, which prevents the federal government from being sued without its consent. *See, e.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941). One possible way around federal sovereign immunity is by bringing a lawsuit against a federal officer, so long as the suit is not, in effect, against the United States. *See, e.g.*, United States v. Yakima Tribal Court of the Yakima Indian Nation, 806 F.2d 853, 858 (9th Cir. 1986) (quoting Penhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 101 n.11 (1984)). In order to have a colorable claim against an officer, the tribes would need to allege that the officer acted unconstitutionally, which is exactly what would be alleged in a Fifth Amendment takings claim. *See generally* Hodel v. Irving, 481 U.S. 704 (1987) (demonstrating how the claimants sued the Secretary of the Interior for an unconstitutional taking under the Fifth Amendment). Claims would not likely be fileable under the Indian Tucker Act as applied through the Indian Claims Act, 28 U.S.C. § 1505 (1994), because the Indian Tucker Act deals with claims that rest on contracts and not with claims that are directly founded on the Constitution. Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981), *aff'd*, 463 U.S. 206 (1983). The federal courts would have jurisdiction over a claim against a federal officer. 28 U.S.C. § 1362 (1994).

228 Whitefoot v. United States, 293 F.2d 658, 663 (Ct. Cl. 1961) (holding that the tribe holds the right to use fishing locations, not individuals, and, therefore, individuals have no claim).

229 Wheeler v. City of Pleasant Grove, 833 F.2d 267, 270-71 (11th Cir. 1992) ("The owner's loss is measured by the extent to which governmental action has deprived him of an interest in property. The value of that interest, in turn, is determined by isolating it as a component of the overall fair market value of the affected property." (internal citations omitted)); *see also* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (explaining that FMV is the compensation in condemnation cases).

230 493 F.2d 564 (9th Cir. 1974).

231 *Id.* at 565.

232 *Id.*

ceived.[233] Lost revenues in fish, however, is illogical because the tribes do not own the fish, and inadequate because it fails to take into account the ceremonial and subsistence uses of the fish resource. By not accounting for the cultural values of the fish to the tribes, any compensation paid under this valuation scheme would fail to compensate the tribes for what they actually lost and would fail to compensate future generations who were supposed to culturally benefit from the treaty right. Placing a value on the cultural meaning of fish is very difficult if not next to impossible. As the tribes advise, "[t]here is no model that can factor in spirituality nor the ultimate value of living creatures."[234]One may never be able to adequately place a numerical value on the treaty right to catch fish.

One area of environmental law that places numerical values on difficult-to-value resources is the natural resource damage provision under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[235] CERCLA does not limit natural resource damages to only those costs to "restore, replace, or acquire the equivalent of such natural resources," but includes monetary damages for the lost natural resource itself.[236] Another example is the Endangered Species Act of 1973,[237] under which the government assesses damages for unlawful takings of endangered or threatened species,[238] which are difficult to valuate. However, the inadequacies under both of these statutory schemes is that the value is monetary.

Monetary valuations would be incredibly inadequate for tribes. As Ted Strong, the Executive Director of the Columbia River Inter-Tribal Fish Commission, explains, "'[t]ribal people want the fish and the ecosystem restored, not simply dollars.'"[239] One chairman of a tribal fish and wildlife committee, Lonnie Selam, Sr., agrees: "'[w]hat we want—and what we think others in the region want—is to have our fish back in the rivers where they belong.'"[240] Money would leave the tribes richer in the eyes of economists, but they would be culturally poorer without the fish or the ability to catch the fish. Using money to purchase canned Atlantic salmon at the grocery store is no compensation.[241] The money would be depleted over the time in which the tribal cultures would disappear. Furthermore, money compensation could extinguish the tribes' fishing rights. A lesson may be learned from *United States v. Sioux Nation of Indians*,[242] in

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233 Confederated Tribes of the Colville Reservation v. United States, 43 Ind. Cl. Comm'n 505 (1978).

234 TRIBAL RESTORATION PLAN, *supra* note 18, at vi.

235 42 U.S.C. §§ 9601-9675 (1994).

236 *Id.* § 9607(f)(1).

237 16 U.S.C. §§ 1531-1544 (1994).

238 *Id.* § 1540.

239 Berg, *supra* note 10, at 15 (quoting Ted Strong, Executive Director of CRITFC).

240 *Id.* (quoting Lonnie Selam, Sr., Chairman of the Yakama Fish and Wildlife Committee).

241 Representative Helen Chenoweth (R-Idaho) is often quoted for saying "How can I [take salmon's endangered status seriously] when you can buy a can of salmon off the shelf at Albertson's?" *See, e.g.*, Robert L. Peters, DEFENDERS, Winter 1995/96, at 24 (satirizing Representative Chenoweth's comments in an editorial cartoon).

242 448 U.S. 371 (1980).

which a well-meaning attorney fought for just compensation for the tribes' loss of the Black Hills in South Dakota. The court held that a taking occurred and ordered the federal government to pay just compensation.[243] The compensation payment, however, extinguished the claim to the Black Hills. Now, one tribe refuses to accept the money because it wanted the land restored rather than a damage award and, as a result, the tribe is without the land or the money.[244] Such a fate for treaty fishing tribes is highly undesirable.

At least one court has found that payment made by the federal government to the tribes, relative to a treaty, did *not* extinguish treaty fishing rights.[245] The court held that claims for compensation to remedy an extremely low sum of money paid pursuant to the treaty in exchange for ceding lands did not affect the reserved treaty right to fish.[246] Though somewhat different, a court could extrapolate from that holding to the takings situation. Like the claims made to remedy an unconscionable payment under the treaty, claims for the taking of the tribes' property right to fish would also be to remedy unconscionable "payments" of fish in the rivers for catching pursuant to the treaty. The continued obligation to ensure fish in the rivers is part of the payment made in exchange for ceding lands, and therefore payments for lack of fish and, thus, lack of ability to fish, should likewise not extinguish treaty rights. Whether such an argument is strong enough to prevent extinguishment may or may not be a risk the tribes would be willing to take.

Perhaps the only purpose for monetary compensation to the tribes, therefore, would be of a punitive nature against the United States for allowing the fish to disappear. The better remedy in light of the treaties, however, would be to construct a more creative compensation plan that would put fish back in the rivers to prevent generations of lost treaty rights and lost fish.[247] Such a plan would account for the value placed on

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243 *Id.* at 424.

244 *See* Oglala Sioux Tribe v. United States, 650 F.2d 140 (8th Cir. 1981) (finding that the federal court lacked jurisdiction to hear a Fifth Amendment takings suit filed by the Oglala Sioux because the Tribe's sole remedy had been established as monetary damages through the Indian Claims Commission).

245 United States v. Washington, 873 F. Supp. 1422, 1447 (W.D. Wash. 1994), *aff'd in part, rev'd on other grounds*, 1998 WL 28223 (9th Cir. 1998).

246 *Id.*

247 Compensation for takings litigated under the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70v (repealed), was not explicitly limited to money. Because of tribal attachment to the land, just compensation could include a return of part of the land rather than money as a substitute for the land. Sandra C. Danforth, Note, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359, 390-92 (1973), *quoted in* GETCHES ET AL., *supra* note 51, at 313. Just compensation in the form of fish in the rivers is therefore not such a stretch in order for the compensation to be meaningful.

Mitigation for salmon loss normally takes the form of federally operated fish hatcheries. U.S. COMPTROLLER GENERAL, *supra* note 11, at app. IV.9. However, the success of hatchery supplementation is up for debate. *See, e.g.*, Michael C. Blumm, *Saving Idaho's Salmon: A History of Failure and a Dubious Future*, 28 IDAHO L. REV. 667, 679-80 (1992) (discussing perceived problems hatchery fish may pose to wild fish). Many also argue that hatcheries have been used for many years but salmon populations continue to decline, demonstrating a

the property by the tribes and would be based on a reasonable expectation under the treaty.[248]

One possible creative remedy to both the valuation and extinguished claim problems could be to focus the compensation on seasonal lost opportunities. Such a plan could compensate tribes on a season-by-season basis relative to the lost opportunities for each season, therefore solving the problem of jeopardizing the long-term right because payment would only extinguish the right for the present season. Other plans could focus on restoring the fish runs. The possibilities are endless if a court will consider them, but above all, a court should consider cultural values as well as subsistence and economic values when determining the appropriate remedy. Fish in the rivers is the most desirable end result.

VI. CONCLUSION

Compensation for unlawful takings of the fish resource could be very expensive for the government, both in terms of the compensation to the tribes and the disappearance of a valuable species. The expensive nature of compensating treaty fishermen for lost treaty rights may make a court somewhat wary of finding any violations of the Fifth Amendment property clause. However, the "unique legal status of Indian tribes,"[249] the negotiated treaties, and the potential for cultural and religious deprivation should compel courts to be serious about holding the government responsible for the decimated fisheries. One judge had the foresight to write,

> [T]he process [relating to hydroelectric power and fish survival] is seriously, "significantly," flawed because it is too heavily geared towards a status quo that has allowed all forms of river activity to proceed in a deficit situation—that is, relatively small steps, minor improvements and adjustments—when the situation literally cries out for a major overhaul.[250]

Furthermore, "acquisition in the 19th century of what is now the Pacific Northwest in return for the Indians' continued . . . right to fish in the ceded area was a transaction so favorable for the settlers that their descendants ought to honor the bargain."[251] Under takings analysis, a court should not hesitate to find that the government-caused fish declines and losses will cost more than just the loss of a species.

The purpose of raising takings analysis in conjunction with treaty fishing is to raise the awareness of the losses that tribes will suffer if the

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failure of the supplementation system. Whether hatchery supplementation alone would be adequate compensation therefore seems unlikely, but it could play a role as part of a package plan for saving salmon. Exploration of the Tribal Restoration Plan, put together in 1995 by the four Columbia River Treaty Tribes, is recommended. *See* TRIBAL RESTORATION PLAN, *supra* note 18.

[248] *See* discussion *supra* Part IV.A.1. (discussing reasonable expectations of property owners and citing to Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992)).

[249] Morton v. Mancari, 417 U.S. 535, 551 (1974).

[250] Northwest Resource Info. Ctr. v. Northwest Power Planning Council, 35 F.3d 1371, 1391 (9th Cir. 1994).

[251] GETCHES ET AL., *supra* note 51, at 862.

salmon continue to dwindle, the losses tribes already suffer, and the economic impacts that have and could yet result. Because "financial interests and motives" often control the salmon's survival,[252] perhaps a threat of great financial cost for compensating tribes for lost treaty rights will awaken the federal government to the seriousness of the situation. The danger involved in claiming an unlawful taking is that the concern for fiscal liability could lead Congress to expressly abrogate the treaty rights. Abrogation is clearly a power that Congress possesses.[253] However, Congress should exercise the power of abrogation "only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."[254] Though avoiding great expense may be in the public's interest, tribes and future generations of Indians and non-Indians would best be served by the continuing availability of the salmon resource. Furthermore, abrogation of the treaty fishing right would only add another sad chapter to an already sad history of government-tribal relations. The threat of a takings claim is therefore most useful in that it may mobilize the responsible government agencies to finally take proper care of the salmon, placing the salmon above other concerns.

Arguing that reduced value in treaty rights should lead to payment for taking property by no means endorses or advocates property rights without responsibility. Private property owners who demand compensation for reduced property value because statutes or regulations prevent them from logging their land, for example, cannot compare their claims to the Indians' claims for fish. Indians' bundle of rights necessarily includes the ability to catch fish, but private property owners do not have a stick in their bundle that allows them to negatively impact public resources, despite rights to put their property to use. Additionally, government restrictions on private property generally leave private property holders with many sticks in their bundle of property rights, whereas Indians lose their entire bundle once the fish are gone. Furthermore, Indians' rights are guaranteed by treaty. Finding lost treaty rights to be compensable therefore carries no implications for those who advocate irresponsible property ownership.

By theorizing about how to apply the Fifth Amendment to treaty fishing, tribes may raise potential claims that could entitle them to compensation and should entitle them to rebuilt salmon runs. The tribes believe that "[w]ithout salmon returning to our rivers and streams, we would cease to be Indian people."[255] A potential takings claim could give tribes additional

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[252] Strong, *supra* note 1, at 2-3.

[253] Lone Wolf v. Hitchcock, 187 U.S. 553, 565-68 (1903).

[254] *Id.* at 566. The congressional power of abrogation could possibly be construed as a type of background limitation of the property right that would defeat a takings claim under *Lucas*. However, congressional abrogation of treaty rights requires Fifth Amendment compensation, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968), and is therefore quite different from the government's power to extinguish a property use without implicating compensation requirements.

[255] TRIBAL RESTORATION PLAN, *supra* note 18, at 2-4.

power to force the issue of saving salmon and thus save their identity as Indians. As two scholars of Native American legends explain:

> In the Indian imagination there is no division between the animal and human spheres; each takes the other's clothing, shifting appearances at will. . . .
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> . . . .
>
> Even though animals were essentially sacred, they still provided an important food source. . . . Thus animals and humans find themselves bound together in a living web of mutual aid and respect.[256]

The federal government and its agencies must therefore be serious about putting the fish back into the rivers. For their heritage, their culture, their physical and spiritual well-being, the tribes deserve their fish back. If money speaks louder than turbines, perhaps the federal government will finally listen and restore the salmon. As one tribal leader reminds us, "we did not inherit this earth or its natural resources from our ancestors, we are only borrowing them from our children's children."[257]

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256 AMERICAN INDIAN MYTHS AND LEGENDS 389 (Richard Erdoes & Alfonso Ortiz eds., 1984).

257 TRIBAL RESTORATION PLAN, *supra* note 18, at 0 (quoting Eugene Green, Sr., of the Warm Springs Tribe).